CUSTODY IN PRIVATE INTERNATIONAL LAW

A comparative study with special reference to Scottish, English and Nigerian Law.

Samuel Efurosibina Mosugu, LL.B., LL.M.

Degree of Ph.D.
University of Edinburgh
1975

CONTENTS

	Page
Abstract and Summary	ii-iv
Acknowledgments	v-vi
Abbreviations	vii-viii
Body (Text)	1-814
Table of Cases	815-824
Table of Statutes	825-832
International Conventions	833
Select Bibliography	834-844

INTRODUCTION AND SUMMARY

This thesis concerns itself with child custody in the conflict of laws. In the United Kingdom and Nigeria, definitive conflict of laws rules for child custody controversies have not been formulated. Accordingly, the thesis endeavours to spell out what may be considered as the more significant aspects of child custody in the private international law of Scotland, England and Nigeria.

The dualism of law in the United Kingdom and the mobility of population not only between England and Scotland but also internationally have accentuated the legal problems of the interstate or international child. That duality does not necessarily mean dissimilarity in the conflicts rules of the two jurisdictions. The United Kingdom rules of child custody which have been influenced by, inter alia, the general philosophy of the welfare state have been analysed.

Also, Nigeria's federalism, the mobility of her peoples, together with the multiplicity of systems of laws operating in the country have created complex legal problems of child custody. In order to understand the child custody problem in Nigerian law, the rules under each system of law operating within the country (statutory, quitable, islamic, common and customary laws) are set out and compared with the position in English and Scots law. The impact of English upon Nigerian law is underlined.

A pervasive theme of child custody law both in its conflicts and non-conflicts aspects is that the welfare of the child must be the paramount consideration. This principle which dominates this area of law just as the concept of domicile or residence

pervades the conflict of laws field in general has been examined in its formulation in domestic legislation and international conventions as well as in customary and case law.

The work is in two parts. Part one surveys the general problems encountered in a discussion of conflict of laws as it pertains to custody or guardianship. We begin with an examination in chapter one of the general background of custody in private international law of England, Scotland and Nigeria. Chapter two sets out the domestic and private international law sources of child custody law in the United Kingdom and Nigeria. We described in some detail the special problems encountered in Nigerian law because of the reception of English common law, doctrines of equity and some English statutes. In chapter three we discussed at great length the pervasive concept of the paramountcy of the welfare of the child. So crucial is the concept to child custody law that it would not be receiving adequate treatment if it should be discussed as part of individual chapters. The varying interpretations which the concept has received in English, Scots, and Nigerian law (W)then examined and the leading criteria applied in awarding custody of a child is described. Chapter four concentrates on some administrative and other problems which are frequently encountered in child custody disputes - whether these involve conflict of laws or not.

Part two is devoted mostly to a treatment of the specialised problems posed for conflict of laws by any branch of the law. In chapter five the rules and problems of child custody jurisdiction are reviewed. Comparative examples are drawn from relevant statutory provisions in the United States of America. In chapter six we concentrate on choice of law questions both for the child's person and property. Chapter seven focuses on the problems

of recognition of foreign guardianship and custody orders.

Part two concludes with a general summary of the conflict of laws problems in the field of child custody. The influence (for the future) if any, of the English conflict of laws doctrines on Nigerian law of guardianship is emphasised.

ACKNOWLEDGMENTS

Dr. Eric Clive, my principal supervisor, has been closely associated with this work right from the preparation of the Outline. Besides making himself readily available to me he has given me very firm and fair supervision throughout the preparation of the thesis. I am extremely grateful to him for directing me through every stage of my research.

To Robert Leslie, Senior Lecturer in the Faculty of Law who acted as my associate supervisor, I owe immense debt of gratitude for assisting me in avoiding errors of substance, language or style.

My sincere gratitude goes to Mr. Neil Whitty of the Scottish Law Commission who exchanged views with me on aspects of this work and also made accessible to me some relevant documents.

My friend, Mr. Abdul El Naiem rendered to me the immense service not only of proof reading all of the chapters and making some very valuable suggestions but also making available to me some materials from the Sudan. My appreciation for his assistance must be specially noted.

I have to thank the Library Staff of the Law Library in the Old College, as well as the staff of the National Library of Scotland and the Institute of Advanced Legal Studies, London, for the great service they gave me while searching for materials needed for this work.

Among those who have rendered special service to me in various ways, mention must be made of the following. Dr. S. Ameh and Mr. R. Gillis who transmitted some needed materials to me from the U.S.A., Mallam Ababukar Abba who sent me copies of some Nigerian cases from Lagos; Dr. Zaki Mustafa, my former Dean in Zaria and now Attorney-General, Sudan Republic; and Professor T.B. Smith and my other friends in Edinburgh who in many ways helped to lift up my spirits during my three years' sojourn in Scotland.

On the financial side, I must thank Ahmadu Bello University, Zaria, Nigeria, for granting me the study leave and for supporting me financially while I carried out my research these past three years.

I have to thank my wife, Medina, who gave me every encouragement and cared for our children while I worked on the thesis.

My gratitude also goes to Annette Stoddart for typing the bulk of the thesis, and to Isabel Roberts for undertaking the responsibility for correcting the typescript.

I also thank my many teachers in Zaria, especially Dr. Gordon Woodman who a decade ago introduced me to the study of conflict of laws.

Finally, I acknowledge the especial and personal debt I owe to my father, mother and sister who were financially responsible for my early education up to the Secondary School level.

Abbreviation	Full Name
All N.L.R.	All Nigeria Law Reports
Am. Jo. Comp. L.	American Journal of Comparative Law
Aust. L.J.	Australian Law Journal
B.I.I.C.L.	British Institute of International & Comparative Law
B.Y.B.I.L.	British Year Book of International Law
Camb. L.J.	Cambridge Law Journal
Can. B.Rev.	Canadian Bar Review
Col. L.R.	Columbia Law Review
Conn. B.J.	Connecticutt Bar Journal
Corn L. Rev.	Cornel Law Review
Cur. Leg. Prob.	Current Legal Problems
E.A.L. Rev.	East Africa Law Review
Enc. So. Sci.	Encyclopaedia of Social Sciences
Fam. L.Q.	Family Law Quarterly
Harv. L.R.	Harvard Law Review
I.C.L.Q.	International and Comparative Law Quarterly
I.L.Q.	International Law Quarterly
Iowa L. Rev.	Iowa Law Review
Is. L. Rev.	Israel Law Review
J.A.L.	Journal of African Law
Jo. Comp. Leg.	Journal of Comparative Legislation
Jur. Rev.	Juridical Review
J.P.N.	Justice of the Peace and Local Government Notes
Law & Contemp.Prob.	Law and Contemporary Problems
L.L.R.	Lagos Law Reports
L.Q.R.	Law Quarterly Review
Mass. L.Q.	Massachussettes Law Quarterly
Miami L. Q.	Miami Law Quarterly
Mich. L. Rev.	Michigan Law Review
Minn. L. Rev.	Minnesota Law Review
M.L.R.	Modern Law Review
New L.J.	New Law Journal
N.Y. U.L. Rev.	New York University Law Review
Nig. J. Cont. L.	Nigerian Journal of Contemporary Law
Nig. L.J. or L. J.	Nigerian Law Journal

N.L.R.	Nigeria Law Reports
N.M.L.R.	Nigerian Monthly Law Reports
N.N.L.R. or N.R.N.L.R.	Northern Region of Nigeria Law Reports
North Western Univ.L.Rev.	North Western University Law Review
Rev. Ghana Law	Review Ghana Law
Sar. F.C.L.	Cases reported in Sarba's Fanti Customary Laws
S.L.T.	Scots Law Times
Sol. Jo.	Solicitors Journal
Stan. L. Rev.	Stanford Law Review
S.L.J. Rep.	Sudan Law Journal and Reports
U.C.L.A. Law Rev.	University of California Los Angeles Law Review
U.Chi.L. Rev.	University of Chicago Law Review
Univ. Ife L. Rev.	University of Ife Law Reports
Univ. Queensland L. Rev.	University of Queensland Law Review
Vand. L. Rev.	Vanderbilt Law Review
Vict. U.W.L.Rev.	Victoria University at Wellington Law Review
Virg. L. Rev.	Virginia Law Review
W.A.C.A.	West African Court of Appeal
W.N.L.R. or W.R.N.L.R.	Western Nigeria Law Reports
Yale L.J.	Yale Law Journal

PART ONE

CHAPTER 1

Historical Introduction and General Background 1

A. General Background 1

1. Introduction 1

2. Social background to the guardianship-custody problem 4

3. Scope of the work 6

4. Historical Introduction to conflict of laws 9

(a) private international law and jurists 11

(b) Some comparative comments on private international law rules in Scotland, England and Nigeria. 17

5. Public International Law dimensions. 29

B. Some Conceptual Clarifications 33

1. The Legal Significance of the extended versus nuclear family 33

2. Adoption and Guardianship 38

C. The Meaning of Custody 40

1. General 40

2. Suggested Definition 46

D. The Context of the Nigerian, Scottish and English Conflicts legal Commonwealth 48

1. An issue of legitimacy of comparative approach 48

2. The Link 61

(a) General 61

(b) Federalism 63

3./

3. The Context 66

(a) General 66

(b) Statutory provisions 68

(c) Judicial formulation 71

CHAPTER 2

Custody and Guardianship Law: Sources, Nature and Problems 75

A. Domestic Law Sources 75

I. England and Scotland 75

II. Nigeria 91

(1) The Legal System and Constitutional Development 91

(2) The General Law 96

Introduction 96

Federal and State Legislation 97

Conclusion 101

(3) Islamic Law of guardianship 103

Introduction 103

Custody or Hadana 107

Guardianship 113

(4) Customary law of custody 116

The Unwritten law of custody 117

The written customary law 118

Guardianship under customary law 122

(5) Guardianship Jurisdiction of Courts in Nigeria 126

(a) Jurisdiction in customary law guardianship-custody 127

(b) Jurisdiction in non-customary law guardianship cases. 135

B. Private International Law Sources 139

I. England and Scotland 139

II. Sources of Nigerian Private International Law 146

(1) Judicial Precedents 146

(2) the "Received" English law 148

(i) The reception statutes 149

(ii) Issue of construction 151

(a) Common law and equity 152

(b) Statutes of general application 162

- issue of "of general application" 164

- a Note on generality of application to Scotland 168

(3) Limiting the Received English Law 174

(i) The local circumstances rule 176

(ii) The limitation date of 1900 181

(iii) case for a downward revision of limitation date 187

(4) The Federal Constitution 197

(i) General 197

(ii) The Constitution and Conflicts of Legislative Competence in Private International law. 200

(5) The Interaction of Customary and English law 206

(a) Customary law and private international law 206

(b) Conflict of laws in Nigeria: Customary, English or mixed? 216

CHAPTER 3

The Concept of the Paramountcy of the Welfare of Children 221

A. (1) Statement of the Rule 221

(2) Variation of the Statement of the Principle 222

B. Origin and Meaning 226

1. Domestic Evolution: Common law and Equity 226

(a) Introduction 226

(b) The parens patriae doctrine 233

(i) Philosophical and legal foundations 233

(ii) The Mischief of the doctrine 237

2. Domestic Evolution: Legislation 245

C. Terminological Clarifications 259

(1) "First and paramount" 261

(2) "Interest and welfare" 266

D. Some Judicial Interpretation 268

1. General 268

2. Application 272

(a) Mode of Invocation 272

(i) Independent Application 272

(ii) Custody as an ancillary to another action 274

(b) Scope of Application 275

(I) Structural Analysis of Section 1 275

(i) Background 275

(ii) Interpretation: The Underlying Principles 277

- Legal Equality

- Private International Law

(iii) A Comment on J. v. C. (or the Rule in J. v. C.) 283

(II) Types of Suits 290

(i) Custody as between father and mother 290

(ii) Custody between parents and third parties 291

- Death of spouse to whom custody was awarded 294

- Religion and custody 297

- Fostering 303

(iii) Custody as between strangers 309

(iv) Guardianship and custody of Illegitimate children 311

3. Rule Scepticism 318

(a) General 318

(b) Examination of the "Rules" 320

(I) Scholarly views 320

(II) Judicial opinion 321

(i) Tender years doctrine 321

(ii) Older boys to father 326

(iii) Siblings together 328

(c) Appraisal: The "Rule" versus "No Rule" Arithmetical calculus 329

(d) Jurisprudential Considerations 334

(e) Conclusion 338

E. The factors or criteria applied in awarding custody 341

(1) Introduction 341

(2) Custody 343

(a) Health and physical welfare 343

(b) Happiness and psychological welfare 346

(c) Reiigion and spiritual welfare 352

(d) Wealth and material welfare 358

(e) Education and moral welfare 362

(f) Family unity and total, long-term, societal welfare 369

(3) Access 376

F. Public Law Dimensions 383

(1) A rule of public policy 383

(a) General consideration 383

(b) Place of public policy in Private International Law 386

(i) Juristic and Judicial views 386

(ii) public policy in guardianship law 387

(iii) conclusion 390

(2) The Welfare Principle and Public Responsibility Towards Children in Modern Law 393

(3) Global or International Implications of the Welfare concept. 407

G. Other considerations 419

H. Appraisal 426

(1) Pre-divorce inter-parental friction: welfare 427

(2) post-custody determinations and travel arrangements: welfare 428

(3) Welfare and Best Interests of Child: Beyond any Discipline's Competence 430

(4) Conclusion 434

CHAPTER 4

Administrative and other special problems of child custody 436

A. General Administrative Problems 436

- tracing the child 437

- preventing removal of child from jurisdiction 440

- securing delivery of the child 442

B. Adversary or Extra-litigious proceedings? 444

C. Guardianship and other ancillary relief 446

D. Wardship and Custody orders concerning minors over 16 years of age 448

E. Criminal sanctions under the United Kingdom guardianship legislation 452

F. The problem of split custody orders 455

G. The lawyer's role and responsibility in custody cases. 461

PART TWO

CHAPTER 5

Jurisdictional Rules and Problems 470

A. Introduction 470

B. General Consideration of some bases of jurisdiction in private international law 474

(1) Jurisdiction in personam 474

(2) Appraisal of the Scottish and English Rules of General Jurisdiction 481

C. Interstate and International Jurisdiction: Distinguishable? 486

D. Nature of the Jurisdictional problem in guardianship and custody 494

Introduction 494

(I) Guardianship of the Person 497

(1) The state of the law 497

(a) Before 1974 (January) 498

(i) Inherent Jurisdiction 498

(ii) Alternative bases of jurisdiction 501

- presence

- residence

- nationality

- domicile

(b) Recent trends in the United Kingdom 516

- custody in matrimonial proceedings 518

- independent custody suits 520

(c) Domicile and residence as bases of custody jurisdiction: A Critical Examination 525

(II) Guardianship of property 540

E. Special Kinds of Jurisdiction 544

(1) Jurisdiction in kidnapping cases 544

(2) Jurisdiction to modify (and time factor) 546

(3) Jurisdiction in matrimonial causes 548

(4) Jurisdiction by consent 551

F. Conflicts of Jurisdiction 553

(1) Introduction 553

(2) Mode of Reconciliation 557

(a) the Hodson Committee 557

Terms of Reference 557

The Recommendations 561

The Dissent 564

(b) The United States Conference of Commissioners on Uniform State Law 566

(i) History 566

(ii) Uniform Child Custody Jurisdiction Act 567

(c) Comments on Resolution of conflicts of jurisdiction in the U.K. and U.S.A. 576

(d) Forum non conveniens 581

(e) A more neighbourly attitude 589

(f) The Law Commissions and the House of Lords 592

G. Conclusion 594

CHAPTER 6

Choice of Law 597

A. General Background 597

(1) Introduction 597

(2) Choice of law and jurisprudential underpinnings 600

B. Relevance of choice of law methodologies 602

(1) Favouring the lex fori 603

(2) Governmental Interest Approach 607

(3) The better Rule of Law 613

(4) Theory of false conflicts 617

C. Is choice of law a relevant consideration in Guardianship? 623

I. Current Attitudes 623

(1) Not a relevant consideration (or the lex fori rule) 623

(a) General 623

(b) The Rule 624

(c) The rationale 625

(d) Judicial attitude 627

(2) A relevant consideration (or the true 'welfare' rule) 628

(a) Introduction 628

(b) Juristic opinion 630

(c) Judicial attitude 633

(d) Practice in International Conventions 637

II. Evaluation 640

D. Choice of Law Rules for the Child's Property 644

E. The Nigerian Position 646

I. The Statutory Choice of Law Rules 647

(1) High courts 647

(a) General 647

(b) Theoretical considerations 648

(2) Customary and Area courts 651

(a) General 651

(b) Theoretical considerations 653

II. The Result of the Invocation of the Guardianship (or "welfare") provision 657

(1) Justification for applying English law 658

(2) Deviations from English law 659

(a) Choice of rules of Islamic law 659

(b) Choice of rules of customary law 662

(c) Resort to natural justice, equity and good conscience 669

- Appraisal 673

(d) Resort to common sense 678

(e) Resort to foreign system other than English law 680

F. Practice, Procedure and Evidence 682

G. Conclusion 688

CHAPTER 7

Recognition of Foreign Guardianship and Custody Orders 692

A. General Introduction 692

B. Recognition of Guardianship and Custody Orders 697

I. (1) Introduction - the nature of the problem 697

(2) Should the rules of recognition for guardianship and custody be different? 699

II. Recognition of Custody orders 701

(1) The problem and philosophy 701

(2) The position before 1900 702

(3) The Rule in McKee v. McKee 714

- The authority of Privy Council Decisions in Nigeria 724

(4) Recent trends (or developments since McKee v. McKee) 727

(a) Introduction 727

(b) Rules of recognition in kidnapping cases 730

(i) The rule of further (or full) inquiry 734

(ii) The "no further inquiry" rule 738

(iii) The rule of via media 742

(c) Summary 745

III. Recognition of Guardianship orders 747

(1) Introduction 747

(2) The status of guardian 747

(a) Appointment 747

(b) Powers and rights of foreign guardian 754

(i) General 754

(ii) Guardianship of the person of the child 756

(iii) proprietary powers of the guardian 758

- Movables 759

- Immovables 760

C. The problem of Recognition - An Evaluation 761

(1) Against recognition 762

(a) Non-finality and changed circumstances 762

(b) welfare and public policy 763

(2) In favour of recognition 765

(a) The doctrines of comity and friendly nations 765

(b) "clean hands" doctrine 768

D. The United States Approach to the Problem of Interstate Recognition 770

E. Conclusion 775

CHAPTER 8

Conclusion 783

A. General Summary 783

B. Concluding Remarks 811

PART ONE

THE GENERAL PART

CHAPTER ONE

HISTORICAL INTRODUCTION AND GENERAL BACKGROUND

A. General Background

1. Introduction

Guardianship or custody in private international law has its gestation in the early part of the 19th century, especially in the epochal Lord Talford's Act of 1839[1] (and Joseph Story's Conflict of Laws, 1834[2]). Since Talford's Act, "to mitigate the severity of the common law has been the object of the Legislature"[3] in this field. This is not to suggest that guardianship in the conflict of laws cannot conceivably be traced to antiquity. Indeed guardianship law can be rightly said to be coeval with man since the father was "by nurture and by nature",[4] the lawful guardian of his children. According to Professor Graveson, the jurisdiction exercised in custody and guardianship matters is grounded on the principle of the concern of the Crown, as parens patriae, for all children within the realm - an ancient principle "which antedates the rules of private international law."[5]

---

1. The Infants Custody Act, 1839.
2. Story, Commentaries on the Conflict of Laws, Foreign and Domestic (1834).
3. Re A and B (Infants) 1897 1 Ch. 786, at 791.
4. Ex parte Hopkins (1732) 3 P.Wms. 151.
5. Graveson, The Conflict of Laws (6th ed) p. 399.

Since the first statute on custody was enacted, the rule which has, by a process of evolution, come to dominate the guardianship field, is the paramountcy of the welfare of the children. The concept of the child's welfare, as applied in a purely domestic legal situation, is well-known; but the juristic content or application of that concept in private international law has been largely ignored: at least one can say no clear and coherent principles have been formulated. So that in spite of all the developments registered in the direction of a realisation of the child's true welfare in domestic law, the theorists have not quite succeeded in presenting a full picture of private international law rules in the matter of child custody, either in the United Kingdom or in Nigeria. It is surprising how only little attention has been given to guardianship in private international law considering the not extravagant claim that "our age is one of children's law".[1] And despite the pressures and urgency of the need for reform[2] of custody law there are still aspects of Anglo-Scottish law of guardianship-custody which can only be described as most unsatisfactory. For there can be no doubt that the legal chaos under which the United Kingdom was submerged in the jurisdictional sphere of custody law

---

1. A Century of Family Law (Graveson ed) p.19.
2. See Report of the Committee on Conflicts of Jurisdiction affecting Children. Cmnd 842 (1959).

in the 1950's showed clearly how the unresolved conflict problems involving tug-of-love children was pitching the Scottish Court of Session and the Chancery Division of the English High Court for "battle" - just as the Gretna Green marriage cases had done a century earlier.

As far as Nigeria is concerned one must observe first, that the resolution of the conflict of laws problems of guardianship is still largely a matter of the future. This is due partly to the infrequency of interstate or international custody disputes. Secondly, the "welfare" concept together with the notorious principle of "natural justice, equity and good conscience"[1] are bound to dominate and bedevil the Nigerian conflicts of law field. But whereas commentaries on the latter principle are burgeoning, none whatsoever exist on the former.

At this juncture we would like to add a word or two on terminology. Running throughout this work is the juxtaposition of the terms "conflict of laws" and "private international law". In our view no useful purpose would be served by exploring the preference of the one term over the other. Both are well-established titles. And both terms relate to the same field of law. The difference between the two terms is one of approach. "It is", Magdalene Schoch writes, "the difference between the static and the dynamic

---

1. See, e.g. Section 34(1) High Court Law, Northern States of Nigeria. p.43, Laws of Northern Nigeria 1963.

aspects of one branch of law". Conflict of laws, she says "suggests what is", and private international law "evokes what ought to be".[1] Furthermore, we have, throughout most of this work, used the terms custody and guardianship interchangeably. Both of these closely related terms almost defy definition and are considered at greater length below.[2] We shall only observe here that, as has been pointed out in a recent Report, "the whole question of terminology in this field (is) extremely troublesome."[3]

2. The Social Background to the Guardianship-Custody Problem

The broad social problem against which the legal position of guardianship and custody has to be examined is a familiar phenomenon. It is a problem created by the increasing interstate and international mobility of peoples either voluntarily or, occasionally, as a result of wars and civil disorders which cause transfers and extensive displacement of people as immigrants or refugees.[4] These (unusual) events and a life in a new country often combine to create the strain that leads to the breakdown of families. Accentuating this trend is the increasing mass production of divorces on easier grounds and at cheaper costs, in monetary terms. These divorces are an index to the fact, as Lord Pearson once

---

1. Schoch, "Conflict of Laws and Private International Law" (1939) Proceedings of Am. So. Int'l Law, p.81.
2. See pp. 40-47, infra.
3. See Parental Rights and Duties and Custody Suits: A Report by Justice (1975), para 18, at p. 9.
4. See, e.g. the U.K. Guardianship (Refugee Children) Act, 1944. Cap 8.

said, "that the stability of marriage has been diminished."[1] But one must quickly add a word of qualification, that recent studies have shown that three out of four divorced people marry again, thus creating the paradox that "marriage is nearly as popular with the unsuccessfully married as it is with the single".[2] In the process of the divorce feuds the inevitable first victims of such "private wars of domestic life"[3] are the children of the marriage. The fact that remarriage after divorce is a common occurence at times heightens the complexity of the issues which have to be weighed in determining who is to have custody which would best conform to the child's best interests and utmost welfare.

This pattern of social life is completely different from that in which the law of guardianship originally developed. For instance, at the time that Joseph Story wrote his Conflict of Laws, judicial custody awards were normally made to guardians since divorces were rare and usually reserved to the legislature. This is why it may be rightly said that the problem of the custody of children of divorced parents has occupied the courts only during the past one hundred years.

Given this social background, the conflict of laws becomes the vehicle by which the courts deal with the legal problems of "that increasing group of young people with

---

1. Indyka v. Indyka (1969) 1 A.C. 33, at 108.
2. See Sunday Times, 28 January, 1973 p. 33.
3. A Century of Family Law (Graveson ed) at 415.

international affiliations, connections and qualifications which is growing up as a result of greater ease of travel and international (and interstate) communications."[1]

3. Scope of the work

There is a special need for a careful demarcation of the scope of the present work. Guardianship and custody law with its central theme of the welfare of the child occupies a mid-stream area in the law of most countries, in the sense that questions about the child's welfare arise at a point where many departments of law are involved. Guardianship law forms part of the wider subject of family law and many issues within that broader field (as well as within the still larger field of law) touch upon guardianship-custody in significant ways. Some examples may make this point clearer. The many Children and Young Persons Acts[2] in Nigeria and the United Kingdom allow parents or guardians to seek supervision for children who are beyond control and are in need of care and control. The Education Act, 1944 (U.K.) section 36 imposes a duty upon parents and guardians to ensure that every child of compulsory school age is given "efficient full time education" suitable to his age, ability or aptitude. Failure to comply with this exposes the parent or guardian to criminal sanctions.[3] The Nigerian Penal and Criminal Codes and the criminal laws

---

1. Per Graham J, in re T (an Infant) (1969) 1 W.L.R. 1608, at 1611.
2. See e.g. Children and Young Persons Act 1969 (England), sections 1 and 70.
3. See Children and Young Persons Act 1933 (England), s.7.

in England and Scotland contain penal provisions for illegally abducting a child out of a parent's or guardian's custody. And several statutory enactments are designed to prevent the economic exploitation of children. All these measures are designed for the interest and welfare of children. Where international conventions to regulate aspects of guardianship-custody law are involved, the subject enters the domain of public international law. Furthermore, the subject of our study also pertains to administrative law in character. Guardianship proceedings are not strictly adversary proceedings along conventional lines. The administrative nature of the subject can be seen by looking at the English institution of wardship proceedings concerning which Lord Cross of Chelsea has stated as follows:[1]

> "Clearly a wardship case differs altogether from ordinary litigation. In an ordinary action the court has before it two parties, each of whom asserts that he has a legal right to a decision in his favour. The function of the judge is to act as umpire at the fight and to decide which side has won. In a wardship case the court is asked to take the child into its care and to decide how and with whom it is best for the child to be brought up. The role of the parties is simply to put before the judge for his consideration their suggestions with regard to the ward's upbringing."

All these different departments of law do not form directly the subject of our inquiry. And we are not concerned with guardianship of the mentally incompetent.

---

1. Cross, "Wards of Court" (1967) 83 L.Q.R. 200, at 207.

Our aim is to examine guardianship-custody in the context of "family law" - a term which in itself creates difficult problems of legal definition. But it would be a mistake to think that a clear dividing line can be drawn between the central theme of the child's welfare as it arises in the guardianship-custody field and as it arises in the other departments of law in the modern welfare state. The latter inevitably influences the manifestations of the "welfare" concept in the family law sphere.

In more specific terms, however, the burden of our work is to examine the Nigerian, Scots and English private international law rules relating to the guardianship of children by looking at the three major problems raised in most conflicts of law situations, viz, the problems of jurisdiction, choice of law, and the recognition and enforcement of foreign guardianship orders. Although the jurisdictional controversy presents a much greater excitement in the United Kingdom than is the case in Nigeria (where uniform rules as to the proper basis of jurisdiction are employed in the various states) the study will not concentrate on this predominance of the problem of jurisdiction. We shall give each of these three departments of conflict of laws its proper emphasis. As Professor Unger rightly said,[1] there is an "inescapable connection between choice of law

---

1. Unger, "Use and Abuse of Statutes in the Conflict of Laws", (1967) 83 L.Q.R. 427, at 434.

and jurisdiction" in all guardianship cases. And from jurisdiction it is but a short step to problems of recognition since the close "interplay of jurisdiction and recognition of foreign decrees among the nations"[1] of the world's conflict of laws is a widely acknowledged fact.

4. Historical Introduction to Conflict of Laws

The guardianship of children, certainly one of the oldest legal institutions in the world is, in its international and conflicts of laws aspects, a very confused and complex subject. Each individual state in the world regulates the subject of custody and guardianship within its own jurisdiction as it deems best. A bewildering multiplicity of laws exist so that in this sphere of private international law the courts of all nations are still groping their way. Occasionally an international convention[2] is approved to regulate aspects of the conflict of laws, but in the main the formulation of conflict of laws rules has remained with the courts, although a few legislative enactments may also be found.

---

1. Indyka v. Indyka 1969 1 A.C. 33 at 77 per Lord Pearce. Lord Wilberforce agreed "that close relationship exists between ... jurisdiction ... and the principles of recognition of foreign decrees." Ibid at 103.
2. See e.g. Hague Convention on the Recognition of Divorces and Legal Separations of June 1, 1970. (For the text see 1968 16 Am. J. Comp. L. 582, also in (1969) 18 I.C.L.Q. 657). The legislation implementing this Convention in the United Kingdom is the Recognition of Divorces and Legal Separations Act, 1971 (Cap 53). See also Hague Convention on Jurisdiction, Applicable Law, and Recognition of Decrees Relating to Adoptions of 15 November, 1965; and Convention on the Jurisdiction of the Authorities and the Law Applicable in the matter of the Protection of Minors of 5 October, 1961.

The international and interstate aspects of custody-guardianship problem are not just theoretical. Rather, as Lord Justice-Clerk Cooper once said, they are "immediate and practical".[1] Many people are affected by the confusion in this field. A Frenchman may be married to an English-woman - a perfectly common place occurence in itself. But when the parties seek dissolution of an unhappy marriage, the question soon arises as to who is to have custody of say, the one year old girl of the spouses. The English magistrate's court decides to award custody of the child to the father. This decision is reversed on appeal by the High Court which considers the mother the best custodian and gives liberal access rights to the father. The father then kidnaps the child to France to which place he is pursued by the mother. Fresh custody proceedings are commenced before the French courts which decide that custody should be "split" or shared on a six-monthly basis by father and mother. One of the parties then appeals to the Cour de Cassation which hands down its ruling that the lower court's decision was legally not justifiable since custody ought to be awarded to the mother alone. Such a finding will once again revert the case for the reconsideration of another lower French court which is not bound to follow the

---

1. Kitson v. Kitson 1945 S.C. 434, at 439.

Cour de Cassation's view of the law. As will be evident, this narration contains the essential ingredients of the custody problem posed in the now classic case of Caroline Desramault.[1]

In the resolution of these guardianship and general conflict of laws problems, jurists, commentators or publicists have played as important a part as the judges, and it may be in order to outline briefly here the role of the former.

(a) Private International Law and Jurists

To borrow the term of the Statute of the International Court of Justice, the teachings and opinions of the "most highly qualified publicists"[2] have played a dominant part in the development of private international law. In the development of this subject in both England and Scotland the Bench has borrowed much from the publicists. It is true that "publicists" is, as Clive Parry says, a "peculiar term"[3] and it may be difficult to determine who the most highly qualified publicists are. Nevertheless, it is hardly open to contention that the Scottish Institutional writers[4] fall within this rare category.

---

1. This case was not reported, but it was highly publicised and commented on in the British press for some three years (1971-1974). See also, New Law Journal 13 May 1971, p. 399.
2. Statute of the International Court of Justice, Art. 38(1)(d).
3. Parry, The Sources and Evidences of International Law, p.103.
4. These usually include Stair, Erskine, Bell, Bankton and Kames.

The Scottish Institutional writers occupy a unique position in the modern Scottish legal system, their influence being far greater than that of writers of books of authority in English law. It has been suggested[1] (albeit a slightly exaggerated claim) that the opinion of an Institutional writer may be treated as the equivalent of the opinion of a Bench of appeal court judges. It is a pity, however, that the Scottish institutional writers do not furnish us with any authoritative views on private international law of guardianship or on conflict of laws in general.

The Scottish institutional writers were, with the possible exception of Lord Kames, ignorant of private international law of guardianship. Their treatment of the subject was confined to footnote references and cursory mention in later supplements of their work.[2] Lord Kames puts the matter of guardianship in this brief sentence dealing with the recognition of foreign curators (guardians).

> "... a foreigner chosen curator" Lord Kames writes, "has the same authority here with a native. Neither is it of importance in what place curators be chosen; and accordingly a choice made in England of curators, whether English or Scotch, will be effectual here."[3]

Although, as Professor Walker rightly says, "Stair, Erskine and Bell will not be discarded for a long time",[4]

---

1. T.B. Smith, A Short Commentary on the Law of Scotland (1962) p.32.
2. See Donaldson, "Some Conflict Rules of Scots Law" (1954) 39 Grotius 145.
3. Kames Principles of Equity (1760) p.325.
4. Walker, "The Progress of Law Reform" (1973) S.L.T. (News) 119 at 121.

these Scottish legal patriarchs have little relevance in most fields of private international law of guardianship. In any case, as Professor Parry says, "We have passed out of the age of the institutional writer into that of the specialist monograph".[1] And so, among modern writers in private international law, Dicey,[2] Cheshire,[3] Anton[4] and Morris[5] stand out for special mention for their contribution to the development of conflict of laws in the United Kingdom.

In addition a special relationship now exists between judges and scholars, which relationship has considerable potential for the future development of private internattional law. That relationship has come about through the creation of the Law Commissions.[6]

In the English Law Commission one has witnessed a situation where Lord Justice Scarman shared views with Professor Gower, and today on the Scottish Law Commission Lord Hunter exchanges ideas with Professors Anton and Smith. The fruits of the work of the Law Commissions in the conflicts field is evidenced by the Matrimonial Proceedings (Polygamous Marriages) Act[7] which was preceded by the Law Commission

---

1. Parry, The Sources and Evidences of International Law p.104
2. The Conflict of Laws.
3. Private International Law.
4. Private International Law: A Treatise from the standpoint of Scots law. (1967).
5. The Conflict of Laws (1971).
6. See The Law Commission Act, 1965.
7. Cap. 38, 1972.

and the Scottish Law Commission joint Report[1] on polygamous marriages, and the Recognition of Divorces and Legal Separations Act.[2]

There are no specifically Nigerian textbooks on the conflict of laws, unlike other fields of law where authoritative monographs have been published. As a result, all the Law Faculties, practitioners and judges[3] in Nigeria rely on English textbooks in the solution of problems of private international law. This factor goes to demonstrate the importance of, and the extent of the reliance upon, English private international law rules. This is not a happy situation since it means that Dicey's Conflict of Laws

1. See The Law Commission: Report on Polygamous Marriages: Law Com. No. 42 (1971).
2. Cap. 53, 1971. This Act was preceded by the Law Commission and the Scottish Law Commission Report on the Hague Convention on Recognition of Divorces: Law Com. No. 34 (1970), Scot. Law Com. No. 16 (1970). For the work of these bodies in yet a third area affecting conflict of laws see the Scottish Law Commission: Report on Jurisdiction in Consistorial Causes Affecting Matrimonial Status: Sco. Law Com. No. 25 (1972) and the English equivalent, Report on Jurisdiction in Matrimonial Causes: Law Com. No. 48 (1972).
3. See, for example, the Northern Nigeria High Court case of Okonkwo v. Eze and Anor (1960) N.R.N.L.R. 80 where Hurley Ag. C.J. relied heavily on Dicey's Conflict of Laws, especially Rules 3, 75 and 178.

whose rules were designed for a country with institutions and habits of life different from that prevailing in Nigeria, is allowed pre-eminent influence in the latter country which the late author would himself disdainfully have considered as being outside the "charmed circle of civilised countries."[1]

Again unlike the United Kingdom, Nigeria has no Law Commission although she has a Law Revision Committee.[2] But more than in either Scotland or England, within the past few years in Nigeria the interchange between scholars and judges has become pronounced. Many leading Nigerian scholars have been serving on or elevated to, the Bench both at the Supreme Court and at the High Court levels.[3] But it is too early to say what theories of private international law these judges will enunciate.[4]

---

1. Dicey, Conflict of Laws, 7th ed. p. 253.
2. See Revised Edition (Laws of the Federation) Decree No. 52 of 1971. Section 1 of this Decree established the Law Revision Committee membership of which includes the Deans of some Law Faculties. The Committee's duties include revision of the laws of the Federation as at 31 December 1970 and of preparing a revised edition of the laws.
3. Dr. T.O. Elias was elevated from the Deanship of the Law Faculty, Lagos University to the Supreme Court of Nigeria as Chief Justice; Dr. A. Aguda, one-time Dean of the Faculty of Law, Ife University was appointed to the High Court, Western Nigeria and was lately Chief Justice, Botswana. Each of these Justices is the author of at least one standard legal work in Nigeria. Dr. Coker of the Supreme Court of Nigeria is famous for his Family Property Among the Yorubas; and Dr. Udoma, a former Chief Justice of Uganda, also sits on the Supreme Court of Nigeria. For a brief but interesting discussion of this "interesting new phenomenon" see "Notes: Academic Judges in Africa" (1972) 16 Journal of African Law pp. 101-102.
4. Dr. Coker's pronouncements on domicile in the case of Udom v. Udom (1962) L.L.R. 112 is one of the few opinions by academic judges on a theme of conflict of laws.

Judicial opinion generally acknowledges the debt of judges to jurists in this field. Thus Scott L.J. delivering a dissenting judgment in a case in 1940 observed:

> "I now come to the jurists. Although Private International Law is a branch of English law, their opinions are of great weight."[1]

And in 1950 Lord Cooper said

> "The utmost respect will always be conceded to ... the settled opinion of jurists of weight."[2]

However it is not to be thought that commentators have a free reign in the conflict of laws. The role these jurists play is accepted within limits since the jurists and their comments, just as with legislation and judge-made law, can, and do become, outmoded. It was in the knowledge of this that Bowen L.J. admonished us that

> "stereotyped rules laid down by juridical writers cannot therefore be accepted as infallible cannons of interpretation in these days."[3]

and Barnard J. said outright that in the case before him

> "the textbook view is wrong".[4]

---

1. Re Luck's Settlement Trusts (1940) 1 Ch. 864 at 914. See also McKee v. McKee where there was a reference to "some writers whose opinions are entitled to consideration" (1951) A.C. 352 at 366 (Privy Council).
2. Cooper, "The Common Law and the Civil Law" (1950) 63 Harv. L. Rev. 468 at 473.
3. Jacobs, Marcus and Company v. The Credit Lyonnais (1884) 53 L.J.Q.B. 156 at 159.
4. Srini Vasan v. Srini Vasan 1946 P. 67 at 69.

(b) Some comparative comments on private international law rules in Scotland, England and Nigeria.

Before we proceed further it may be pertinent to offer here some comparative comments on the approach of the Scots, English and Nigerian judges to questions of private international law in general. Such preliminary comparative comments may be of help in an appreciation of why not much difference has resulted in the outcome of English, Scots and Nigerian guardianship cases, and why divergencies in results may probably occur in future.

In the first place, several private international law problems have not yet, as Dr. Elias says,[1] begun to trouble the Nigerian judges. And because of the bond between Nigeria and England through the English common law, equity, statutes and treatises, Nigeria had and still has a readily accessible storehouse of conflict of laws principles of which she became the undiscriminating inheritor. And "whenever a general question involving conflict of laws arises, reference will have to be made to English" authorities.[2]

Secondly, as between England and Scotland, although operating under the same legislature and under the same supreme appellate court in civil matters, Scots and English private international law rules though similar are not

---

1. Elias, The Nigerian Legal System, p. 275.
2. Ibid.

the same. A major source of the difference in general terms has been well stated by Patterson. As the author says, the founders of Scottish jurisprudence drew largely "upon the Roman law for its principles and its nomenclature - for both of which the predecessors of Coke as well as his successors have not hesitated their dislike."[1] One consequence of these source differences is reflected in the often-repeated statements that Scots law is one of principle rather than precedent,[2] which claim was confirmed by Lord Denning's recent reference to "the Scottish judges, insistent as ever on principle."[3] This difference of approach has resulted in the still unresolved divergencies as to the proper basis for assuming jurisdiction in guardianship and custody cases.

In the third place, in the past the federal nature of the Nigerian government distinguished its rules of private international law from those in the United Kingdom. The Nigerian cases to a considerable extent were, and still are, interstate while the Scots and English conflicts cases were predominantly international. But this was never really a valid distinction in the guardianship field especially because the (recent) phenomenon of child kidnapping occurs as easily interstate as it occurs internationally. In

---

1. Patterson, A Compendium of English and Scottish Law (1860) Preface, p. vii.
2. e.g. MacMillan, Law and Other Things, p. 112.
3. Boys v. Chaplin (1968) 2 Q.B. 1, at 26 (C.A.)

other words the clandestine removal of children is a regular feature of interstate and international communication and conflict of laws.

Although Nigeria has a written Constitution unlike the United Kingdom (excepting, possibly, the Act of Union, 1707), the Constitution has not had an overwhelming influence on Nigerian private international law rules which are still regarded, as in England, as part of the common law. In this connection conflicts law in the Nigerian federalism is in marked contrast to the United States federalism in which major constitutional clauses control the operation of conflict of laws.

Another main difference between England and Scotland on the one hand and Nigeria on the other in the field of guardianship-custodylaw is that in Nigeria, in sharp contrast to the United Kingdom, guardianship-custody law is compounded by an admixture and coexistence of English law (statutory, common and equitable) and Nigerian law (customary, islamic and local statutory law). The islamic and customary laws tend to emphasise certain aspects of guardianship more than would be permissible in either the English or Scots law. Also, the several customary laws and the islamic law normally apply only to members of a particular ethnic group or to members of a particular religion. Thus Nigerian conflict of laws utilises such connecting factors as religion and membership of a tribe, in addition to the general connecting factor of domicile as is the case in Anglo-Scottish conflict of laws. This means that even more

unsatisfactory than English and Scots law in the matter of artificiality of connecting factor, the personal law of a Nigerian may be determined by a law which is very remote from him. For in this age of high mobility and weakening tribal and family cohesion a man carries with him his tribal laws even when he has become "detribalised". Domicile, nationality or residence as connecting factors may be changed. But how can membership of a tribe be changed? The concept of detribalisation is not known to Nigerian customary law. And Nigerian law has no equivalent of the concept of forisfamiliation - a species of emancipation - in Scots law. Although "the mere fact of the adoption of a western way of life is not enough"[1] for purposes of detribalisation and non-subjection to customary law, Professor Allott has nevertheless suggested that an African may be exempt from subjection to customary law "by change of domicile: thus an African ... who makes England his permanent home would lose his (African) domicile and acquire an English one. On a return visit to (Africa) the rules of Private International Law would operate so as to make his personal law the law of England; he would not, in the words of the relevant legislation, be a person subject to a system of customary law or subject to customary law or affected by it."[2] We need only add that there has been

---

1. A.N. Allott, New Essays in African Law p. 195.
2. Ibid, at 193.

no judicial authority in support of such a position.

Furthermore, Nigeria, in marked contrast to the United Kingdom has, up till now, no specific local legislation on the topic of guardianship and custody. The only exception is the Infants Law[1] of the Western and Mid Western States of Nigeria. The reason for this comparative lack of local legislation on guardianship is due in part to the Nigerian legal history. In Nigeria, the common law, doctrines of equity and statutes of general application of England have been received through the so-called reception statutes.[2]

We must next observe that in Scotland, England and Nigeria, choice of law rules have the same theoretical bases, that is, the rules are jurisdiction-selecting. "Jurisdiction-selecting" is a term used in contradistinction to the American approach to conflict of laws problems. The American approach, as is well known, is now overwhelmingly based on "interests" or "policy" analysis approach. The two terms will now be explained.

"<u>Jurisdiction-Selection</u>"

A jurisdiction-selecting choice of law rule is a rule that merely indicates the source of the law to be applied without regard to that law's content. The content of the laws in conflict are considered as irrelevant under this approach. James Lorimer, who is said to have "played the

---

1. Infants Law, Western Nigeria, Cap. 49 Laws of Western Nigeria (1959 ed.).
2. See, e.g. Law (Miscellaneous Provisions) Act (formerly The Interpretation Act) Cap. 89 Laws of the Federation of Nigeria and Lagos (1958 ed.) s.45.

role of pioneer in the subject of private international law,"[1] in Scotland subscribed to the jurisdiction-selecting rule. In his view

> "private international law was not a separate system of positive law, and in this respect it differed both from public international law and from municipal law, public and private. Public (private) international law determines no legal relations whatever: it simply says by what system they shall be determined. It is a doctrine of jurisdiction and nothing more."[2]

A more recent statement of jurisdiction-selecting rule is by Dr. Cheshire who said:

> "It must be observed that the function of private international law is complete when it has chosen the appropriate system of law. Its rules do not furnish a direct solution of the dispute."[3]

Professor Anton agrees with this view, observing that "choice of law rules ... do not provide a direct answer to the question, what are the judicial consequences of a particular course of conduct? They answer it in an indirect way by pointing to the country whose legal system should provide the answer."[4]

---

1. Charteris, "Scotland and the Common Law System of Private International Law" (1938) 11 Aust. L.J. 378 at 384.
2. Lorimer Institutes of the Law of Nations (1883-4) quoted in Charteris, note 1 supra, at 384.
3. Cheshire and North, Private International Law 8th ed. p.9.
4. Anton, Private International Law, p.6. It should be noted that in selecting the jurisdiction reference is made to the legal system not to the country. Lord Denning once championed reference to "country". See Re United Railways of the Havana (1961) A.C. 1007, at 1068. But his Lordship recanted from this opinion in the recent case of Whitworth Street Estates (Manchester) Ltd. v. James Miller & Partners Ltd. (1969) 2 All E.R. 210 at 212 (C.A.)

Interest or policy analysis approach

Professor Cavers has given probably the best statement of the "interest-policy" approach in America to choice of law. That approach, he writes,

> "recognises that the problem confronting the court is a choice between two particular rules of law to govern the issue before the court; it is not a problem of choosing between two legal systems in their entirety and accepting in advance whatever might, on inspection, prove to be the relevant rules in these two systems. Only if the court is choosing between particular rules can it identify the respective policies embodied in those rules and decide whether they present a true conflict, and, if so, which law appears to have the better claim to application in the light of the facts of the case, including the expectations of the parties. This means that a few simple rules of wide sweep are not likely to be developed; instead, it offers the hope that decisions based on discriminating assessments of policies and expectations will gradually build up a body of differentiated rules to which courts can adhere and which they can steadily develop."[1]

Naturally, both the U.K.-Nigerian approach and the American approach can be criticised. "Without taking the content of the conflicting laws into account, how could one know what would satisfy the demands of justice ...?"[2] This has been the main query of Professor Cavers in connection with jurisdiction-selecting approach. Such an approach which ignores the real purpose behind the conflicting

---

1. Cavers, "Change in Choice of Law Thinking and its Bearing on the Klaxon Problem", in A.L.I. The Division of Jurisdiction between State and Federal Courts 164-165, quoted in Prebble "Choice of Law to Determine the Validity and Effect of Contracts etc." (1973) 58 Corn. L. Rev. 433 at 447.
2. Cavers, Choice of Law Process, p.9.

laws may often yield a chosen law which has little reasonable basis for its application to the question at issue; and it may also prevent inquiry "whether a real conflict of policies exists and if so, how it can best be accommodated."[1]

On the other hand, the United Kingdom is not a natural environment for the growth of an interest approach to conflict of laws. That approach is a "product of academic theorising"[2] and in conflict of laws academics in the United States appear to have been in a position to wield greater influence than their United Kingdom counterparts. While the interest or policy approach may be appropriate for the American overwhelmingly inter-state conflicts situation, how would a Scottish or English Court concerned largely with international conflicts situation determine "the policies behind the laws of some totally alien system?"[3] How, for example, would such a court discover the policies behind the laws of some Asian or an African non-English speaking, non-common law country? Moreover, the rules of statutory interpretation[4]

---

1. Ibid, p.65.
2. Prebble, "Choice of Law to Determine the Validity and Effect of Contracts: A Comparison of English and American Approaches to the Conflict of Laws" (1973) 58 Corn. L. Rev. 433 at 723.
3. Ibid. at 724.
4. A heavy amount of case law has built up around these issues and useful summary and recommendations are contained in The Interpretation of Statutes, a joint Report by the Law Commission (Law Com. No. 21, 1969) and the Scottish Law Commission (Scot. Law Com. No. 11, 1969) Chapter 5.

in Scotland and England frown at construction which goes outside the words of a statute and into materials such as committee reports and travaux preparatoires, Royal Commission Reports, White Papers, Parliamentary History. And finally, policy analysis gives more scope for subjective decisions in a field of law where there is everything to be said for an objective approach.

But it must not be thought that the United Kingdom courts are totally impervious to new influences such as those of the "interest" and "policy" approaches to conflict of laws problems. At least for Lord Wilberforce, where in a tort or delict case the strict conflict rules do not sufficiently allow the court "to take account of the varying interests and considerations of policy which may arise when one or more foreign elements are present",[1] his Lordship would reason as follows:

> "that the necessary flexibility can be obtained from that principle which represents at least a common denominator of the United States decisions, namely, through segregation of the relevant issue and consideration whether, in relation to that issue, the relevant foreign rule ought, as a matter of policy ... to be applied. For this purpose it is necessary to identify the policy of the rule, to inquire to what situations, with what contacts, it was intended to apply; whether not to apply it, in the circumstances of the instant case, would serve any interest which the rule was devised to meet."[2]

1, Chaplin v. Boys 1971 A.C. 380, at 391.
2. Ibid.

But too much should not be made of this passage, for it does not appear that the "interest" or "policy" analysis in conflict of laws is winning adherents in either Scotland or England. It is significant, for instance, that even Lord Wilberforce made no reference to the principles of "policy" or "interest" analysis in two recent House of Lords decisions.[1] Moreover, in advocating the "interest" or "policy" analysis in Chaplin v. Boys Lord Wilberforce was in the minority.

One suspects that in all this methodological theorising in conflict of laws Nigeria is waiting for a positive indication that England would opt for some measure of "interest" and "policy" approach before the Nigerian judges embrace the American concept which English judges are wont to describe as "still embryonic"[2] and "not ... fully developed".[3] As Dr. Elias once said "(Nigerian) Judges, both British and African, tend to rely on English law as the ultimate source of their inspiration and their precept."[4] This is regrettable for, in the words of Professor Von Mehren, "private international law theory grounded basically on the experience of a single unitary system tends to be overly

---

1. Whitworth Street Estates (Manchester) Ltd. v. James Miller & Partners Ltd., 1970 A.C. 583; 1970 1 All E.R. 796; Compagnie Tunisienne de Navigation S.A. v. Compagnie d'Armament Maritime S.A. 1971 A.C. 572, 1970 3 All E.R. 71.
2. Boys v. Chaplin (1968) 2 Q.B. 1 at 43 per Diplock L.J. (C.A.)
3. Chaplin v. Boys 1969 3 W.L.R. 322 at 330 per Lord Hodson (H.L.); (1971) A.C. 356 at 379.
4. Elias, The Impact of English Law on Nigerian Customary Law (1958) p.10.

simplistic".[1] Furthermore, the English judges whom the Nigerian courts tend to follow have said that they have rejected the American doctrine "while we remain a United Kingdom".[2] This clearly takes a political fact into account in fashioning conflict of laws rules. In view of the predominance of interstate conflicts in the Nigerian federation - much like in the United States - one would have expected the Nigerian conflicts rules to be closer to the American rules and methodologies.[3] What we find, instead, is that the Nigerian courts still doggedly adhere to the old common law tort conflict of laws rules. In a significant decision[4] in 1967 - years after the birth of the "interest" or "policy" approaches - the Supreme Court of Nigeria mechanically followed the rule in Philips v. Eyre[5] with all it implies, that is, an approval of the much-criticised case of Machado v. Fontes.[6] Nigerian judges must be prepared to experiment on their own and to furnish

---

1. Von Mehren, "Conflict of Laws in a Federal System: Some Perspectives" (1969) 18 I.C.L.Q. 681 at 684.
2. Chaplin v. Boys (1969) 3 W.L.R. 322, at 336 per Lord Donovan. (1971) A.C. 356 at 383
3. "Consideration of multi-state or interstate values and interests in the federal system, and of ways in which to harmonise or reconcile conflicting state policies, are surely the basic elements of an approach to choice of law in a federal system." Horowitz "Towards a Federal Common Law of Choice of Law" (1967) 14 U.C.L.A. Law Rev. 1191.
4. Benson v. Ashiru (1967) N.M.L.R.363.
5. (1870) L.R. 6 Q.B. 1.
6. (1897) 2 Q.B. 231. See Cheshire, Private International Law 6th ed. p. 286.

their own answers to common law problems at least in view of the concession by the Privy Council that "the common law may develop differently within territories of the Commonwealth..."[1]

It might be objected that the preceding account of the approaches to choice of law is not relevant to guardianship consideration because of the overwhelming consensus that choice of law considerations are not relevant to guardianship and custody questions where, instead, discretion and public policy factors prevail.[2] This is the theme we shall take up in Chapter 6.

Finally, although one might have expected the different approaches of English and Scots private international law rules, for example the different bases of jurisdictional competence in guardianship matters, to produce different results, this has not been so. The results arrived at in all the three countries studied in this work are largely the same. This is the consequence of the liberal interpretation to which the over-flexible principle of the paramountcy of the child's welfare has been subjected.

---

1. Australian Consolidated Press v. Uren (1969) A.C. 590, 644 (P.C.).
2. See e.g. Morris, The Conflict of Laws (1971) p. 180.

5. Public International Law Dimensions

Dr. Cheshire once wrote that "there is ... no affinity between private and public international law."[1] With great respect this cannot be correct as regards the conflicts law of guardianship of children, if ever it was true for other branches of private international law. The truth of the matter is that public international law has great impact upon private international law rules as can be seen from the following statement of Professor Graveson:[2]

> "Between public and private international law lies a good deal of common ground, first in a largely common historical origin; secondly in the seventeenth-century basis of the conflict of laws in the territorial theory of sovereignty and comity; thirdly, in exceptions to the normal application of law created by sovereign and diplomatic immunity; and finally by overriding considerations applied by the courts to displace the normal operations of rules of the conflict of laws when they threaten friendly international relations."[3]

The present work is concerned with private international law but there are certain striking developments in the public international law sphere which one cannot ignore. Within this century in particular the world has witnessed phenomenal developments in the field of protection of fundamental human rights of the individual, especially women and children. Political action within each State, world public opinion concerning the rights of man accompanied

---

1. Cheshire, Private International Law 2nd ed. 1938 p. 27.
2. Graveson The Conflict of Laws 6th ed. 1969 p.6.
3. See, e.g. Regazzoni v. K.C. Sethia (1944) Ltd. 1958 A.C. 301.

by the struggles of the suffragettes and, more recently, women's liberation movements in respect of women's rights, have all confined to effect throughout the world a situation whereby the rights of the father with regard to the guardianship and control of his children have diminished almost to vanishing point.[1] With the United Nations as a whole reaffirming its faith in "the equal rights of men and women"[2] it becomes difficult for nations, in consistency with membership of the World Body, not to make provision in municipal legislation for care and protection of children to whom "mankind owes ... the best it has to give."[3] The concepts of equality of husband and wife and of the paramountcy of the welfare of the child - both very basic to modern guardianship law - have today become internationalised by the fact that these concepts now feature prominently in most national legislation and they have become the subject of a number of international conventions. Thus, Article 16(1) fo the United Nations Declaration of Human Rights provides that

> "men and women ... are entitled to equal rights as to marriage, during marriage and at its dissolution."[4]

---

1. See, e.g. Hewer v. Bryant (1970) 1 Q.B. 357 for a modern statement of the position of the rights of the father relative to his child under English law.
2. United Nations Charter, Preamble.
3. Preamble, United Nations Declaration of the Rights of the Child (1959).
4. United Nations Universal Declaration of Human Rights U.N. Doc A/811 of 10 December, 1948. For the text, see Brownlie Basic Documents on Human Rights (1970) p. 106.

And the U.N. Declaration on Elimination of Discrimination Against Women in 1967 provides in Article 6(2) as follows:

> "All appropriate measures shall be taken to ensure the principle of equality of status of the husband and wife, and in particular:
> (b) women shall have equal rights with men during marriage and at its dissolution. In all cases the interest of the children shall be paramount."[1]

Still of much more direct significance for our present purposes is the United Nations General Assembly Declaration of the Rights of the Child. Principle 2 states as follows:

> "The child shall enjoy special protection, and shall be given opportunities and facilities by law and by other means to enable him to develop (fully). In the enactment of laws for this purpose the best interests of the child shall be the paramount consideration."

It is needless to stress that both Nigeria and the United Kingdom acceded to these declarations. But quite apart from these general declarations of principles which are relevant to guardianship-custody questions, in a number of other conventions, states have limited their freedom to determine the governing principles in conflict of laws matters. The Guardianship Convention of 1902[2] is an instance of this class of conventions. And more recently the 49th Conference of the International Law Association in 1960 adopted an important convention on the Recognition of Orders on the Custody of Infants.[3]

---

1. For the texts see Brownlie, Basic Documents on Human Rights, p. 183.
2. The Hague Convention on Guardianship, 1902.
3. For the text of the Convention, see (1960) 9 Am. J. Comp. L. 708. See also, Hague Convention of 5 October 1961 (concerning the Protection of Minors) noted at p. 9 above.

It would be no exaggeration to say that private international law of guardianship can best perform its function only with the aid and collaboration of international rules and standards. What is significant here is that by virture of these several treaties and conventions private international law enters into the realm of public international law. And, in as much as the conflict of laws is part of the internal municipal law of each state "it stands to that extent in the same relation to public international law as municipal law generally. This means that it ought to be in accordance with any relevant rules of public international law."[1]

In the case of the Serbian and Brazilian Loans[2] the Permanent Court of International Justice said that "private international law or the doctrine of the conflict of laws ... may be common to several States and may even be established by international conventions and customs" and in that case they "may possess the character of true international law governing the relations between States."

This opinion would therefore indicate, as the Reporter's Note to the Restatement (Second) Foreign Relations Law of the U.S. has stated, that "some conflict of law rules may

---

1. Lauterpacht, International Law: Collected Papers Vol. I General Works (E. Lauterpacht ed., 1970) p. 38.
2. P.C.I.J. Reports, Series A, Nos. 20/21 (1929).

have become so established by custom that a refusal to follow them would violate international law."[1]

Many of these private international law conventions on guardianship and custody have important bearings to the conflict of laws rules of jurisdiction, choice of law and recognition. We shall consider these in greater detail under the appropriate chapters in Part II.

B. Some Conceptual Clarifications.

Certain notions are commonly entertained in relation to guardianship which are capable of raising confusion in any attempt to discuss or analyse the problems of guardianship law. Two of these are discussed below.

1. The Legal Significance of the Extended versus Nuclear Family.

It is well-known that in Nigeria, apart from the regime of monogamous marriage introduced by the Marriage Act,[2] the marriage laws - whether these be islamic or customary - are polygamous in basic orientation and philosophy. And as has been long recognised by anthropologists, a main feature of polygamous marriages is that they are unions between families, not just between the immediate individuals.

---

1. Restatement of the Law, Second, Foreign Relations Law, S. 9 at p. 27.
2. Cap. 115, Laws of the Federation of Nigeria and Lagos (1958 ed.).

Custody as we have observed, belongs to the general area of problems connected with the family. The word "family" itself is not susceptible of precise definition[1] since it has varying content for different legal purposes. Probably as a result of this, many commentators - particularly Nigerian (African) legal writers - often endeavour to demonstrate that "family" in the Nigerian (African) sense has no precise counterpart in Euro-American or Anglo-Scottish law. These writers refer to the implications of the Nigerian extended "family" as justification for their claim that in the Nigerian context it is extremely difficult (indeed impossible) to shake off the domicile of origin which is usually cotaminous with ancestral "family" home. Dr. Agbede, for example, presented the distinction between the Nigerian and Western conceptions of family in these terms:

> "Unlike England, where the husband and wife (together with their infant children) constitute the unit of the family, a Nigerian 'family' often included collaterals of the third or fourth degree of relationship."[2]

Dr. Akanle agrees, saying that "the composition of the elemental or immediate family is still wider than that

---

1. See Kludze, The Ewe Law of Property, esp. pp. 30-32 for a short but useful discussion of "family".
2. Agbede, "Lex Domicili in Contemporary Nigeria: A Functional Analysis" (1973) No. 9 African Law Studies (New York) p. 61 at 80.

in the English or the European concept."[1] Both these authors then cited in support of their views the provisions of section 2 of the Eastern States of Nigeria Fatal Accidents Law.[2]

We submit that the English "family" (and the position would not be different for the Scottish "family") which these authors have in mind is that which one more commonly encounters in the construction of wills. For example, in Re Terry's Will[3] Romily M.R. said:

> "I have looked into the authorities, which confirmed the opinion ... that the primary meaning of the word 'family' is 'children'".

Although his book dealt with the legal problems of the nuclear family of husband wife and children, Professor Bromley admitted that:

> "The word 'family' is one which it is difficult, if not impossible, to define precisely. In one sense it means all blood relations who are descended from a common ancestor; in another it means all the members of a household, including husband and wife, children, servants and even lodgers."[4]

It is obvious from this statement that the membership of the English family adverted to is capable of matching the widest of Nigerian extended family.

---

1. Akanle, Some Aspects of Nigerian Private International Law of Family Relations: A comparative Study (Unpublished) Ph.D. Thesis. Univ. of London p. 115. (1970)
2. Cap. 52 Laws of Eastern Nigeria (1963 edition). This defines immediate family as including wife or wives. husband, parent (which includes father, mother, grandfather, grandmother, stepfather and stepmother) child (which includes son, daughter etc.) brother and sister (both full and half), nephew and niece.
3. (1854) 19 Beav. 580 at 581.
4. Bromley, Family Law, 2nd ed. p.1.

Perhaps the best that one could say is that it would be misleading to dichotomise out of context the concept of family in Nigeria and the United Kingdom. It would be nearer the truth to say that in Anglo-Scottish law the basic rule is one of recognition of nuclear family. Thus, whereas it is in the exceptional situations that the extended or wider family has legal significance in Anglo-Scottish law, under the Nigerian law, on the other hand, the extended family is the rule and it is only in exceptional cases that the nuclear family has controlling legal significance. It is true, for instance, that the wider or extended family retains significance in English and Scots law in such vital areas as intestate succession, obligations of aliment, prohibited degrees of marriage relationships etc. In addition (although by way of exception), the extended family has importance in English and Scots law as can be readily seen in the various fiscal and social security legislations which all contain, for their separate purposes, very wide definitions of "family" and/or "relative". thus the United Kingdom Workmen's Compensation Act, 1925 gave an exhaustive list of the members of the family by providing that:

> "...member of a family means wife or husband, father, mother, grandfather, grandmother, stepdaughter, stepmother, son, daughter, grandson, grand-daughter, stepson, stepdaughter, brother, sister, half-brother, half-sister."[1]

---

1. Section 4, Workmen's Compensation Act, 1925.

Nigeria, too, of course, has her own equivalents of these social security enactments. The Eastern Nigeria Fatal Accidents Law which the two Nigerian learned authors cited in support of their proposition contain, except for the insertion of nephew, niece and the plural "wives" (inserted to take account of the Nigerian polygamous situation) an identical list of members of the family as in the U.K. legislation on which the Nigerian one was probably based. The only relevant observation one can make is that the Nigerian provisions are not, unlike in the United Kingdom, exceptions to normal conceptions of 'family' but they rather accord well with, and accurately reflect, both the legal and sociological understanding of 'family'.

For our purposes, these observed distinctions in the ambit of the term "family" in the two countries assume legal significance when we examine the various persons who normally feature in guradianship and custody disputes. In other words, the sharp distinction which once existed in Scots and English law between parent against parent custody disputes on the one hand and parents versus strangers disputes on the other hand - the distinction itself is now blurred by the House of Lords decision in J. v C.[1] - are largely non-existent under Nigerian law. Thus persons who under English and Scots law would be designated as "strangers" would, under Nigerian law, qualify as "parent".

---

1. 1970 A.C. 668.

2. Adoption and Guardianship

Due to the fact that many applications for adoption are often preceded by a ripening period of de facto custody of the child involved, it is important to draw a distinction between the two legal concepts. Guardianship, as we have observed, is an old institution, but adoption was not known to the common law probably owing to the desire of parents to rear their own children and to the fact that the consequences of adoption were often too drastic and total. It was not until 1926 that statutory adoption was introduced into United Kingdom law through the Adoption Act[1] of that year. Today adoption is governed by the Adoption Act of 1958.

Similarly, in Nigeria the institution of adoption, unlike guardianship, was not known to Nigerian customary or statutory law. Because of its late development in England, the English law of adoption has not been "received" into Nigeria. Although a few states (the three Eastern and Lagos states) have their own local adoption laws,[2] we still await an Adoption Decree with country-wide application. As far as case law is concerned, adoption has not yet aroused the interest of the Nigerian courts, but it may be expected that the paramountcy of the interest and welfare of the

---

1. Adoption Act, 1926.
2. E.g. The Adoption Law, Eastern Nigeria, No. 12 of 1965.

child will come to dominate the judicial view of adoption in Nigeria - just as is currently the case with guardianship.

The main difference between adoption and guardianship is that following the adoption the natural parents of the adopted child are relieved of all parental rights and responsibilities. Adoption will terminate all legal relationships between the adopted child and his relatives, including the natural parents. Thereafter the adopted child becomes, in the eye of the law, a total stranger to his former relations for all purposes including inheritance and the interpretation of legal documents. In the words of Lord Simon, adoption effects a complete "legal metamorphosis" so that "the two classes of adults - those who wish to surrender their rights and obligations in respect of a child and those who wish to assume them - are brought together, so that the latter are legally substituted for the former in relation to the child in question."[1]

This basic distinction between the two concepts is best expressed in the words of section 13 of the Adoption Act, 1958:

> "Upon an adoption order being made, all rights, duties, obligations and liabilities of the parents ... of the infant in relation to the future custody, maintenance and education of the infant ... shall be extinguished and all such rights, duties, obligations and liabilities shall vest in and be exercised by and

---

1. A and B Petitioners (1971) S.L.T. 258 at 262 (H.L.)

> enforceable against the adopter as if the infant were a child born to the adopter in lawful wedlock; and in respect of the matters aforesaid (and, in Scotland, in respect of the liability of a child to maintain his parents) the infant shall stand to the adopter exclusively in the position of a child born to the adopter in lawful wedlock."

Guardianship involves no extinguishment of parental rights, duties, obligations and liabilities.

The concept of the paramountcy of the child's welfare dominates in the determination of guardianship and adoption questions. The difference in this connection is that, as Lord Donovan said, "while the welfare of the child is not, as it is in custody proceedings, the paramount consideration, it is inferior in importance to no other."[1]

C. The Meaning of Custody

1. General

We have employed one compendious title for this work mainly as a matter of convenience. We shall now turn to consider its breakdown into the component parts, viz, custody and guardianship.

An extraordinary amount of confusion exists in the use of the terms guardianship and custody in English, Scots and Nigerian law. Both terms have not been clearly demarcated in either private international law or the purely internal municipal law spheres. Clarification has not been

---

1. Re W (An Infant)(1971) 2 All E.R. 49 at 78.

helped by the tendency in most modern statutes which have continued to combine the two terms under legislation compendiously entitled "Guardianship of Infants (or Minors)". An instance of this confusion may be highlighted.

The Comment to Rule 48 in Dicey-Morris[1] states that "Parental authority includes the power ... to exercise custody and guardianship"[2]. And then a few pages later in the Comment to Rule 50 it is stated that "Guardianship ... concerns the exercise of parental authority over infants."[3] Clearly, these two definitions are essentially circular. Combined, the two definitions, in other words, are saying that parental authority includes the exercise of parental authority.[4] With due respect, this absurdity refutes the purported definition; but it does show the difficulty of defining or ascribing a meaning to these terms.

It is tempting to suggest that the confusion or difficulty arises partly in the use of the phrase "parental authority". Under the Guardianship statute itself the "rights and authority" of the mother and father "shall be ... exercisable by either without the other."[5] Perhaps it is unfortunate to stress parental rights and authority

---

1. The Conflict of Laws 8th ed.
2. Ibid at p. 381.
3. Ibid at p. 384.
4. Putting it another way, the authors have in effect said "guardianship concerns the power to exercise guardianship."
5. Guardianship Act 1973, S.1(i) (England) and s.10(i) (Scotland).

considering that these most important sections were prescribing that the governing principle in guardianship and custody cases is to be the child's welfare. However, Dicey and Morris have advanced this thesis which seeks to explain the reason for the difficulty in definition. "During the nineteenth century", the learned authors write, "English domestic law did not differentiate between guardianship and custody."[1] As a result of this, "Even at the present time, when guardianship and custody have become separate institutions ... English Conflict of Laws does not provide separate rules for determining the jurisdiction of English courts to make guardianship and custody orders respectively."[2] This statement calls for two comments: First, the confusion which exists in English law as to the meaning of guardianship and custody is not overwhelming in Scots, as it is in English law. As Dr. Clive has stated, "there is in Scots law a much sharper distinction between parental custody and parental guardianship than there appears to be in England."[3] This is mainly because the Scots concept of tutory and curatory ensures that these forms of parental authority exist independently of any question of custody and can never be extinguished by the determinations of the custody issue.

---

1. Rule 50, comment at p. 384.
2. Ibid.
3. Clive, "The Guardianship Act 1973". 1973 S.L.T. (News) 225 at 227. See also, Kirk v. Scottish Gas Board 1969 S.L.T. 18; 1968 S.C. 328.

Secondly, the "separate institutions" of guardianship and custody to which Dicey and Morris refer may be so only in name. The authors' assertion is not borne out by the English cases. In English law, custody has expanded into what in Scotland would be termed guardianship. In other words, as Dr. Clive says, in England "the distinction between custody and guardianship is less clear than it is in Scots law."[1] Thus, in Re W (an infant)[2] Lord Upjohn made the following statement:

> "If an order is made granting custody to one parent without more, that would include care and control of the infant or, if the parent does not want care and control, power to direct with whom the infant shall reside; it also gives that parent the right to organise the infant's religious and general education and his general upbringing."

This blurring of custody into guardianship is brought out even more distinctly by the following statement of Sachs L.J. in Hewer v. Bryant:[3]

> "In its wider meaning the word 'custody' is used as if it were almost the equivalent of 'guardianship' in the fullest sense ... (S)uch guardianship embraces a 'bundle of rights' or to be more exact a 'bundle of powers' which continue until a male attains (18) or a female infant marries. These include the power to control education, the choice of religion, and the administration of the infant's property. They include the entitlement to veto the issue of a passport and to withhold consent to marriage. They include also both the personal power physically to control the infant until the years of discretion and the right ... to apply to the courts to exercise the powers of the Crown as parens patriae. It is thus clear that somewhat confusingly one of the powers conferred by custody in its wide meaning is custody in its limited meaning, namely, such personal power of physical control as a parent or guardian may have."

---

1. Clive and Wilson, The Law of Husband and Wife in Scotland (1974) p. 567 N. 20.
2. (1964) Ch. 202 at 213-214.
3. (1969) 3 All E.R. 578 at 585 (C.A.)

If this is the meaning of custody in English law, then clearly there is almost nothing left to be brought under the umbrella of guardianship. Matters which Sachs L.J. mentioned, such as parental power to withhold consent to marriage and to veto the issue of passport to the child, and those things not specifically mentioned by his Lordship, such as consent to surgical operation, willingness to institute an action for damages on behalf of the child, and the signing of school and other forms pertaining to the child, are all matters which would more properly belong to guardianship. In Scots law they are so treated, it being the view that these matters are within the proper province of tutory and curatory. This consideration lies behind the remark that there is a "sharper distinction" between the English and Scots law on matters of custody and guardianship.

Nigerian law, for its part, is enmeshed in the same (if not a worse) confusion that plagues English law on this matter. In modern Nigerian legislation guardianship and custody are mentioned in the Sharia Court of Appeal Law,[1] the Area[2] and Customary[3] Courts Edicts and in the Matrimonial Causes Decree,[4] but these terms are nowhere defined. And the viewpoint of the Nigerian courts on these terms is not greatly developed (indeed it is hardly forthcoming) partly because cases on guardianship and custody

---

1. No. 16 of 1960. Cap. 122, S.12 Laws of Northern Nigeria, 1963 ed. But custody is not mentioned.
2. E.g. No.2 of 1967, North-Central State, Section 23 and First Schedule, Part II.
3. E.g. No. 38 of 1966, Mid-Western State, Section 25 and Second Schedule.
4. No. 18 of 1970, e.g. Sections 71(i) and 114(i).

coming before the superior (English-type) courts are few and far between. One would imagine, though, that Nigeria has practically inherited the English definitions of these terms.

In fact, one is almost bewildered by the total lack of legislative awareness about any distinction between these two terms, as a scanning through of the area and customary courts edicts would show. For instance, whilst there is in Part II of the First Schedule of the Area Courts Edict (North-Central State) a provision about "suits relating to the custody of children under native law and custom", when one turns to the main provision in the statute, custody is not mentioned at all. It simply states instead, in section 23, that "In any matter relating to the guardianship of children", the interest and the welfare of the children shall be the first and paramount consideration. The draftsmen do not seem remotely to be aware that custody and guardianship do not necessarily mean the same thing - especially in the Nigerian legal situation where any one of the plurality of laws is capable of throwing up unsuspected distinctions and qualifications to any hitherto generally formulated and accepted principle or concept. It should not be taken for granted that the mention of the one term would necessarily imply the mention of the other especially when to all appearances there is a deliberate attempt to maintain the dichotomy. Moreover, the guardianship provision in the customary and area courts edicts, as it would now be evident, is at large.

It is not tied to a guardianship dispute under any particular system of law. A guardianship or custody dispute, say between an English wife and a Nigerian husband arising in an area court[1] in Kaduna would undoubtedly be "a matter relating to the guardianship of children." In resolving that dispute the application of (English) private international law rules - which are in force in Nigeria and whatever these may be in this connection - instead of customary or other Nigerian law may well best accord with the child's best interest and welfare.

2. Suggested Definition

Because guardianship encompasses a "bundle of rights"[2] and because custody embraces a "complex of rights"[3] it may well be impossible to draw a completely iron-cast distinction between the two terms. A broad definition of custody will always merge into guardianship while a definition of guardianship - unqualified - will normally include custody. We would, therefore, tentatively and cautiously suggest the following meanings.

Guardianship: As used in this work, guardianship is concerned with the exercise of parental authority over infants. It may, but need not necessarily, include custody of infants. We have, in other words, given the word a wide

---

1. Section 12(e) of the Sharia Court of Appeal Law, 1960, envisages the possibility of such a case arising.
2. Hewer v. Bryant (1969) 3 All E.R. 578, 585.
3. Dicey-Morris, The Conflict of Laws, Rule 50, comment, p. 384.

meaning in the "fullest sense" as Sach L.J. says. Or, to borrow the language of Professor Bromley, guardianship would normally stand for "the whole bundle of rights and powers vested in a parent or guardian."[1] We would add that "parental authority" as employed in this definition would exclude those bodies such as managers of approved schools or a local authority who are often asked to assume parental authority under the Children Act and the Children and Young Persons Acts.[2]

Custody. Bearing in mind that in Scotland and in Nigeria, unlike in England, "there has been very little discussion ... of what is meant by custody,"[3] we would propose the following meaning of that term. Custody as used in this work will have the meaning of the right of factual care and control of, and of access to, the child. In including access we are aware, as it has been rightly said, that "The concept of access is more nebulous even than that of custody."[4] But since the two concepts of custody and access are so closely intertwined, a discussion of custody, without regard to access where this issue is relevantly raised, would be a distortion of the true position. In the United Kingdom Domicile and Matrimonial Proceedings Act, 1973, Parliament has expressly enacted that custody "includes acces to the child in question."[5]

---

1. Bromley, Family Law 4th ed. 1971 p. 268
2. See Dicey-Morris, op. cit. p. 384 n. 27.
3. Clive and Wilson, The Law of Husband and Wife in Scotland p. 565.
4. Ibid, p. 567.
5. Cap. 45, Schedule 1, paragraph 11(1) (England) and Schedule 3, paragraph 11(1) (Scotland).

D. The Context of the Nigerian, Scottish and English Conflicts legal commonwealth.

Since there is no universally acknowledged body of private international law,[1] each country normally going its own way in devising its own conflicts rule as best she could, the question to be asked under this section resolves into this: is it proper or possible to set this present study within the context of Nigerian, Scottish and English laws which are or might be very different after all?

1. An issue of legitimacy of comparative approach.

Is it legitimate that we draw Scots law into a discussion of any legal problem affecting Nigeria since Scotland has a distinct system of law (civilian-Roman) while Nigeria belongs to the common law system? On the other hand, can it be maintained that English common law rules of private international law ought automatically to be imported into Nigeria as part of the received law? These are the questions we now turn to examine.

For too long one had the distinct impression that academic writers have over subscribed to the theme of Anglo-Nigerian law both at a comparative and a non-comparative level. What strikes one as odd was the overwhelming assumption that Nigeria was no more than an English appendage in legal matters. Yet, one cannot escape the indubitable fact that Nigeria, like many ex-colonies, was a British, not an English problem. An appreciation of this fact might

---

1. See Graveson, The Conflict of Laws 6th ed, pp. 38-39; Beale, The Conflict of Laws Vol III, p. 1961-62. The leading exponent of universalist theory of private international law was Savingy.

rationally have led to seeking solutions to some of Nigeria's legal problems in wider fields than English statutory and common law.

Now, in both England and Scotland a process of comparative borrowing of legal ideas is an established tradition. Both Viscount Stair[1] and Professor Blackstone[2] recommended it. And what these legal luminaries said about the need for fertilisation of indigenous legal ideas through study and possible borrowings from foreign systems of law has been sanctioned by the United Kingdom Legislature. The Law Commission Act of 1965 imposes upon the English and Scottish Law Commissions an obligation "to obtain such information as to the legal systems of other countries as appears to the Commissioners likely to facilitate the performance of any of their functions."[3] If this "liberty to search" for useful ideas is preserved by the United Kingdom with a comparatively more developed legal system than Nigeria, is there any justification for limiting Nigeria's search for comparative legal materials to the English horizon?

When the Nigerian judges assert that the rules of English private international law are in force in Nigeria via the received common law,[4] their Lordships seem to overlook

---

1. Stair, The Institutions of the Law of Scotland (1681) Book I, Title I, p.1. See also, Kames, Historical Law Tracts. Speaking about the best method of studying law, Lord Kames stated: "I know none more rational than a careful and judicious comparison of the laws of different countries". 4th ed. Preface xii.
2. Blackstone, Commentaries on the Law of England "Introduction" (1787 ed.) pp. 35-36.
3. Section 3(1)(f).
4. See e.g. Benson v. Ashiru (1967) N.M.L.R. 363.

the serious lacunae existing in the body of English private international law itself. What Professor Cheshire said some 40 years ago as regards English conflict of laws may still be worth repeating today. The decisions of the early English judges, he says,

> "were necessarily hesitating and tentative",[1]

and that the whole subject

> "is, at the moment, fluid not static, elusive not obvious; it repels any tendency to dogmaticism; and, above all, the possible permutations of the questions that it raises are so numerous that the diligent investigator can seldom rest content with the solution that he proposes."[2]

And, conflicts rules being part of the English "common law" should have furnished adequate warning to the Nigerian law makers that those rules need not be automatically transplanted into an alien environment. Moreover, as P.B. Carter has observed[3] by way of a play upon words, the fascination of "common law" rules of conflicts to Nigerian judges ought to have been marred by a realisation that, according to the Shorter Oxford Dictionary,[4] the word "common" can mean not only "in general use" but also "of inferior quality or value".

Therefore, whatever may be the case for adhering to English rules in other fields of civil law, it is especially weak in the conflict of laws field for a number of reasons.

---

1. Private International Law 7th ed. p. 38.
2. Private International Law, 1st ed. Preface.
3. Carter, "Some Impressions of Private International Law in Australia" (1954-56) 3 Annual Law Review 67 at 68-69.
4. See Shorter Oxford English Dictionary.

First, conflict of laws is still a young[1] and developing field of law and even within the otherwise rich field of English common law, the subject still occupies a backward area of the common law. For example, it was only in 1948 in Apt v. Apt[2] that the Court of Appeal recognised the validity of proxy marriages. And as we have seen, adoption was not known to English law until 1926. Many of its rules have not been fully tested and even one of the oldest of these - domicile - is currently subject to great stress, especially the aspect of its "revival".[3] As P. Fraser says, private international law is still "in the same state of formation as is indicated in geology by the old red sandstone."[4]

In the second place, conflicts of laws is a field in which "local peculiarities"[5] deserve greater influence than would be the case in many other fields.

Thirdly, conflicts rules ought not to be evolved without regard to local legal conditions. "The unitary or federal structure of the State, which the law district constitutes or to which it belongs, cannot be justifiably disregarded,"[6]

---

1. Prof. Nadelman is not convinced about the accuracy of the term "young", because conflict of laws has been a subject of juridical interest for almost seven centuries. See Nadelman, "Marginal Remarks on the New Trends in American Conflicts Law" (1963) 28 Law & Contemp. Prob 860 at 868.
2. (1948) P. 83.
3. The Lord Chancellor's Private International Law Committee as long ago as 1954 recommended the abolition of the rule of revival of domicile See Cmnd. 9068 (1954) para. 14.
4. Patrick Fraser, The Conflict of Laws in Cases of Divorce pp. 72-73.
5. Elias, The Nigerian Legal System p. 275.
6. P.B. Carter, supra note 3 (Page 50), at 69.

EDINBURGH UNIV. LIBRARY

and this implies that before applying English conflicts rules in inter state cases, such rules should be the subject of particular scrutiny.

Making a case against the automatic application of English law does not amount to a case for necessary borrowing from Scots private international law. In turning to Scots law it is in the knowledge that that law can lay claim to the direct heirship of the growth of private international law in the (British) Commonwealth. It is a widely acknowledged fact that principles of the conflict of laws reached England mostly through the Scottish influence.[1] As Professor Charteris has said, "Scots law served to provide the courts of England, and notably the House of Lords, with the raw materials for those judgments which now constitute the common law system of private international law so far as not governing commercial relations".[2] Professor Charteris goes on to say that Scots law furnished the requisite foreign element in the first recorded decision of an English court in private international law of family matters,[3] as well as providing the same foreign element in many of the other leading conflicts of law cases.[4]

---

1. See Anton, "The Introduction into English Practice of Continental Theories on the Conflict of Laws", (1956) 5 I.C.L.Q. 534.
2. Charteris, "Scotland and the Common Law System of Private International Law" (1938) 11 Aust. L.J. 378 at 380.
3. Scrimpshire v. Scrimpshire (1752) 2 Hagg. Con. 395; See also Dalrymple v. Dalrymple (1811) 2 Hagg. Con. 54.
4. E.g. Shaw v. Gould (1868) L.R. 3 H.L. 55; Udny v. Udny (1869) L.R. 1 Sc. & Div. 441.

Scotland had shown interest in private international law longer than England had.[1] Long ago Joseph Story, the great American jurist referred to "the highly cultivated state of jurisprudence in Scotland". He contrasted the position with that in England expressing surprise and regret that "the Bar of Westminster Hall have not hitherto directed more time to the study of Scottish jurisprudence." He ended with his conviction that on the subject of the conflict of laws the English "will find ... the most extensive information and accurate researches in the doctrines and decisions" extanct in Scots law.[2]

We should add that in this work we shall be drawing from American source materials especially those available through the instrumentality of the American Law Institute as well as legal periodicals and judicial decisions. In saying this one again faces a question of relevance. The Roman-civilian background of Scots law would tend to distinguish that law from that in the United States which Lord Cooper described as "the domicile of choice of the common law."[3] But this is not the case because in recent years the civilian method of approach has found expression in the unofficial Restatement of the law "in much of which Scots lawyers feel perfectly at home - far more so than in the Reports of the English Chancery Division."[4]

---

1. See McNair "The Debt of International Law in Britain to the Civil Law and the Civilians" (1954) 39 Grotius Society 183. For a view on the late development of the subject in English law, see Harrison, On Jurisprudence and the Conflict of Laws (1878) pp. 117-118.
2. See Nadelman, Joseph Story and George Joseph Bell (1959) Jur. Rev. 31 at 38-39.
3. Cooper, "The Common Law and the Civil Law - A Scot's View" (1950) 63 Harv. L.Rev. 468 at 472.
4. Ibid.

English law has still less reason to be bashful in borrowing from American law sources. First both belong to the common law system. Secondly, Professor Willis L.M. Reese, Reporter of the Restatement (Second) Conflict of Laws has written that

> "In preparing the Tentative Drafts (of the Restatement (Second)), nearly as much consideration was given to English as to American cases. The drafts should, in general, be consistent with English law, since it is believed that there are few basic differences between the choice of law rules prevailing in England and in the United States."[1]

It would be difficult for English law to ignore the Second Restatement which has earned the commendation of Dr. Morris of Oxford for being "the most impressive, comprehensive and valuable work on the conflict of laws that has ever been produced in any country, in any language, at any time."[2]

The Nigerian Constitution it has been said with some justification "exhibits many similarities to the Constitution of the United States."[3] That being so, it would seem that some of the American decisions showing the interaction between the Constitution and the conflict of laws would be studied with some interest in Nigeria.[4]

---

1. Reese, "Contracts and the Restatement of Conflict of Laws Second" (1960) 9 I.C.L.Q. 531 at 541.
2. Morris, "The American Law Institute Restatement of the Law, Second: Conflict of Laws" Book Review (1973) 21 Am. Jo. Comp. L. 322 at 330.
3. Utton, "Nigeria and the United States of America: Some Constitutional Comparisons" (1965) 9 J.A.L. 40.
4. Nigeria, it should be noted, has at present no constitutional provision equivalent to the full faith and credit clause of the United States Constitution, Art IV s.1.

But it must not be thought that there is anything magical in confining our comparative enquiry to England, Nigeria, Scotland (and the United States of America). The arguments in the preceding pages can be applied to still wider comparisons (with other legal systems) if in a particular case containing a foreign element the Nigerian courts do not find a solution in the lex fori. In such a case it would be necessary, logically, to find out how any other legal system deals with the problem. Such a broad comparative approach is regarded by Dr. Rabel[1] as the only satisfactory one to the resolution of a problem for which the lex fori furnishes no answer. But in our view a limit to our enquiry must be set somewhere. And our demarcation has been dictated by historical as well as cultural considerations, among others. It will be necessary now to elaborate this point further.

The rules of private international law in England, Nigeria and Scotland are very similar.[2] Nigeria, presently a military democracy, inherited strong parliamentary,

---

1. Rabel, The Conflict of Laws, A comparative Study 4 Vols, Vol. I (2nd ed. Ann Abbor 1958) pp. 54 et seq.
2. E.g. both the United Kingdom and Nigerian conflicts law are based traditionally on the principle of domicile as the connecting factor (i.e. the incident connecting the issue with a legal system), whereas most continental countries of Europe use nationality as connecting factor. Moreover, conflict of laws doctrine in both the U.K. and Nigeria has so far managed to avoid over-concentration on the entanglements of "local" or interstate laws as is the case in the U.S.A. But see our discussion at pp. 17 -22, supra.

governmental and legal institutions on the British model. The country witnessed radical transformation in many spheres within the last few years. First, after the attainment of independence (1960) and Republican status (1963) Nigeria retained strong Commonwealth links with Britain. Secondly, while Nigeria remains basically a producer of raw materials - cocoa, palm produce, ground nuts, crude oil etc - the country is being transformed by rapid industrialisation in which the British (and to a lesser extent the Americans) are playing an important part expecially in the form of heavy investments in oil and oil-related industries. These investments and the large volume of international trade between the United Kingdom and Nigeria have caused substantial influx of British (and American) nationals into Nigeria. This phenomenon is capable of giving rise to private international law problems not only in the commercial sphere but in the family or private law sphere as well. These various links have influenced us in our focus on United Kingdom and Nigerian conflict of laws, especially when it is recalled first, that there are no Nigerian judicial decisions on many important questions in private international law; and secondly that United Kingdom decisions in this field are generally acceptable as authority in Nigeria because of similarity in English and Nigerian common and statutory law and a similar approach to the doctrine of judicial precedent.

According to Professor Graveson,[1] there is general uniformity in Commonwealth private international law due chiefly to the work of the Judicial Committee of the Privy Council. The Privy Council was Nigeria's highest court until October 1963 when this arrangement was altered.[2] And of course the close proximity of England and Scotland has meant very intimate interaction between the conflict rules in the two legal systems. Apart from acting as a conduit for the reception of continental theories of private international law into English law, Scots law rules of conflicts, in the words of Professor Anton,[3] "are in fact very similar to those of the English system. This derives chiefly from the fact that both systems have drawn heavily upon the same sources in continental juristic writings." And in more recent times Scottish courts have turned increasingly to English cases and legal literature despite a gradual increase in Scottish case law in this field.[4]

Furthermore, both England and Scotland share basically the same political, social and economic structure and institutions, and have a common court of appeal (which is

---

1. Graveson, "The Judicial Unification of Private International law", in De Conflictu Legum 154 (Netherlands International Law Review, 1962 ed), cited in Prebble, (1973) 58 Corn. L. Rev. 433 at 436 n.6.
2. See Nigeria Republic Act, 1963, s.1(3) (a U.K. enactment) Cap. 57 and Constitution of the Federation of Nigeria (1963), s.120.
3. Anton, Private International Law, p.9.
4. Anton, op. cit. at p. 15.

the authoritative expositor of the "English common law" which Nigeria has imported) and a common legislature (whose old enactments still constitute a large proportion of "good" law for Nigeria!). Finally, to all these factors helping to delimit the jurisdictions which from the subject of our comparative study must be added the factor of linquistic consideration. United Kingdom authorities are readily available and accessible not only to the various jurisdictions in the United Kingdom but to Nigerian law makers as well, because no language problem is presented to, say, a Nigerian court approaching the conflicts of law rules of the U.K. or the U.S.A. Thus an inquiry by a Nigerian court into a conflict of laws problem implicating the United Kingdom (or the United States) will not fail because of lack of the necessary knowledge of the language involved - as might be the case if a European or a neighbouring African country were to be involved. Therefore, a comparison of the Nigerian conflicts rules with those of Scotland, England and the United States of American would be more profitable than comparisons with legal systems farther afield.

In concluding this present discussion of the legitimacy of a comparative approach we would emphasise, nevertheless, that private international law is a subject which must be given an autochthonous growth if it is to be durable and serviceable in any country. So that besides the unsuitability of importations of conflict rules from unitary England,

"the mere fact that a solution has been tried and found successful in a federation does not necessarily mean that such expedient should not be properly considered before it is foisted on the citizens of the federation of Nigeria."[1] In this connection, the far-sighted provision in section 81(5) of the Matrimonial Causes Decree[2] is to be warmly welcomed. That provision states that foreign divorce decrees will be recognised in Nigeria provided such decrees

> "would be recognised as valid under the rules of private international law."

This has a comparative legal significance even though its concern was with divorce and nullity decrees. It will be seen that this provision as to recognition is at large. The Australian model has been departed from; the words "English" and "common law" have been omitted, and this latter has prompted severe criticism of the provision. For example, Dr. Cotran has written that "unlike public international law, each country has its own rules of private international law or conflicts and there is no such universal system of law."[3] Because the wording of the section is open to various interpretations, Dr. Akanle has described it as "anomalous", "vague" and "meaningless". The learned

---

1. Akanle, op. cit. at 725.
2. No. 18 of 1970.
3. Cotran, "The Matrimonial Causes Decree, 1970" (1972) 16 J.A.L. 40 at 42.

author even unjustifiably ascribed the shortcoming to the draftsmen "whose knowledge of Nigerian or English private international law is limited."[1] If anything we originate ourselves is going to be dubbed as "anomalous" and "meaningless" then Nigeria will for a long time to come remain a legal appendage of other countries. On the other hand, however, Professor Kasunmu has described the Nigerian provision as "far reaching" and "of considerable importance".[2]

In our opinion, it is true that the provision has immense potential as a vehicle for "lex shopping", and that its vision of a universal and internationalist private international law is illusory. But we must note that the rules of recognition have, since Indyka v. Indyka[3] and the U.K. Recognition of Divorces and Legal Separations Act, 1971,[4] been subject to ever broadening application. Distinctions between the rival nationality, domiciliary and residential schools of private international law are disintegrating. It would appear, then, that in one broad sweep the Nigerian legislature has spanned a workable recognition bridge across these three rivalling schools. In principle, therefore, the provision is to be commended.

---

1. Akanle, op. cit. at p. 724. Dr. Akanle's criticism is unfortunate in this sense: the House of Lords has the last word on what falls within the "common law of England". By dropping the words "English common law", the Nigerian enactment obviates the difficulty of resorting to English decisions for any exposition of "common law"rules of private international law.
2. Kasunmu, "The Matrimonial Causes Decree, 1970: A Critical Analysis" (1971) 2 Nig. Jo. Contemp. L. at 205. For shorter comments on the provision, see Ilegbune, (1970) 14 J.A.L. 178; Ijaodola (1971) 5 Nig. L.J. 144; Nwogugu, (1971) 5 Nig.L.J. 76.
3. 1969 1 A.C. 33.
4. Cap. 53, as amended by the Domicile and Matrimonial Proceedings Act, 1973, sections 2 and 16.

Finally, having regard to the scope of the present work, we submit that there is much value in Professor Ehrenzweig's words that "in the area of child custody, if anywhere, we may hope that the profession will be willing, and indeed eager, to avail itself of foreign experience in order to mitigate some of the hardships which the law has added to the unavoidable human plight of the interstate (or international) child."[1]

2. The Link

General: English statutes of general application together with English common law and doctrines of equity, as we have observed, have been received into Nigeria by way of the reception statutes.[2] Scots law and judicial decisions,[3] on the other hand, are generally never cited in argument by counsel before the Nigerian courts - excepting those Scottish cases which have become naturalised in England via the House of Lords (and the Privy Council) such as Donoghue v. Stevenson,[4] Udny v. Udny,[5] to mention just a few. When Webber[6] J. probed the possibility of extending some Scottish statutes to Nigeria under the formula of "statutes of general

---

1. A. Ehrenzweig, "The Interstate Child and Uniform Legislation: A Plea for Extralitigious Proceedings" (1965) 64 Mich. L. Rev. 1 at 4.
2. The reception statutes are discussed below.
3. It is doubtful if there is any volume of Court of Session Reports in most law libraries in Nigeria.
4. 1932 S.C.(H.L.) 31; 1932 A.C. 562.
5. (1869) L.R. 1 H.L. Sc & Div. 441.
6. In Dede v. African Association (1910) 1 N.L.R. 130; Re Sholu (1932) 11 N.L.R. 37.

application", the effort was scotched in Young v. Abina.[1] It is, accordingly, rare to find specific citation and reliance upon Scottish judicial decisions as happened in Afonja v. Afonja[2] and in Lawson v. Siffre.[3] It is still rarer to find, as in a recent Western Nigeria Court of Appeal case, judicial pronouncement equating the laws of Nigeria and Scotland. In Trustees of Islamic Missionary Society v. Anjorin[4] the Western State Court of Appeal was confronted with a problem which involved a discussion of the distinction between "damages" and "penalty" in the law of contract. The Court said:

> "On this point, the law is not only the same in England and Scotland; it is also the same in this country (Nigeria)."

It may be surmised that over the next few years, in the conflict of laws field at least, moves by Nigerian counsel to introduce Scots legal principles and authorities into Nigerian judicial reasoning will inevitably occur. This will be so especially because with Britain's entry into the European Economic Community there will be few things specifically English in "English" law which will continually benefit from cross-fertilisation with European legal ideas with which Scots law in turn has had long contact. Nigerian

---

1. (1940) 6 W.A.C.A. 180.
2. 1972 Univ. of Ife Law Reports 105, approving the Scottish custody case of M'Lean v. M'Lean 1947 S.C. 79.
3. (1932) 11 N.L.R. 113, following the Scottish case of Donaldson v. Haldane (1840) 7 Cl & F 762.
4. (Unreported), Suit No. CAW/116/68.

law stands to gain from this interchange between civil and common law systems because in the years ahead her law will be influenced by the civilian legal traditions of the neighbouring former French colonies - the Republics of Dahomey, Niger, Chad and the Cameroons.

Federalism: In these days when the necessities of practical politics plus nationalist activities in the United Kingdom are pointing towards fragmentation of the Kingdom, we consider it appropriate to say a word or two on the issue of federalism which usually has such far-reaching consequences for the type and evolution of conflicts law in federal systems.

Nigeria has continuously been a federation since 1954 when a federal form of government was instituted by the Macpherson Constitution of that year. The only time since 1954 when this arrangement was disturbed was the two month period in 1966 following the promulgation of the Decree[1] which abolished the federation from May 24, 1966. It is well-known that the Armed Forces took over the government of the country on 16 January 1966 and the said Decree was one of the more notable acts of the first Military Government. However, Decree No. 5 was repealed by the second Military Government which promulgated Decree[2] No. 9 of 1966, section 1(1) of which restored the country back to federalism.

---

1. Constitution (Suspension and Modification) No. 5 Decree, No. 34 of 1966.
2. Constitution (Suspension and Modification) No. 9 Decree, No. 59 of 1966.

As far as concerns the United Kingdom with a unitary form of government, one suspects that there are many people besides Professor Cheatham[1] upon whom it would not immediately dawn that the word "United" which qualified the "Kingdom" of Great Britain indicates the federal structure of the arrangement in the United Kingdom. Also, Professor D.M. Walker would not be alone in the United Kingdom in thinking that in discussing ways and means of accomodating the different regional interests in the United Kingdom, "the sensible anwers is federalism."[2] Yet, federalism is viewed with such aversion by so many other people.

Before proceeding with our discussion of whether there is a basis for comparing the private international law rules of Nigeria and the United Kingdom in spite of the differences in political structure of the two countries, it may be helpful to make a brief comment on these two forms of government with a view to seeing whether the two are not closer than might at first appear.

A feature which distinguished a federal from a unitary constitution is that in a unitary constitution all sovereignty rests with the central government, whereas in a federal

---

1. Cheatham, "A Federal Nation and the Conflict of Laws" in The Conflict of Laws and International Contracts (Univ. Michigan Summer Institute on International and Comparative Law 1949) p. 193.
2. Walker, "The Constitution and the Proposed Scottish Convention" 1970 S.L.T. (News) 117 at 122.

system sovereignty is shared so that the federal government is sovereign in some matters whilst the state, regional or provincial governments are sovereign in others.[1] The recent Kilbrandon Report,[2] after a study of federations in the older dominions, in America and in Europe has adopted the view that federalism and its theory are a nineteenth century, not a twentieth century phenomenon. In the tempo of 20th century governmental responsibilities and duties, the Report says, the federal idea of dividing sovereignty has receded and indeed become difficult to sustain. "(S)tate sovereignty is being eroded" and "power is fast gravitating to the centre,"[3] although the Report reluctantly conceded that "Canada is an interesting exception to the general rule that power in federations gravitates towards the centre".[4]

In rejecting a federal structure for the United Kingdom, the Report emphasised that British constitutional tradition would not now accept a written constitution which is a central feature of federations; that the geographical imbalance among the component parts of the United Kingdom militate against federalism, and it then emphasised its fear of possible "regional" chauvinism in political and economic matters.

---

1. See generally, K.C. Wheare, Federal Constitutions (4th ed.) Parts I-III.
2. Royal Commission on the Constitution 1969-1973 (Lord Kilbrandon Report) Cmnd. 5460 (1974)
3. para. 515.
4. para. 521.

We would emphasise, however, that there is nothing immutable about either a federal or a unitary system of government. For clearly the "unitary" structure in operation in the United Kingdom is less than perfect, while federations as in the case of Nigeria, can come and go. Therefore, there would seem to be no serious objection to comparing a supposed (and perhaps temporary) unitary State's laws with those of a federation. We would also add that we have adverted to the above issue simply in so far as it furnished us with a clearer context or condition under which private international law operates or would operate in both the United Kingdom and Nigeria. It will now be necessary for us to consider the context within which different systems of law operate in England, Scotland, and in the several jurisdictions in Nigeria.

3. The Context

General: A convenient starting point is to comment on the concept of sovereignty as it is used in private international law. It is usual to state that each country has its own system of private international law, and "country" usually implies a sovereign country. In private international law sovereignty is used mainly to denote an area which can identify as a legal unit. For this purpose uniformity of law within that unit and a separate judicial jurisdiction

are all that is needed.[1] In truth, of course, it is more usual to find a different system of territorial law existing in every place where there is a distinct legislative sovereignty within the territory. We shall not spend further time examining the concept of sovereignty itself since that is outside the scope of the present work. After all, as Oppenheim admits, "There exists perhaps no conception the meaning of which is more controversial than that of sovereignty."[2] In short, what is important for private international law purposes is that there should be a territory with its own system of law. For this purpose, the Restatement (Second) Conflict of Laws preferred the term "state" which it defines as "a territorial unit with a distinct general body of law."[3]

Given this illustration, England, Scotland and Northern Ireland as well as each of the twelve states of the Nigerian federation is a different law district. "Law district" itself has been defined by Read as

> "A district or territory which (whether it constitutes the whole or a part only of the territory subject to one sovereign) is the whole of a territory subject to one body of law."[4]

---

1. See, e.g. Attorney-General for Alberta v. Cook 1926 A.C. 444 esp. at 450; also, Practice Direction, reported in (1953) 1 W.L.R. 1237. See also the Nigerian case of Okonkwo v. Eze and Anor (1960) N.N.L.R. 80 esp. 81.
2. Oppenheim, International Law Vol. I, p. 191.
3. Section, 3.
4. Read, Recognition and Enforcement of Foreign Judgments in the Common Law Units of the British Commonwealth (1938) p. 6.

With this definition it will not surprise one to hear Dr. Cheshire asserting that "for the purpose of private international law and so far as English courts are concerned, the law of Scotland ... is just as much a foreign law as the law of Italy or Portugal."[1]

We are now in a position to examine what legislative provisions and judicial pronouncements back up the existence of different law districts in the U.K. and in Nigeria.

Statutory provisions

The internal constitutional arrangements in both the United Kingdom and in Nigeria as quasi-federal or fully federal states have had far reaching consequences for the conflict of laws. The sowing of seeds of separate law districts lay, in the case of the United Kingdom, in the Treaty of Union[2] of 1707, and in the case of the Nigerian federation, in the Federal Republican Constitution of 1963 and its predecessor federal constitutions.[3]

When on May 1, 1707 the separate Kingdoms of England and Scotland were merged by the Treaty of Union "into one Kingdom by the name of Great Britain",[4] the separate legal systems of Scotland[5] and England were left intact. While

---

1. Cheshire and North, Private International Law (8th ed.) p.9.
2. See T.B. Smith, "The Union of 1707 as Fundamental Law" (1957) Public Law 99.
3. I.e. the Nigerian Constitutions of 1954 and the Independence Constitution of 1960.
4. Union with England Act, Art. 1.
5. It has been said that the retention of a distinct Scots legal system is a major reason for the survival of Scotland as a nation. See e.g. P.G.B. McN, "The Conquests of Scotland" 1963 S.L.T. (News) 49; Smith British Justice: The Scottish Contribution, p.61.

making detailed provisions on different aspects of the Union, the Treaty of Union made no provision as to the effect to be given in one nation to the judgments of the other. This was left to private international law and each part of the new Kingdom interpreted the conflict of laws rules in its own way.[1] The consequences of the Union Agreement for the conflict of laws have been aptly summarised by Professor Anton in the following words:[2]

> "far from ensuring that questions of private international law would no longer arise between England and Scotland, the Treaty of Union ensured both that they could arise and that they should arise with increasing frequency. It ensured that they could arise by preserving intact the Scottish legal system and the courts which administered it. The Treaty ensured that they arose even more frequently than before by providing that all subjects of the United Kingdom should have 'full freedom and intercourse of trade and navigation to and from any port or place within it'."[3]

The existence of separate statutory law districts in Nigeria was necessitated by the fact of her federalism. Unlike Scotland and England which are distinct nations, Nigeria as an entity was not a distinct nation at its creation. As Chief Awolowo has said, "Nigeria is not a nation. It is a mere geographical expression."[4] Given this situation, the British Colonial Administrators and Nigerian nationalist leaders spent a considerable time between

---

1. Fraser, The Conflict of Laws in Cases of Divorce, p. 75.
2. Anton, Private International Law, p.7.
3. Union with England Act, Art. IV.
4. O. Awolowo, The Path to Nigerian Freedom, pp. 47 and 52.

1945 and 1954 devising the administrative arrangement that would best accomodate the different ethnic interests coexisting within the country.[1] In the words of Lord Chandos, one time Colonial Secretary, "it was clear that Nigeria, if it was to be a nation, must be a federation, with as few subjects reserved for the Central Government as would preserve national unity."[2] Therefore, when a new Constitution[3] came into effect in Nigeria on October 1st. 1954, a federal government was created, made up of three Regions (East, West, North), a federal territory of Lagos, and the territory of Southern Cameroons.[4]

Besides settling federal and regional questions, the 1954 Constitution in section 147 provided for the establishment of a Supreme Court[5] whose orders are to be effective throughout the federation,[6] and which also functions as the Appellate Court for the particular Region or unit out of which an appeal has ensured. At the sametime, in order to maintain the distinct legal entities of Lagos and the Regions which the Constitution has established, it was

---

1. See generally, J.P. MacKintosh, Nigerian Government and Politics, Chapter 1.
2. The Memoirs of Lord Chandos, p. 419.
3. Nigeria (Constitution) Order in Council, 1954. Statutory Instrument No. 1146, 1954.
4. Section 3, of the 1954 Constitution. It should be noted that the ex-German territory of Southern Cameroons ceased to be part of Nigeria following the United Nations Plebiscite of February 11, 1961, in which the territory voted to join the Republic of the Cameroons. See Odumosu, The Nigerian Constitution pp. 137-139.
5. This was established by the Federal Supreme Court (General Provisions) Act, Cap. 68, Laws of the Federation of Nigeria & Lagos, 1958 ed.
6. s.149, 1954 Constitution.

provided that each of the legal units was competent to pass laws establishing its own Court of Justice.[1] This arrangement has been maintained through the Independence[2] Constitution of 1960[3] and the Republican Constitution of 1963.[4]

Judicial formulation. In both the United Kingdom and Nigeria judges have taken particular care to spell out the fact and circumstances of the existence of different law districts within these countries. In the case of Nigeria, as we have observed, the existence of different law areas derives principally from the federal system of government.[5] The following judicial observations of Mr. Justice De Lestang, a former Chief Justice of Lagos High Court, on the existence of separate "law areas" in Nigeria is illuminating. He said:

> "It is well-known that Nigeria is a Federation composed of several independent and sovereign (States), each with its own legislature and Courts of Justice. So the power of making and administering law in Nigeria is shared between the Central Government and the (State) Governments. It is true that on a number of subjects the Federal Parliament has exclusive jurisdiction, and on those subjects the

---

1. s.142.
2. The country's independence came by the United Kingdom Nigeria Independence Act, 1960, (8&9 Eliz 2 c.55).
3. Nigeria (Constitution) Order in Council, 1960. (Statutory Instrument No. 1652, 1960), Schedule II.
4. No. 20 of 1963.
5. This excludes the several islamic and customary 'law districts' which coexist with the general or territorial law in different states.

> law may be the same throughout Nigeria, but this need not necessarily be so. Moreover it is equally true, that the Legislatures of the (States) have concurrent Legislative powers with the Federal Parliament in a large number of subjects and also possess exclusive powers in matters not contained in the exclusive and concurrent Legislative lists. On these matters differences either exist or are liable to exist. The (States) have also their own separate Courts, created by the Constitution itself which are outside the control of the Federal Parliament. That being the position it seems to me that Nigeria cannot properly be described as a territory with one system of law. That description however fits each (State) better ...".[1]

And in British Bata Shoe Co. Ltd. v. Mellikian,[2] Jibowu Ag. C.J. of the then Federal Supreme Court even went so far as to say of the Nigerian Federal set up that "each region is like a foreign country to any other region."

In the United Kingdom, the continued existence of the different law districts was ensured by the Union Agreement of 1707.[3] That Agreement or Treaty not only left the separate legal systems on the two sides of the border intact, it was also silent as to what effect was to be given in one of the two Kingdoms to the judgments of the other. So an opportunity for inserting a "full faith and credit" clause into the basic constitution was

---

1. Machi v. Machi (1960) L.L.R. 103, at 107. It should be noted that the principles of division of powers referred to in the judgment have been altered since 1966. See Constitution (Suspension and Modifications) Decree, No. 1 of 1966.
2. (1956) 1 F.S.C. 100 at 102; see also Okonkwo v. Eze (1960) N.R.N.L.R. 80, esp. at 81.
3. Article XVIII: "...that all other Laws, in use within the Kingdom of Scotland do after the Union, and notwithstanding thereof, remain in the same force as before (except such as are contrary to or inconsistent with this Treaty) but alterable by the Parliament of Great Britain. ....that no alteration be made in Laws which concern private rights, except for evident utility of the subjects within Scotland."

missed and, as will be evident under the appropriate chapter, that became the recipe for near-total disregard, in the one part, of the guardianship and custody orders rendered in the other part.

The judicial pronouncement in the United Kingdom is represented best by Lord Chancellor Campbell's opinion in the famous case of Stuart v. Moore.[1] "As to judicial jurisdiction", he said, "Scotland and England although politically under the same Crown and under the supreme sway of one united legislature are to be considered as independent foreign countries unconnected with each other." He added that the famous guardianship appeal case which the House of Lords was hearing (in 1861) must

> "be treated as if it had occured in the reign of Queen Elizabeth."[2]

That statement clearly shows that legislative competence is not the sole test in constituting a territory into a distinct law district. Other things may count as equally significant. Thus, behind the Union Agreement itself there is an acknowledgement of the fact that it is not a matter of peradventure that the Scottish 'nation' exist and is distinct from the English and the other 'nations' that make up the United Kingdom. (We are, of course, not using 'nations' here in the sense of public international law).

---

1. (1861) 4 Macq. 1 at 49; see also Orr Ewing v. Orr Ewing's Trustees (1884) 11 R 600 at 629.
2. Ibid, at 49.

On this latter point, in the recent House of Lords case of Ealing London Borough Council v. Race Relations Board,[1] Lord Simon said:

> "Scotland is not a nation in the eye of international law, but Scotsmen constitute a nation by reason of those most powerful elements in the creation of a national spirit - tradition, folk memory, a sentiment of community. The Scots are a nation because of Bannockburn and Flodden, Culloden and the pipes of Lucknow, because of Jenny Geddes and Flora Macdonald, because of frugal living and respect for learning; because of Robert Burns and Walter Scott. So, too, the English are a nation - because Norman, Angevin and Tudor Monarchs forged them together, because their land is mostly sea girt, because of the common law and of gifts for poetry and parliamentary government, because (despite the wars of the Roses and Old Trafford and Headingley) Yorkshiremen and Lancastrians feel more in common than in difference and are even prepared at a pinch to extend their sense of community to southern folk. By the Act of Union English and Scots lost their separate nationalities, but they retained their separate nationhoods, and their descendants have thereby retained their national origins."[2]

---

1. (1972) A.C. 342 (H.L.)
2. (1972) A.C. 342, at pp. 363-364. Lord Simon goes on to add:
   "So again, the Welsh are a nation - in the popular though not in the legal, sense - by reason of Offa's Dyke, by recollection of battles long ago and pride in the present valour of their regiments, because of fortitude in the face of economic adversity, because of the satisfaction of all Wales that Lloyd George became an architect of the welfare state and prime minister of victory."

CHAPTER TWO

CUSTODY AND GUARDIANSHIP LAW - SOURCES, NATURE AND PROBELMS

Tha nature, sources and problems of guardianship law will be examined from two main angles. We shall first consider the domestic law sources and then we shall turn to the private international law sources. And in each case a consideration of the Scots and English law sources is followed by our discussion of the more complex and confusing situation under the Nigerian Law.

A. Domestic Law Sources

I. England and Scotland

Guardianship is an old legal device for the provision of general overall protection for children in minority status. According to Professor James, "it is under the broad term of guardianship that minors, of varying ages under (eighteen) are specially protected by the law."[1] The law thus steps in to interfere with parental prerogative because it is assumed that in certain situations, however good parental intentions may be towards their children, the State knows best what is good for the children. It is not unusual to find parents themselves conceding their own deficiencies

---

1. James, "The Legal Guardianship of Infants" (Inaugural Lecture) (1966) 82 L.Q.R. 323, at 324.

in this regard. For instance, in 1680, the Earl of Rochester, John Wilmot, was reported as saying:

> "Before I got married, I had six theories about bringing up children; now I have six children, and no theories".[1]

This statement, which may not have been made in the context of child custody, clearly underlines the fact that children and the problems connected with them have been baffling their parents and thwarting the theorists for longer than we may normally suppose, not least in that part of the child's existence concerning its guardianship.

At this juncture one immediately runs into distinctions between the English and Scots law of guardianship, and between the English and Islamic law of guardianship as applied in Nigeria. Under the Islamic law[2] which is guided by Divine revelation, detailed rules have been worked out, as in Scots law, for the regulation of guardianship.

Guardianship law differs in England and Scotland principally on account of its origins in the two systems of law. The Scots law of guardianship derives from Roman law while the English law on the subject emanates from the "English common law rules which grew out of the feudal law of the land with its peculiar system of land tenure".[3]

---

1. Quoted in Dr. Elizabeth Newsom, "The Single Parent (Postscript)", The Sunday Times, March 4, 1973 p. 81. (Magazine)
2. See below, at pp. 103-116.
3. Fowler Harper, Problems of the Family (1952) p.505. It should be noted that Scotland also had feudal wardship, but this does not seem to have had a great influence on later law of guardianship.

The Roman law from which Scots law derives its rules was essentially a concept of blood relationship, and guardianship represents a continuation of the power of the head of the family over his descendants. It assumed two forms: one was called tutory (or tutorship) and the other curatory (or curatorship). The explanation of these two concepts is as follows. Children below the ages of 14 (if boys) and 12 (if girls) were described as pupils and they must have a tutor to protect, act for, and assist the pupil in doing things which the law denied the child capacity to do. The child was supposed to come to full enjoyment of his personal and proprietary rights when he or she attains puberty, represented by the magical ages of 14 and 12 for boys and girls respectively. But since all the wisdoms of the child does not crystallise at any fixed age, the law soon recognised that the pupil would need protection and assistance in the management of his affairs. So the law came to recognise the status of minor which extended from the ages between pupillarity and majority, and this furnished the basis for the institution of curatory. The curator's job being essentially to act with the minor in matters concerning the minor's property. The curator, in other words, has no concern with the person of the minor.

It is interesting to note that before 1973 the father of the child, under Scots law, was both the tutor and curator

when both parents are alive.[1] This position was changed by the Guardianship of Infants Act, 1973, which confirmed both the father and mother as tutors and curators, either of them being able to act without the other.[2] And any disputes arising out of this new status as joint and equal guardians were to be referred to the Court for resolution.[3]

The situation becomes more complicated after the death of either or both parents. In each of these situations, however, Scots law has carefully worked out rules relating to tutory and curatory,[4] the 1973 Guardianship Act in each case making significant alterations in the pre-existing law. Thus, under the new legislation of 1973 upon the death of one parent, the surviving parent will simply continue to act as tutor of the child. This in itself was not a significant change from the regime that existed under the Guardianship of Infants Act of 1925. However, in relation to curatory, whereas before 1973 upon the death of the father, the mother does not become curator of the minor, under the Guardianship of Infants Act 1973 the surviving parent will continue to be curator.

---

1. See Kirk v. Scottish Gas Board 1969 S.L.T. 18.
2. Guardianship Act, 1973 s.10(1).
3. Ibid, s.10(3).
4. See generally, Smith, A Short Commentary on the Law of Scotland (1962) Chapter 12.

The English law of guardianship presents a sharp contrast to the Scots and Islamic law. The English common law of guardianship, as we have observed, grew out of the feudal land tenure and law. It knew about ten different kinds of guardianship and its rules were not as comprehensive as the Roman law of guardianship, as reflected in its Scots law form. Little wonder that Sir Edward Coke[1] regarded the guardianship of the estates of infants as a confused and very unsatisfactory part of the common law of property. The whole situation was admirably summarised in The History of English Law by Pollock and Maitland in the following words:[2]

> "No part of our old law was more disjointed and incomplete than that which deals with the guardianship of infants. When it issued from the Middle Ages, it knew some ten kinds of guardians,[3] and yet it had never laid down any such rule as that there is or ought to be a guardian for every infant."

---

1. I. Coke, Institutes, 74b-90b (13th ed. with Hargraves Notes, 1787)as cited in James, "The Legal Guardianship of Infants" (1966) 82 L.Q.R. 323.
2. Second edition, pp. 443, 444.
3. The following are the ten kinds of guardianship under English law: (i) guardianship by nature; (ii) guardianship by nurture (both of these usually belong to the father as they express the relationship between the father (parent) and his legitimate children); (iii) guardianship in chivalry (the right of the feudal lord to military service from his tenants); (iv) guardianship in socage (involves the obligation of an heir below 14 years to pay rent or give service to his landlord who became his guardian; (v) guardianship by election (this springs from the minor's own choice); (vi) guardianship by prerogative (this was peculiar to the royal family); (vii) Ecclessiastical guardianship (relates to the rights of ecclesiastical courts to appoint guardians for minors); (viii) guardianship by special custom (this was the privileged appointment of guardians/

This multiplicity of guardians was probably the reason why English law never formulated any comprehensive definition of guardianship. And this chaotic English common law guardianship was what, in theory at least, was introduced into Nigeria as part of her general law. As Professor Bevan says,[1] "the lack of a unifying definition has had other, serious consequences, which have become increasingly apparent with the growth of 'administrative family law'".[2]

Yet, in spite of differences, the general progression of guardianship law from the earliest to modern times is similar in the three legal systems covered in this study - the English, Scots and Nigerian. This is how that progression has been stated:

> "Guardianship stems from ancient conceptions of family organization, inheritance rights, and the powers of the State. Its use has varied historically with the varying social valuations placed on the child in different times and places. In English common law, it was first considered a profitable right of the guardian, and only gradually was converted into a duty beneficial to the child. Nowadays it is viewed as a trust relation."[3]

---

guardians for orphans by borough public officials such as mayors) (ix) guardianship ad litem (to represent the child in litigation); (x) chancery guardianship (this represented the authority of the King's Chancellor and was the source of the authority of courts of equity jurisdiction to appoint guardians). See generally F. Harper, Problems of the Family pp. 505-506. See also Blackstone, Commentaries (9th - Burn ed) pp. 461-462.

1. Bevan, The Law Relating to Children (1973) p. 396.
2. The single quotations are from Friedman, Law in a Changing Society, 2nd ed. p. 287.
3. Fowler Harper, Problems of the Family p. 504, citing from U.S. Children's Bureau Publication No. 330 (1949).

The foregoing statement about the progression of guardianship law calls for three comments:

(a) The welfare concept is now paramount in guardianship as in custody cases. There is no doubt that the law has done much to chip off the ugliest aspects of guardianship. The child's welfare and interests are now the first and paramount consideration, and the position of the woman, at least in theory, is now made equal to that of the man. So that women, through whose labour and anguish the child comes into the world, can now say, in a modified paraphrase of Macbeth, "The law we delight in physics pain."[1]

(b) There is now a considerable similarity in Scots and English law between the office of guardian and that of a trustee. Concerning a ward's property, as Professor Bromley says, "the guardian is a trustee in every respect, with precisely the same powers and duties as the trustee has over any other trust property; and as a trustee he is bound to account to his beneficiary, the ward, when his guardianship comes to an end."[2] In other words, the guardian stands in the position of trustee in relation to the ward's property, and this is

---

1. Macbeth, in Act II, Scene III had used the words, "The labour we delight in physics pain". See W. Shakespeare, Macbeth. See also remarks by Lady Emmet of Amberley and Lady Bacon during the passage of the Guardianship Bill in the House of Lords. The Times, 21 Feb. 1973. Lady Emmet spoke of how she had waited 24 years for "this dear little Bill". Parliamentary Debates (Lords) Official Report, vol. 339 (Feb. 20-March 8, 1973) pp. 24-34.
2. Bromley, Family Law (4th ed) p. 321.

also the position under the customary law of Nigeria. The guardian, therefore, ought in general, to be strictly accountable as trustee to his ward. Professor O.R. Marshall has however adopted, correctly in our view, a modified view of this strict rule. He conceded that it is the trustee's duty to prefer the interests of his beneficiaries to his own and that if there is a conflict between the trustee's self interest and his duty to the beneficiaries, the former must yield. And he added that the rule "applies to other fiduciaries as well (such as) guardians ... though, perhaps, it applied to these with a lesser degree of intensity than it does to trustees."[1] With respect this is to be preferred to an interpretation which holds the guardian to the test of strict accountability to the beneficiary in all circumstances. The justification for such a strict view is usually that only by so holding could the law guard against the incidence of defalcations by wily guardians and custodians. The strict view is best represented by the felicituous language of Cardozo, J. who stated that the law expects from trustees (and hence guardians) a standard of "Not honesty alone but the punctillio of an honour the most sensitive ... Only thus has the standard tenet of conduct for fiduciaries been kept at a level higher than that trodden by the crowd."[2]

---

1. O.R. Marshall, "Conflict of Interest and Duty" (1955) 8 Current Leg. Prob. 91.
2. Meinhard v. Salmon (1928) 249 N.Y. 458 at 464.

We would observe with respect that strict accountability can be harsh in certain situations and it has accordingly not always been insisted on, at least by Scottish courts. If, for example, a child's father dies leaving small business which the child's mother continues to run without distinguishing the child's share from her own and using the income to support the family, this would be a perfectly normal situation. In such a case, to hold the mother accountable to her child, say at a time when the small family business was the only source of social security available for mother and child, would not only be unconscionable but would be disruptive of family harmony which would not be to the best interest of a child who is already half-orphaned.

The Trusts (Scotland) Act, 1921[1] defines the term "trust" to include "the appointment of any tutor, curator or judicial factor"[2] and the section designates these classes of people or institutions as "trustees". The provisions of the Trusts (Scotland) Act were supplemented by the Guardianship of Infants Act, 1925 which provided[3] that a mother or father acting as tutor to a pupil child shall be deemed to be a trustee within the meaning of the Trusts (Scotland) Act 1921.

---

1. As supplemented by the Trusts (Scotland) Act, 1961. See generally T.B. Smith, "Trusts and Fiduciary Relationships in the Law of Scotland", in his Studies Critical and comparative (1962) pp. 198-228.
2. Section 2.
3. Section 10.

The same view that the nature of the office of a guardian is analogous, if not identical, to the office of trustee in English law has been expressed by Romily M.R., who said:

> "The relation of guardian and ward is strictly that of trustee and cestui que trust. I look upon it as a peculiar relation of trusteeship ... A guardian is not only trustee of the property, as in an ordinary case of trustee, but he is also the guardian of the person of the infant, with many duties to perform such as to see to his education and maintenance ... Of all the property which he gets into his possession in the character of guardian, he is trustee for the benefit of the infant ward."[1]

The statement that the role of the guardian in relation to the child (ward) extends beyond the person to the property of the child leads us to our third comment, viz,

(c) The proprietary aspects of guardianship: The guardianship of the minor's estate in England has now been rendered obsolete or of only minimal significance by the property legislation of 1925. That law now ensures that in the majority of cases where an infant becomes beneficially entitled to property it will be held for the infant on trust by trustees with powers to apply the income for the maintenance of the ward.[2] But in Scotland the guardianship of a pupil's or minor's property is very much a live issue since property can easily be owned by pupils in Scotland, that is, without the property being held for them by trustees.

---

1. Mathew v. Brise (1851) 14 Beav. 341, at 345. See also Hunter v. Atkins (1834) 3 My & K. 113.
2. See Trustee Act, 1925, sections 31 and 32. But see the Guardianship Act, 1973, section 7(1) which preserves the substance of guardianship of minor's property in English law.

In concluding this part of our discussion we must make brief mention of two special institutions closely connected with guardianship, viz, guardian ad litem and wardship proceedings. The first is a known institution under the laws of Scotland, England and Nigeria (both customary and statutory) while the latter (wardship) is peculiar to English law. It is unknown in Scots law and it does not appear that Nigeria has an effective machinery for the proper exercise of wardship jurisdiction.

Guardianship ad litem.

Because of an infant's incapacity to institute or defend any action in a court of law, it is usual in Anglo-Nigerian law for the child to sue by his next friend or to enter appearance as a defendant through the offices of a guardian ad litem. The function of the guardian ad litem is primarily the safeguarding of the interests of the infant. In the High Court of Justice of England the guardian ad litem is usually the Official Solicitor. Although a guardian ad litem features more often in adoption proceedings, the institution is assuming increasing significance in guardianship cases as well. In Scots law, the specific term is a curator ad litem[1] who is usually appointed by the court and he, like the Anglo-Nigerian guardian ad litem, protects the

---

1. This is the more usual term, although a tutor ad litem is also used.

interests of the pupil or minor either because the tutor would not act on behalf of the pupil or because there is no tutor at all or still because the tutor has an adverse interest. The role of the curator or guardian ad litem is limited to the particular litigation at hand.

Under the customary law of Nigeria, any suitable person, usually a parent or near-relative who is willing to act on behalf of the infant, is appointed as guardian ad litem to represent the infant in court. As in Anglo-Scots law under the Nigerian 'general' law the guardian ad litem must not have an interest which conflicts with that of the infant whom he represents.

Because legal practitioners are prohibited from appearing for parties to disputes arising in the area courts in the six northern states of Nigeria, it is provided in the Area Courts Edicts that

> "An area court may permit -
> the husband, wife, brother, sister, son, daughter, guardian, servant, master or any inmate of the household of any party, who shall give satisfactory proof that he or she has authority in that behalf; or a relative of a person administering the estate of a deceased person who was subject to the jurisdiction of an area court,
> to appear for any party before an area court."[1]

---

1. Section 28(1) Area Courts Edict, No. 2 of 1967, North-Central State. The remaining five northern states have identical provisions in their area courts edicts. There are corresponding provisions also in the customary courts law of the southern states where such courts exist, e,g. s.27(2) Customary Courts Edict, Mid-West. These provisions have no equivalents in the High and District Court Civil Procedure Rules.

The terms of the provision contemplate litigation much broader then custody-guardianship suits. In so far as it applies to these latter it is the infant's parents who more usually perform the role of representative of the infant in court. But strictly all that the law requires is that in order to claim a locus standi for such appearance and representation on behalf of the child, the one claiming the right to represent the infant must "give satisfactory proof" that he or she has authority as guardian, brother, sister etc. to represent the infant. What should be the relationship of the "inmate" of the household" to the infant is not indicated.

Wardship proceedings

Until quite recently, "the wardship jurisdiction was a natural appendage to the jurisdiction over trusts."[1] In the light of this close affinity between wardship jurisdiction and trust law, it may not be necessary to give a full statement of the subject. We would nevertheless present a short account of the salient features of wards of court.

As one of the oldest known institutions of English family law, if one expression would conveniently describe wardship in English law, it would be its "feudal connections".[2] "It was one of the incidents of tenure in chivalry that the King

---

1. Cross, "Wards of Court" (1967) 83 L.Q.R. 200, at 202.
2. Bevan, The Law Relating to Children, p. 411.

became the guardian of the infant heir and entitled to the profits of the fief during his minority subject to the obligation of maintaining and educating him according to his station."[1] That statement sums up neatly the origins of this ancient and peculiar institution known to English law.

Wardship today serves certain purposes which may be summarised[2] as (a) the protection of the property of the ward; (b) the protection of the ward's person and general welfare; (c) the protection, in the ward's own interests, of the parent's rights over him; and (d) supplementing the statutory powers and duties of local authority bodies concerning children in their care.

And because the typical ward of the 18th and 19th centuries was often a wealthy orphan, such as the young Marquis of Bute[3] it was evident that the King would derive considerable wealth from the management of infants' property. Wealth on such a scale required specialised management which in Tudor times became the province of the Court of Wards. Although the Court of Wards was abolished in 1660, that abolition did not see the demise of wardship as an institution owing to the Crown's claim "that as parens patriae it had

---

1. Cross, op. cit. at p. 200.
2. See Bevan, op. cit. p. 411.
3. (1861) 4 MacQ. 1.

by virtue of the prerogative the ultimate right of supervision over all infants within its allegiance."[1] In other words, "the essence of wardship is the duty of the sovereign to protect the minor arising from the correlative right to his allegiance."[2]

Over the years, however, the actual number of children who became wards of court was rather small but recently wardship cases have begun to cascade due mainly to the effect of broken homes and the revolt of youths against parental authority leading to teenage wardships.[3]

It is in matters pertaining to the exercise of the wardship jurisdiction that much excitement is aroused. Several statutes touch upon wardship questions but for our present purposes it is the provisions in the Guardianship of Infants Acts 1925-1973 with which we are concerned. It is under these Acts'overriding provisions concerning the paramountcy of the ward's welfare in matters of his custody, guardianship, education and upbringing that the wardship jurisdiction is hotly debated today. There is no judicial unanimity as to how the jurisdiction is to be exercised in the broken home situations and in those cases involving foreign elements which in its most accute form is referred to as the "kidnapping cases".

---

1. Cross, op. cit. p. 201.
2. Bevan, op. cit. p. 418.
3. Cross, op. cit. pp. 209-211

As regards the broken home wardship situation judicial attitudes have fluctuated and continue to fluctuate considerably between whether to penalise or not to penalise the parent who breaks up the home. And as the kidnapping cases have become much more common the exercise of the wardship jurisdiction has caused the judges searching anxiety involving, as it does, the weighing and balancing of competing considerations. As Lord Cross of Chelsea has said in expressing his extra-judicial view on the issues involved on the scales of wardship justice:

> "Plainly it is in the interest of wards as a class that the court should give no encouragement to self-help by allowing persons who act in defiance of the orders of the proper court to benefit by their wrongdoing. On the other hand, if one directs one's mind exclusively to the welfare of the particular child it may be difficult to say that on balance he or she would be better off if sent back to the foreign country than if allowed to remain here with the wrongdoer. In such cases the modern tendency is to send the child back unless it is clear that serious harm would result to him from that course."[1]

Both these issues are examined further in subsequent chapters.

Finally, among the effects of wardship may be noted the following. Wardship of court over a minor vests in the court the general rights of custody or guardianship. And because the court cannot itself exercise the guardianship, it vests actual care and control over the minor in either a parent, guardian or other appointed person who would act

---

1. Cross, op. cit. at 207.

as agent of the court and would comply with the court's orders and instructions regarding the minor's upbringing etc.[1] Defiance of any order of the court would deprive the parent or guardian of the de facto care and control of the child,[2] as well as constituting contempt of court. The court, which must be kept informed of the minor's movements, holds the right of veto over the ward's marriage. A marriage without the court's permission would amount to contempt of court. Such contempt of court orders extend to include the ward himself.

II. Nigeria

1. The Legal System and Constitutional Development

A discussion of any branch of Nigerian law will not be complete without an appreciation of the country's jug-saw legal and constitutional development and history. This we now proceed to sketch, even though in a rather speedy and superficial manner.[3]

---

1. Johnstone v. Beattie, (1843) 10 Cl & F 42, 85 (H.L.)
2. Eyre v. Countess of Shaftesbury (1724) 2 P. Wms. 103.
3. For a full account of the constitutional history of Nigeria, the standard works should be consulted, e.g. Odumosu, The Nigerian Constitution: History and Development; Elias, Nigeria: The Development of its Laws and Constitution (1967)
Ezera, Constitutional Developments in Nigeria, 1960; Nwabueze, Constitutional Law of the Nigerian Republic 1964, Chapter 2.

One must start with the dawn of the Colonial era. The Federation of Nigeria as we know it today - an "arbitrary block of Africa"[1] as a learned writer calls it - is a British Imperial creation. Within it lies traditional emirates, chiefdoms and kingdoms and in each of these flourish conglomerates of customary or native laws and custom.

Other European nations, principally the Protuguese who were primarily engaged in the spice trade to the East Indies, had had contact with coastal parts of Nigeria as far back as the 15th century.[2] But British Colonial rule did not begin until 1861 when the British annexed the colony of Lagos in order to "put an end to the slave trade."[3] And in 1863 there was passed by the Colony of Lagos Ordinance Number 3 of that year which introduced the "laws and statutes which were in force in England" on the 1st January, 1863. Besides mentioning "laws", the Ordinance did not expressly refer to the English common law and equity, but in the leading case of Cole v. Cole[4] it was held by Brandford Griffiths J, that the "common law" of England fell within the term "laws and statutes".

---

1. Elias, Makers of Nigerian Law, p. 44.
2. See generally, Alan Burns, History of Nigeria; K.O. Dike, Trade and Politics in the Niger Delta 1830-1885.
3. See Treaty of Cession of Lagos, Art. 1. The test is in Hertslet, The Map of Africa by Treaty, 3rd ed. p. 94 (Vol. I).
4. (1898) 1 N.L.R. 15, at 18.

The year 1874 saw the eclipse of Lagos Colony which was absorbed into the older Gold Coast Colony, but only to reappear again as a distinct Colony in 1886. But in those short eventful years there was passed in 1876 the Supreme Court Ordinance[1] of the Gold Coast Colony which repealed the earlier (1863) Ordinance of Lagos Colony and, significantly, formally introduced "the common law, the doctrines of equity and the statutes of general application" of England into the West African Colony (or Colonies). This Ordinance had far-ranging provisions relating to the application of common law and equity and, what is more, it introduced the formula which has dictated the manner of reception of English law into all the Nigerian jurisdictions.

The Protectorates of Northern and Southern Nigeria were proclaimed on 1st January, 1900 and the Imperial laws in force in Lagos Colony were extended[2] to the two Protectorates.

The next significant development was to witness that "pioneer of original genius",[3] Sir (later Lord) Lugard amalgamating the Northern and Southern Protectorates in 1914.[4]

---

1. No. 4 of 1876.
2. By Supreme Court Proclamation No. 6 of 1900.
3. Elias, Makers of Nigerian Law, p. 18.
4. The Colony of Lagos and the Protectorate of Southern Nigeria had earlier been merged in 1906 by the Supreme Court Ordinance No. 17 of 1906.

In that same year was enacted the Supreme Court Ordinance No. 6 of 1914.[1] Section 14 of the Ordinance provided that

> "Subject to the terms of this and any other Ordinance, the common law, the doctrines of equity and the statutes of general application which were in force in England on 1st January, 1900 shall be in force within the jurisdiction of the court."

Nigeria emerged as a sovereign independent nation within the Commonwealth and as a member of the United Nations Organization in 1960. Before that date, there had been successive revisions of the country's constitution in 1922, 1947, 1951 and 1954. For fourty years before 1954 Nigeria had a unitary government like the United Kingdom. The first idea of federation was introduced in the 1947 Constitution whereby Nigeria was divided into the Eastern, Northern and Western Regions, with a distinct federal territory of Lagos under the Federal government. On 1st October, 1954 full scale federation was established and within each of the Regions and the Lagos federal territory there was established a High Court of Justice. This was the birth of the distinct law districts in Nigeria.

In 1963, the year of Nigeria's attainment of Republican status, a fourth Region - Mid-West - was created out of the Western Region.[2] On January 15, 1966 there was a military

---

1. See Cap. 211 Laws of Nigeria (1948 ed) for Ordinance No. 23 of 1943 which replaced the Supreme Court Ordinance No. 6 of 1914.
2. See Mid-West Region (Transitional Provisions) Act, No. 19 of 1963 which followed the Mid-West Region Act No. 6 of 1962.

coup d'etat or revolution and on January 16 the Armed Forces formally took over the government of the country from the civilian acting-President. Certain provisions of the Republican constitution of 1963 have remained suspended:[1] these are the provisions relating to the legislative and executive arms of federal and regional governments, and the unsuspended parts of the Constitution which related to fundamental human rights[2] were made subservient to Decrees promulgated by the new sovereign, the Federal Military Government. Federal enactments became known as decrees and regional ones were called edicts.[3] In May 1966, the federal system of government was abolished in Nigeria.[4] But when between July 28 and August 1, 1966 a second military revolution took place and succeeded, federalism was restored[5] again and Nigeria was divided into 12 new States.[6] A distinct

---

1. See Constitution (Suspension and Modification) Decree No. 1 of 1966.
2. See Aihe "Fundamental Human Rights and the Military Regime in Nigeria: What did the Courts say?" (1971) 15 J.A.L. 213; Aguda and Aguda "Judicial Protection of Some Fundamental Rights in Nigeria ... Before and During Military Rule" (1972) 16 J.A.L. 130.
3. Decree No. 1 1966 section 4.
4. See Constitution (Suspension and Modification) No. 5 Decree, No. 34 of 1966.
5. By Constitution (Suspension and Modification) No. 9 Decree, No. 59 on 1966.
6. The twelve new states are the North-Eastern; North-Western; North-Central; Kano; Benue-Plateau; Kwara (all from the former Northern Region); South-Eastern; East-Central; Rivers (these being from the former Eastern Region) Western; Mid-Western; and Lagos. All the states were created by the States (Creation and Transitional Provisions) Decree, No. 14 of 27 May 1967.

federal territory disappeared and the word "Region" was replaced by the word "State" in the Constitution and all other legal documents.[1] The States (Creation and Transitional Provisions) (Amendment) Decree[2] specifically provided in section 1(b) that

> "For the avoidance of any doubt, ... the reference to "Region" in section 7(2) of the Decree aforesaid (the States (Creation and Transitional Provisions) Decree) shall in addition to the meaning to be assigned to it in the Constitution of the Federation be construed and have the like meaning where it occurs in any enactment."

The amendment had retroactive effect to the beginning of the creation of 12 States in 1967, and has effect throughout the federation.[3]

This complex constitutional structure which we have briefly narrated was superimposed on the 'general'(i.e. British-type), Islamic and customary laws, which laws have been such fruitful source of intra-state and interstate conflicts. We shall now proceed to examine guardianship under these three different types of law.

2. The 'general' law

Introduction: Guardianship law in Nigeria is far more confused than the Scots and English law which we have examined. Any intelligible discussion of the guardianship-custody

---

1. Ibid, s.7(2)
2. No. 19 of 1967.
3. The significance of the alteration of "Region" to "State" has been litigated in one major land case: see Oguche v. Iliyasu and Ors, noted in (1973) 17 J.A.L. 116.

problem in Nigeria must begin with an appreciation of the fact that there are three main systems of marriage in the country - statutory (and Christian), Islamic, and customary. Each of these retains its distinct rules for regulating guardianship and custody questions. The existence of a federal system alongside with a multiplicity of laws and courts in each state means that the Nigerian lawyer is very much a comparatist who has to search for his authorities in a much wider field than his counterpart in Scotland or England.

Federal and State Legislation

The Nigerian federal enactment dealing with (parental) custody is contained in sections 57 and 71 of the Matrimonial Causes Decree.[1] Section 57(1) deals with the powers of High Courts having jurisdiction under the Decree to make orders relating to the welfare, advancement and education of children of the marriage which is the subject of the proceedings. In making such an order the court must be satisfied as regards the arrangements made pertaining to the child's welfare etc.

Section 71(1) deals with independent applications pertaining to custody and guardianship of children. In such proceedings, "the court shall regard the interests of those children as the paramount consideration."

---

1. No. 18 of 1970.

The unsatisfactory feature of this last provision is that moslem and customary law marriages are excluded by the definition of "marriage" in section 69 which excludes marriages "entered into according to Muslim rites or other customary law". So it appears that only monogamous marriage children can benefit from the Decree's "welfare" provision. It thus perpetuates the dichotomy in the guardianship and custody law.

Moreover, another confusion arises from the term "child" which seems to have two different meanings for purposes of the Decree. The definition of child contained in section 69 is relevant only to Part IV of the Decree which deals with monogamous marriage. "Child" is defined as including

> "Any child of (either spouse) (including an illegitimate child of either of them and a child adopted by either of them) if, at the relevant time, the child was ordinarily a member of the household[1] of the husband and wife".

Obviously this would include children of customary and muslim law marriages who have been accepted as members of the household. It is therefore not clear whether in relation to the "welfare" provision in section 57(1) the term "children of the marriage" as defined has one and the same meaning throughout the Decree. We submit, with respect, that it is not correct, as Mr. Justice Aguda maintains, that "the children covered by these provisions

---

1. The term "household" is not defined in the Nigerian Decree. The English Court of Appeal has held, in interpreting an equivalent provision, that the term "has an abstract meaning" but that it refers essentially to "people held together by a particular kind of tie even if temporarily separated". Santos v. Santos (1972) Fam. 247, at 262.

(of s.69) are the children in respect of whom orders as to custody, guardianship, welfare and advancement or education can be made under the Decree".[1] The only certain thing is that "these provisions" cover children under Part IV (ss.69-75). Beyond that it is not certain what the position is with regard to children e.g. under Part II (s.57) which Dr. Aguda apparently included in his broad conclusion.

Important legislation also exists at the state level since the states have legislated in the custody and guardianship field for longer than the federal authority. Apart from custody and guardianship arising out of monogamous marriages, custody falls within the residual (i.e. state) list of the constitutional allocation of legislative competence. Therefore the various States' customary and area courts edicts contain provisions on the paramountcy of the child's welfare in custody and guardianship cases. Moreover, although no Nigerian court has yet so held, it is submitted that the various English enactments on custody and guardianship before 1900 apply in most jurisdictions in Nigeria by virtue of the received English statutes of general application. A proper test of what are "statutes of general application" would, in our opinion, enable the pre-1900 English enactments to be "received" into Nigeria. As Professor Seidman has said, the late 19th century saw the start of a "glacial

---

1. Aguda, Select Law Lectures and Papers (1971) at 112. See generally Kasumu, "The Matrimonial Causes Decree, 1970: A Critical Analysis" (1971) 2 Nig. Jo. Cont. L. at 184-185.

movement"[1] in welfare legislation in the United Kingdom. Therefore, Chief Justice Osborne's overworked dictum of applicability to "all classes of the community"[2] as the proper test of what are "statutes of general application" was unduly restrictive. The English social welfare legislations were aimed very specifically at particular groups and classes, such as women and children, not at "all classes of the community". Hence, "To make applicability turn on the generality of its application in England was to guarantee that none of the welfare statutes would be applied in (Nigeria)".[3] It would be absurd to say that what was desirable for England was anathema in Nigeria, especially in such an area as that of the child's welfare.

The following English enactments would therefore appear to have been received into the different jurisdictions in Nigeria, excepting the West and Mid-Western States:

(i) Custody of Infants Act 1839

(ii) Custody of Infants Act 1873

(iii) Guardianship of Infants Act 1886

(iv) Custody of Children Act 1891.

---

1. Seidman, "The Reception of English Law in Colonial Africa Revisited" (1969) 2 E.A.L. Rev. 47, at 67.
2. (1910), 2 N.L.R.1., at 21.
3. Supra note1, at 70.

But as far as the West and Mid-Western States are concerned the position is as follows. The former Western Region of Nigeria in 1959 passed a law[1] which demarcated the extent of the English law applicable within the Region. In particular, the law abrogated all English statutes of general application hitherto in force in the Region. The then Regional legislature proceeded to enact its own Infants Law[2] which is based largely on the more progressive United Kingdom Guardianship of Infants Act, 1925.

Conclusion

We have indicated that the 1970 Matrimonial Causes Decree contain some gaps in its provisions relating to guardianship and custody, and that the pre-1900 English statutes on these topics are in force in most Nigerian jurisdictions. One consequence of these is that a chief feature of the received law of guardianship and custody in Nigeria is its antiquity. For example, most of the pre-1900 English statutes have been superseded in England in substance by the 1925-1973 Guardianship of Infants Acts. Yet, since it is the common law (arguably) and statute law before 1900 that has been received into Nigeria, it would not surprise anyone to

---

1. Laws of England (Application) Law, Cap. 60, Laws of Western Nigeria, 1959 ed, sections 3 and 4.
2. Cap. 49, Laws of Western Nigeria, 1959 edition.

find that the "dreadful"[1] rule in Re Agar Elis[2] is still good law in most Nigerian jurisdictions - a rule which was abolished in the United Kingdom in 1925.[3] The "local circumstances" qualification to the applicability of the received statutory law, even if it could be invoked, would be inefficacious given the widespread customary law rule which still largely holds the father's rights to the custody of his children as sacrosant and inviolable.

It should be added, however, that perhaps even in the absence of express provision in terms of section 1 of the Guardianship of Infants Act, 1925 - that the parents have equal rights and that the child's welfare is to be first and paramount - that omission may not be too serious. All the High Court Laws contain provisions that law and equity are to be applied concurrently and further that in case of conflict between the two the rules of equity shall prevail.[4] Therefore, guardianship cases arising outside monogamous marriages and outside customary courts may still be resolved by the equitable rule of paramountcy of the child's welfare.

---

1. The quotation is Lord Upjohns: See J.vC. (1969) 1 All E.R. 788, at pp. 829, 831. (1970) A.C. 668 at pp 721, 723.
2. "The father has the control over the person, education and conduct of his children until they are (18) years of age. That is the law". (1883) 24 Ch.D. 317 at 326 per Brett, M.R.
3. See Guardianship of Infants Act, 1925, (9 & 10 Geo. 5 c.71) section 1.
4. See e.g. High Court Law, Western State, s.16; High Court Law, Lagos State, s.15; High Court Law, Eastern States, s.19(3); High Court Law, Northern States, s.31.

3. Islamic Law of Guardianship

Introduction: Islamic law is the personal law of the majority of the inhabitants of the six northern states of Nigeria. In discussing guardianship and custody law under Islam, one is struck by the basic fact that the islamic approaches to legal problems have developed from an entirely different legal background to those of customary law or Anglo-Scottish common law. The islamic system of law derives from a religious basis. The "closest ties exist between religion and law. Islam is a complete way of life; a religion, an ethic, and a legal system all in one."[1]

Islam, like English law, was an importation into Nigeria from abroad. According to Trimingham,[2] islam was introduced into Northern Nigeria during the 14th century and at the early stages it was confined to the ruling and commercial classes, the bulk of the peasantry remaining pagan whose lives were governed by indigenous customary law. Today the majority of the inhabitants of Northern Nigeria are moslem whose civil life is governed by the sharia. Here one observes a sharp contrast between the northern and southern states of Nigeria.[3] For although a substantial proportion of the southern population is moslem - in the western and Lagos

---

1. Dr. Saba Habachy's "Introduction", in Anderson, Islamic Law in the Modern World (1959) p. ix.
2. Trimingham, A History of Islam in West Africa (1962) p. 32.
3. See Ijaodola, "The proper place of Islamic law in Nigeria" (1970) 4 N.L.J. 129.

states moslems account for nearly 50% of the population in each of those states - islamic law has had little, if any impact on the lives of the people. And unlike in the northern states there are no special shari'a courts manned by alkalis who are specialists in islamic law. But so strong is islamic law and traditions in northern Nigeria that Professor Anderson was able to group Northern Nigeria as among those countries - alongside Syria, Iraq, Egypt etc. - which "still regard the Shari'a as their fundamental law and still attempt to apply it throughout the whole range of human relationships."[1] Indeed, before the abolition of Islamic (Maliki) law of crimes in Northern Nigeria[2] the same learned author wrote that in Northern Nigeria islam is probably "more extensively followed than anywhere else in the world outside Arabia and Afghanistan".[3] Again, the extent to which islamic law pervades "every sphere of life" among the moslems of Northern Nigeria, Anderson writes, is "almost wholly without parallel."[4] It is worthy of note that the school of islamic law generally imported into all of Nigeria is the Maliki school.[5]

---

1. Anderson, Islamic Law in the Modern World, p. 83.
2. Anderson, "A Major Advance" (1961) 24 M.L.R. 616 also Conflict of Laws in Northern Nigeria (1957) I.J.A.L. 2.
3. Anderson, Islamic Law in Africa p.3.
4. Islamic Law in the Modern World, p.84.
5. See e.g. Apatira v. Akanke (1944) 17 N.L.R. 149 at 151. The other main Sunni schools of Islamic law besides the Maliki school are the Hanafi, the Shafi and the Hambali.

In approaching islamic law of guardianship, therefore, we must further observe that it is part of the broader field of family law which, to quote Professor Anderson once more, "has always been regarded as the very heart of the Shari'a".[1]

So sacred is the position of Shari's law in moslem family matters that it is mentioned specifically in the former Northern Nigeria Constitution.[2] To be sure, islamic law is also mentioned in the Nigerian Republican Constitution[3] of 1963 which refers to "Moslem law or other customary law".[4] In one sense this mention in the Republican constitution gave legitimacy to the muddle introduced into the former Northern Nigeria Native Courts Law,[5] 1956, which stated that "native laws and custom" includes "moslem law". The legislature may have had in mind the considerable interaction over the years between islamic law and indigenous customary law in many parts of Northern Nigeria. But one can hardly justify the subsumption of such a foreign-grown, ancient and highly developed jurisprudence as islamic law under "native law and custom". Happily, the muddle has been redressed by the new Area Courts Edicts in force in the six Northern States.

---

1. Islamic Law in the Modern World p.15.
2. No. 33 of 1963 (Laws of Northern Nigeria, 1963 ed.).
3. No. 20 of 1963.
4. Schedule, Part I, Item 23, Exclusive Legislative List.
5. Cap. 78 Section 2.

Questions of "moslem law" or questions "relating to moslem matters" have been defined in identical terms in the Northern Nigeria Constitution[1] of 1963 and in the Sharia Court of Appeal Law.[2] Such questions (relating to moslem matters) have been defined to mean:

> "(a) any question of Moslem law regarding a marriage concluded in accordance with that law, including ... a question that depends on such marriage relating to family relationship or the guardianship of an infant;
> (b) where all the parties to the proceedings are Moslems, any question ... regarding family relationship, a foundling or the guardianship of an infant;
> (c)
> (d) any question of Moslem law regarding an infant, prodigal or person of unsound mind who is a Moslem or the maintenance or guardianship of a Moslem who is physically or mentally infirm; or
> (e) where all the parties to the proceedings (whether or not they are Moslems) have by writing under their hand requested the court that hears the case in the first instance to determine that case in accordance with Moslem law, any other question."

Since the Sharia Court of Appeal is a court of appeal for area courts handling cases of moslem personal status under the Shari'a,[3] in order to avoid any discrepancy between the definition of Moslem law in the Area Courts Edicts and in

---

1. No. 33 of 1963, section 53(5).
2. No. 16 of 1960, section 12.
3. See e.g. Statement made by the Government of Northern Nigeria on Additional Adjustments to the Legal and Judicial Systems of Northern Nigeria para. 20 p.5 (Government Printer, Kaduna).

the Sharia Court of Appeal Law, it is simply stated in the Area Courts Edicts that "moslem law" shall have "the same meaning as it has in the Sharia Court of Appeal Law."[1]

With the foregoing introductory remarks we shall now proceed with a consideration of the provisions of islamic law of guardianship and custody in Northern Nigeria, bearing in mind that our views necessarily must be tentative since most original islamic law materials are in Arabic and hence not accessible.

Custody[2] or Hadana

Hadana is the islamic term for custody and it means "to love or soothe" a child at the bosom, thus implying the idea of protection of small infant children who cannot fend for themselves. And all the rules of hadana illustrate this basic orientation towards the protection (and safe-guarding the welfare) of the child.

A main feature of the islamic law of custody is that, unlike English and Nigerian non-islamic law, it displays detailed and carefully elaborated rules. Islamic law also draws careful distinction between custody and guardianship proper.

---

1. E.g. Section 2(1) Area Courts Edict, North Central State (No. 2 of 1967).
2. I am gratefully indebted for this discussion and the next on guardianship to Professor N.J. Coulson's Zerox Teaching Materials, Ahmadu Bello University, Zaria, Nigeria (1966).

In general, the rights to the custody of a child are vested in both parents if they are living together in an on-going matrimonial union. But if the mother is living apart from the father of the child the right to the custody of their infant children is vested in her irrespective of differences in religion or social status between the parents. This would almost be unthinkable under Scots and English law where, at one time, the mother's custody rights were so diminished as to be virtually non-existent. The following statement by Professor Bromley is illuminating by way of contrast:

> "Subject to certain limitations ... at common law the father was absolutely entitled to the custody of his children until they reached the age of (eighteen). After his death, the mother was entitled to the custody of her infant children for nurture, but even this right was superseded after 1660 if the father appointed a testamentary guardian under the provisions of the Tenures Abolition Act. Common law accorded no other right to the mother as such, and so absolute against her were the father's rights that he could lawfully claim from her the custody even of a child at the breast."[1]

Under islamic law custody rights exist up to the age of puberty in the case of a male child and, in the case of a female infant, until her marriage.[2] It is fascinating to note that custody (hadana) is treated very much in a way

---

1. Bromley, Family Law, pp. 280-281.
2. See Kasumu and Salacuse, Nigerian Family Law p. 257.

reminiscent of the concept of domicile in Anglo-Scots law. Hadana, like domicile, has evolved detailed rules governing its acquisition, as well as its loss and revival. The built-in qualifications in respect of entitlement to custody under Islamic law place heavy emphasis on safeguarding the moral welfare of the child. A work such as this dealing with private international law is not one in which to attempt detailed exposition of the islamic rules of custody. Nevertheless we may illustrate from one area of custody the detailed nature of the rules that islamic law has worked out: that area concerns the rules governing the loss of the right to custody. We have accompanied each of the rules with short comments.

Custody or hadana may be lost through the following: (a) By the subsequent marriage of the custodian mother to a total stranger. But if within one year of the wife's second marriage and its consummation the father or other legal guardian who is aware of the marriage fails to claim the custody of the child, islamic law would consider the father's or other guardian's claim as lost - on a kind of equitable principle of laches and acquiescence. The child will henceforth remain under the care and control of the mother. The mother's right to custody is, however, never lost if upon her husband's death she marries her deceased husband's brother.

(b) By apostacy and other serious misconduct on the part of the custodian as is considered prejudicial to the interests of the child. Islamic law attaches treasonable consequences to renunciation of islam; other religious malpractices and acts of gross moral torpitude are not countenanced either. But it should be emphasised that the sharia court judges are not simply mechanical judicial instruments applying hallowed law. In the settlement of custody disputes the sharia or islamic courts enjoy, just as their English and Scottish counterparts, wide discretion.

(c) The right to custody (hadana) is again lost if the infant child is, without the consent of the father or guardian removed permanently to such a distance from his usual place of residence as would hinder the father or guardian from exercising his right of general supervision, control and visitation. According to the islamic legal texts this rule is only effective when the distance separating child from father is more than 72 miles.

It is interesting to observe first, that islamic law had long viewed any act of "kidnapping" of the child as a serious misdeed entailing legal consequences. This is in contrast to English and Scots law which is still not decisive one way or the other in questions pertaining to child kidnapping. Since all acts of "kidnapping" involve the substitution of self-help for due process of law, English

and Scottish courts do not on account of this alone order the return of the child and loss of custody rights. These courts would consider public policy, justice, possible harm to the child if returned[1] etc. Islamic law, on the other hand, does not delve into these niceties: hence the islamic rules unfortunately, smack of punitive designs. Secondly, the distance limitation appears to be dictated by economic and sociological considerations. The distance of 72 miles was set by the texts because that was the distance a camel - the traditional means of transport for desert Arabs - can cover in a day. But of course all legal systems are subject to change including those which, as islamic law, are based on religious conceptions. The fundamental rule may be found in the Holy Koran, but face to face with modern civilisation its acknowledged expositors do not hesitate to modify its meaning and by a process of interpretation substitute for the literal meaning another meaning more apposite to the manners, policy and tempo of the times.

Bearing in mind what a renowned authority on islamic law has observed as to the existence in islamic law of an undoubted "distinction between the ideal doctrine and the actual practice, between the Sharia law as expounded by the classical jurists and the positive law administered by the courts",[2]

---

1. See In Re H (Infants)(1966) 1 W.L.R. 381, at 393.
2. Coulson, A History of Islamic Law (1964) p.3.

it surely would not be beyond the ability of the Sharia courts of Northern Nigeria to give a different meaning to the 72 miles limit in light of ease of interstate and international travel within and without Nigeria by roads, rail and air. In Nigeria we are living in a post-camel era and there is little logic or common sense in penalising a custodier for travelling more than 72 miles. An ex-husband may unreasonably be withholding consent; and a distance of 10 or 72 miles may be more difficult to traverse internationally than travelling 100 miles within the same country. Kidnapping cases do not fit readily into a regime of rigid rules.

The concern of islamic law to preserve the father's or guardian's rights of access to the child is a legitimate one. But time and accessibility are no longer insurmountable obstacles when considering a rule which originated at a different time and in a different socio-geographic environment. If our concern here had been with the imported English law we would almost invoke the "local circumstances" rule as not permitting the rigid application of the received law. One wonders whether justification exists for recoiling from invoking "local circumstances" rule in some issues of religious law which arise in our non-theocratic Republic.

Guardianship

The islamic law of guardianship encompasses both the direction or care of the person of the infant child and the administration and care of the infant's property. As in English and Scots law, guardians may be classified into natural, testamentary or court-appointed guardians. As in nearly all aspects of islamic law, the law of guardianship is a mine of detailed rules. In the appointment, termination and duties of the guardian, the child's welfare is held very high, though it may not be said unreservedly that the child's welfare is first and paramount as in English and Scots law. It is rather puzzling that in questions of moslem personal law which have been defined with such particular and repeated references to guardianship in the Sharia Court of Appeal Law[1] there is no express mention of the principle of the paramountcy of the welfare of the infant not even under section 15 of that Law which lays down the "Law, practice and procedure to be applied" in questions of moslem law.

The Holy Quran (Koran) has very specific words on the guardianship of orphan children's property:

> "If you perceive in them (i.e. the children) right judgment (then) deliver to them their property."[2]

---

1. No. 16 of 1960 section 12.
2. The Holy Koran, Sura IV, verse 5, as contained in Arthur J. Arbery, The Koran Interpreted (1964) p.72.

That is the law. It is contemplated that the guardian would, by stages, release some of the ward's property to him so he (the ward) can enter into commercial transactions to test his maturity and ability to manage his property. The final release of the property only eventuates when the ward is deemed to be of mature understanding or of right judgment. It is needless to add that the phrase "right judgment" would almost defy close definition by mortals.

Perhaps the most striking contrast between the Anglo-Scots law and the islamic law of guardianship is to be found in the rules relating to the powers and duties of guardians. Take for example, the guardian's powers over the ward's property. Here one finds such clear justaposition of the guardian's self-interest and his duty to preserve the property in the interest of the ward. Under islamic law, a guardian can pledge or even sell the property of his ward and use the proceeds in maintaining the ward. The father, as guardian, is allowed to maintain himself from the ward's property if he has no other means of maintaining himself. In addition, other guardians who are poor are allowed to take a reasonable and moderate remuneration for their labour, but not more. In a sense, then, guardianship appears to be a profitable undertaking as far as the guardian is concerned. But it does not appear that islamic law, unlike English and Scots law, has

any armoury of elaborate rules specifically aimed at deterring the remotest conflict between self-interest and the duty to preserve the ward's property. All that the Holy Koran says is:

> "If any man is rich, let him abstain (entirely from the orphan's estate); if poor, let him consume in reason."[1]

Surely this would sound startling to the Scots and English lawyer for, under the Scots and English law of guardianship, a guardian as trustee is, as a general rule, not automatically entitled to remuneration or self-maintenance for his administration of the trust, i.e. the ward's property, even if he is poor. By allowing the guardian to take beneficially out of the ward's property as islamic law ordains, the property falls in danger of becoming depleted. It is true that what is taken is enjoined to be reasonable: and reasonableness is not unilaterally determined by the fiduciary. In determining this, analogy is often drawn from what practice obtains elsewhere. But as is well-known hardly any two men would agree on such mundane tests as "reasonable"; the categories of reasonableness or unreasonableness are various. The difficulty with the islamic rule on the guardian's powers in this connection is, therefore, determining who is "rich" or "poor" and what is "reasonable".

---

1. , The Holy Koran, Sura IV, verse 6, as contained in Arbery, The Koran Interpreted (1964) pp. 72-73.

By sanctioning the taking out of the ward's property under what appears as amorphous criteria, islamic law comes perilously close to confering on unscrupulous guardians a divine charter for defalcations. Surely, islamic law in its infinite sagacity is capable of fashioning more sophisticated concepts of the guardian's duties. (We confess, however, we have had no opportunity for observing the operation of these rules in practice by the Sharia courts in Northern Nigeria).

4. Customary Law of Custody

It is common knowledge that there are as many customary systems of law as there are ethnic groups in Nigeria. Unlike islamic law which is uniformly observed and, being Divinely prescribed, is fixed and immutable, customary laws are numerous, flexible to a high degree and constantly changing under the pressures and corroding influences of Western and islamic civilisations. Hence it has been rightly said that customary law is "a mirror of accepted usage".[1] And as Speed, Ag. C.J. observed in Lewis v. Bankole[2] there can be an "existing native law and custom" as distinct from "that of bygone days".

---

1. Owonyin v. Omotosho (1961) 1 All N.L.R. 304 at 309.
2. (1908) 1 N.L.R. 81 at 83.

The sheer multiplicity of customary laws is a limitation to what may be relevantly discussed. In this work, therefore, we can only give sample illustrations of customary laws of guardianship and custody. A useful survey of customary laws on customary law of guardianship and custody is contained in some specialist studies.[1]

Customary law of custody has two main sources: (a) It exists in an unwritten form; and (b) it exists in the few written declarations of customary law relating to guardianship. But it should not be imagined that these two forms of customary law differ in kind.

The unwritten law of custody.

The lower, non-professional customary and area courts judges have traditionally been recognised as repositories of the customary law within their area of local jurisdiction.[2]

---

1. See e.g. Salacuse, Selected Survey of Family Law in Northern Nigeria (1965); Oloyede, The Law Relating to Children and Young Persons under the Customary and Statutory Laws of Nigeria, with special reference to Lagos and Western States. (Unpublished) Ph.D. Thesis, Univ. of London 1970; Ijewere, Mid-Western Nigeria: Family Law with special reference to Marriage and Divorce (Unpublished) Ph.D. Thesis, Univ. of London 1970.
2. See Ehigie v. Ehigie (1961) 1 All N.L.R. 842. Ehioghae v. Ehioghae (1964) N.M.L.R. 842; Edokpolor v. Idehen (1961) W.N.L.R. 11; (all Mid-Western State cases); Gyang v. Gyang, unreported, Appeal No. JD/13A/1969; Kpelanya v. Atsoo, unreported, Appeal No. MD/64A/1970 (both cases from Benue Plateau State); and the Ghana case of Ababio II v. Nsemfoo (1947) 12 W.A.C.A. 127.

This necessarily has to be so because, as Kasumu and Salacuse have stated "one does not find the (customary) law in statutes, reported cases, or scholarly works, but in the customs and habits of the people".[1]

The one unbroken thread that runs through the customary law of guardianship is that in general unlike English and Scots law of today, most customary laws proceed along the principle that upon divorce it is the father who is entitled to the custody of the children of the marriage, and, after his death, custody rights belong to the father's family. The only exception to this line of approach is the "tender years doctrine"[2] which requires that children below a certain age (usually 3 to 6) should be awarded to the custody of the mother.

The Written Customary Law

An interesting phenomenon is the provision in the Native Authority Law[3] which empowers native authorities to declare or modify, in writing, the native law and custom relating to any topic in their administrative area. Section 49(1) of the Native Authority Law provides:

---

1. Kasumu and Salacuse Nigerian Family Law (1966) pp. 22-23.
2. For which see below, Chapter 3.
3. Cap. 77 Laws of Northern Nigeria (1963 ed.).

> "A native authority may, and where the Governor so requires, shall, record in writing a declaration of what in its opinion is the native law or custom relating to any subject either as applying throughout the area of authority of the native authority or in any specific part thereof ... and submit such declaration to the Governor."

Subsection (2) allows written modifications to be made to native law and custom by the native authorities and once such declaration or modification receives the approval of the Governor it becomes henceforth the native law and custom in force on the subject in the area. In the former Northern Nigeria four native authorities[1] in three different states very early availed themselves of this liberty to declare the native law and custom in regard to, for our present purposes, the custody of children after divorce. These native authorities are Biu federation, Borgu, Idoma and Tiv.

The custody provisions are all identical for the four local authority areas, and we produce below that of Idoma Local Authority.

> "Paragraph 15
> (1) At the time of granting the divorce the court shall make an order as to the custody of children born to the wife during the period of the marriage.
> (2) All children in respect of whom an order is made in accordance with subparagraph (1) of this paragraph shall be given to the husband unless it shall

---

1. "Native Authorities" throughout the six northern states are now designated "Local Government Authorities". See e.g. Native Authority (Amendment) Edict, No. 14 of 1968, Kano State, Section 2.

> appear to the court that their interest and welfare would thereby be adversely affected, in which case it may, having due regard to local custom, award them to any person in whose custody their interest and welfare would be cared for:
>
> Provided that if any child has not been weaned[1] the court shall order the child to remain in its mother's custody until it has been weaned:
>
> Provided further that if the husband, having been awarded the child, wishes to leave it in the custody of its mother, after weaning, he is not thereby debarred from claiming custody of it at a later stage."[2]

These provisions call for a few pertinent comments. First, the accuracy of these declarations is thrown into doubt having regard to the uniformity of customary law of custody which it prescribes for such vastly different ethnic communities. The same draftsman was employed for all the declarations and, being a legislative policy to encourage such declarations, one wonders whether these latter factors have not left too heavy an imprint on the purported declarations.

In the second place, while the putting of customary law into written form ensures certainty and ease of ascertainment of that law, the end result may be to freeze the development of customary law. The written native law and custom may become fossilised whilst the people's customs and ethos have marched on. The declarations would, in

---

1. See Igbirra Local Authority Declaration which, in s. 33 expressly provided that "All children must have a woman's care until they reach the age of seven."
2. Reference should also be made to the Western States Marriage, Divorce and Custody of Children Adoptive Bye-Law, Western Region Legal Notice 456 of 1958.

consequence, not be a "mirror of accepted usage" and might indeed not even have semblance of customary law. In saying this one must, of course, bear in mind that, as the Judicial Committee of the Privy Council has observed,[1] it is not easy for native law and custom to lose its essential features: these normally retain a tenacious hold.

Thirdly, the declarations necessarily cannot be comprehensive in matters of custody. Now, where they are silent, is the unwritten native law and custom revived?

Finally, the provision in the declarations does not place the child's welfare as paramount. Instead the father's right is paramount. When the interest and welfare of the child is likely to suffer, then the court must have "due regard to local custom". But the whole question is already being determined under native or local law and custom, and so to urge the court to have regard to local custom is absurd and circular reasoning.

It is interesting to note that the provision in the declaration is being addressed to the local or area courts, which at the same time are already enjoined by section 23(1) of the Area Courts Edict that in any matter relating to the guardianship of children "the interest and welfare of the child shall be the first and paramount consideration."

---

1. Eshugbayi Eleko v. Government of Nigeria (1931) A.C. 662, 673.

There is, then, this intriguing situation of two contradictory instructions being addressed by the State legislature and the local government authority to the same area court. In our view, there can be no doubt that the Area Courts Edict has placed a limitation on the right of the father to have custody of his child - through the paramountcy of the welfare rule - and that provision must prevail over any contrary provisions in any written declarations on custody.

Guardianship under customary law.

Guardianship proper, as distinct from custody, again varies, where it is a known concept, from one customary law to another. Very little literature exists on guardianship under various Nigerian customary laws in general, but the Yoruba customary law on the subject has been widely commented upon.

Dr. Elias, while admitting that guardianship exists at customary law, states that "owing to the desire of most parents to rear and nurture their own children themselves, guardianship is not a popular institution. But weak and impoverished parents sometimes put their children under the care of neighbours who can bring them up properly."[1]

Ajisafe, for his part, was quite explicit about the institution of guardianship of orphans in the customary law of the Egba Yorubas. As he puts it:

---

1. Elias, Groundwork of Nigerian Law, p. 301.

> "Guardianship exists quite distinct from the authority of the head of the family. In the case of an orphan who requires a guardian, the head of the family appoints the nearest relative of the child on the mother's side. A male relative has the first claim. The head of the family has to see that proper care is taken of the ward by the guardian."[1]

What is clear is that in most customary law systems there exist a widespread form of informal guardianship whereby a child is simply placed under, say, the guardianship of an uncle probably as a mark of faith in the cohesion of the family. An aspect of this form of guardianship is the system of levirate or widow inheritance under which the deceased's brother takes the wives of the deceased. Such brothers (uncles to the child) automatically assume the guardianship of the children of the deceased.[2] It is also the custom among the Yorubas and some other ethnic groups that upon the death of a man, his eldest surviving son, if old enough, succeeds to the headship of the family and assumes responsibilities as guardian for his own brothers and sisters.[3] Dr. Oloyede sums up the whole picture under customary law when he said:

> "The existence of the extended family as a body corporate readily admits of guardianship since the cohesion which results from such a system easily makes possible the care and control of a child within the family. In other words the strong family ties enable a child to stay with near relations as a matter of custom and voluntarily too."[4]

---

1. Ajisafe, The Laws and Customs of the Egbas, p.4.
2. See, In re Agboruja (1949) 19 N.L.R. 38.
3. Lewis v. Bankole (1908) 1 N.L.R. 82. See also Elias, "Towards a Common Law in Nigeria" in Elias ed. Law and Social Change in Nigeria (1972) at p. 269.
4. Oloyede, op. cit. p. 237.

Such strong family ties would qualify the child's paternal side of the family equally to guardianship as the maternal relatives if the placement of the child with the latter would mean substantial material deprivation for the child.[1]

As far as the operation of the customary law of guardianship is concerned, Dr. Ijewere has noted that in the Mid-Western state of Nigeria, in addition to appointment of guardians by deed, will or by the court, as in English and Scots law, guardians may also be appointed by word of mouth and by actual physical transfer of the child.[2]

The guardian's duty to care for the ward's person and property is dominant among the legal incidents of guardianship under all systems of customary law.[3] On the whole the customary law guardian stands, as in England and Scotland, in the position of trustee in relation to the ward's property. He is under a duty to take reasonably good care of the child's property in the interest of the child, and is bound by rules of accountability. How strict this rule is has been a matter of debate. In the leading case of Martin v. Martin[4] the facts were as follows: The plaintiff was an orphan who, during his minority, lived with his uncle, the defendant.

---

1. This is the position among the Ogori, in Kwara, to which this writer belongs.
2. Ijewere, op. cit. p. 400.
3. See Oloyede, op. cit. pp. 240-241; Ijewere op. cit. pp. 400-403.
4. (1940) 9 N.L.R. 126.

The infants' deceased father had left the sum of £145 in a bank deposit on behalf of the infant. During the plaintiff's minority, the defendant as guardian, by means which may be termed an abuse of process of court, obtained the court's authority that the bank release the deposit money. This money he then used in purchasing real estate as he claimed, on behalf of the infant. But in fact, he had not purchased any real property. The child on attaining majority brought an action for the return of the money. The defendant pleaded that he was not obliged to refund all the money since he had expended some of the money, with the plaintiff's approval, for the latter's benefit. The receipts in respect of certain payments were produced in evidence. The court, after a close scrutiny of the receipts, held that the defendant was liable to pay the sum of £58 to the plaintiff, the sum representing "expenditure" on those items which the defendant could not show affirmatively that he had incurred with the consent and to the benefit of the infant.

In conclusion, it should be added that under all the legal systems examined - English, Scots and Nigerian - guardianship is terminated in the following ways:

(i) By the death of the guardian. In a joint testamentary guardianship situation, the surviving guardian carries on the duties,[1] but if joint guardians were court-appointed, the death of one determines the guardianship completely;[2]

---

1. Eyre v. Countess of Shaftesbury (1725) 2 P. Wms. 103.
2. Bradshaw v. Bradshaw (1826) 1 Russ 528.

(ii) By the infant or minor attaining majority;

(iii) By the marriage of the ward. But it should be noted that in Scots law the marriage of a minor girl does not terminate her father's curatory if her husband is himself a minor or incapax;

(iv) By the removal of the guardian by the court - for good cause;[1]

(v) By the guardian's own resignation.

5. Guardianship Jurisdiction of Courts in Nigeria

The multiplicity of laws in the field of custody and guardianship has contributed to the existence of a duality (or multiplicity) of courts. The customary and area courts in the different states exercise jurisdiction only in certain classes of cases, while the British-type of courts (i.e. the High, Magistrate and District Courts) assume jurisdiction in another set of guardianship and custody cases. As will presently be shown, it is not easy readily to demarcate jurisdiction in these matters, and the fact that jurisdiction in custody-guardianship cases often turn upon the type of marriage under which the children were sired creates internal conflicts of jurisdiction between the High and customary or area courts in these matters. As Lord Justice-Clerk Cooper once said with regard to the jurisdiction of the lower Scottish

---

1. Duke of Beaufort v. Berty (1721) 1 P. Wms. 703.

courts in custody cases, so with Nigeria it may be said that the jurisdiction of the courts "cannot be stated with precision".[1] It would therefore help clarification to set out these jurisdictional rules in guardianship.

(a) Jurisdiction in customary law guardianship-custody

The High Court Laws[2] of all the States of the Federation (excepting the East Central State) contain very similar provisions to the effect that the High Courts will have no original jurisdiction when the custody or guardianship of a child is governed by customary or islamic law. In such cases, it is the customary and area courts which have supreme jurisdiction. The East-Central State has recently abolished her customary courts, so that custody and other customary law matters formerly reserved to the exclusive original jurisdiction of customary courts now fall within the original jurisdiction of the State's High Court.[3] We may now illustrate with the following provisions.

---

1. Kitson v. Kitson 1945 S.C. 434 at 439.
2. E.g. High Court Law, Western Nigeria, Cap. 44 (1959 ed.) S.9 proviso; High Court Law, Northern Nigeria, Cap. 49 (1963 edition of the Laws of Northern Nigeria) S.17; High Court Law, Cap. 61, Laws of Eastern Nigeria, 1963 ed. S. 14 (for Rivers and South-Eastern States); and High Court of Lagos Act, Cap. 80, Laws of the Federation of Nigeria and Lagos, 1958 ed. S. 11(2), as inserted by s.2 of the Lagos State (Adaptation of Laws) (Miscellaneous Provisions) Order, 1972 (L.S.L.N. No. 16 of 1972). We have not considered the similar provisions in the Magistrates (South) and District Court (North) laws in the different States.
3. See High Court Law, Cap. 61, Laws of Eastern Nigeria, 1963 edition, ss. 11(2) and 14 as amended by the High Court Law (Amendment) Edict, 1971 (No. 22 of 1971), s.3.

The proviso to section 10(1) of the Mid-Western State High Court Law[1] is in these words:

> "Provided that, except in so far as the Military Governor may by order otherwise direct and except in suits transferred to the High Court under the provisions of the Customary Courts Edict, the High Court shall not exercise original jurisdiction in any matter which is subject to the jurisdiction of a customary court relating to ... guardianship of children."

The provision in the High Court Law of the six Northern States appears even fuller than the preceding proviso since the list of restrictions is wider. It is identical to the provisions in the former Supreme Court Ordinance of 1943.[2] Section 17 of the High Court Law of each of the Northern States[3] is as follows:

> "17(1) Subject to the provisions of the Land Tenure Law and of any other written law, the High Court shall not exercise original jurisdiction in any suit or matter which -
>
> (a) raises any issue as to the title to land or as to the title to any interest in land which is subject to the jurisdiction of an area court;
>
> (b) is subject to the jurisdiction of an area court relating to marriage, family status, guardianship of children, inheritance or disposition of property on death.
>
> (2) The provisions of subsection (1) shall have effect except -
>
> (a) in so far as the military Governor may by order otherwise direct;
>
> (b) in suits transferred to the High Court under the provisions of the Native Courts Ordinance or of any law replacing the same."

---

1. No. 9 of 1964.
2. No. 23 of 1943, Cap. 211, Laws of Nigeria (1958 ed.).
3. It should be noted that by virtue of s.1(5) of the States (Creation and Transitional Provisions) Decree, No. 14 of 1967 all laws in force in any part of Nigeria immediately before the creation of states continue to apply in that part (with necessary modifications) until they are repealed by the appropriate authority.

It will be observed from the two provisions set out above (and from the provisions of the other States - Lagos, West, Rivers, South-East) that all the provisions on jurisdiction are subject to two general exceptions. Firstly, since the making of laws on customary or area courts is generally viewed as not falling within the legislative lists in the federal constitution - being in other words, a residual matter - the Military Governor of each State has power to direct that the High Court shall exercise jurisdiction even in matters within the limitation list, i.e. matters normally reserved to customary and area courts. Secondly, because of the extensive provisions in the customary and area courts edicts permitting transfers of causes from these courts to the High Court,[1] the latter courts again have jurisdiction in matters within the above limitation list where the suits come before the High Court by way of transfer. And once these exceptions are present the original jurisdiction of the High Court on custody and guardianship cases cannot be ousted.

We may observe in connection with these jurisdictional provisions, that first, as the enactments have not defined "guardianship" and "custody" it is difficult to say what

---

1. See e.g. Part VI, Customary Courts Edict, Mid-Western State, No. 38 of 1966; Part VI (section 33(1)) and Part VIII (s.48(2)(c)) of the Area Courts Edict, North-Central State, No. 20 of 1967.

exactly these terms mean under the statutes. Guardianship alone is mentioned, but does it include custody as well - on the reading that custody is a subject "relating to ... guardianship"? If it does include custody then the provisions in the customary and area courts edicts have created a confusion by proceeding specifically to mention in their respective Schedules[1] only "custody" and not guardianship.

Secondly, in order to determine whether a suit or matter relating to guardianship of children is one "subject to the jurisdiction of an area (or customary) court" we must first refer to the laws which confer jurisdiction in such matters on area and customary courts. Here we find, for example, that s.17(1) of the Area Courts Edict[2] states that except where the Chief Justice of the Northern States otherwise orders, the jurisdiction and powers of an area court are not to exceed those set out in the First Schedule to the Edict in respect of each grade[3] of court. And then Part 2 of the First Schedule enacts that provided the court is of competent jurisdiction (in the territorial sense under section 19(3)) the jurisdiction of all grades of court in matters relating to the "custody of children under native

---

1. See e.g. First Schedule Part 2, Area Courts Edict, North-Central State, No. 2 of 1967; Second Schedule, Customary Courts Edict, Mid Western State, No. 38 of 1966.
2. North-Central State, No. 2 of 1967.
3. Originally 4 grades, viz Upper, Grades I, II and III. Most States have abolished the last.

law and custom" shall be "unlimited". But we must observe in connection with this last provision that the jurisdiction of area courts is not as unlimited as may at first appear. The provision says nothing about custody or guardianship under islamic law - as distinct from under native law and custom. The former Native Courts Law[1] had included, erroneously, islamic law within the term "native law and custom". But under the new Area Courts Edicts, that position has, happily, been altered and islamic law or moslem law is no longer brought under the umbrella of "native law and custom" but is now assigned "the same meaning as it has in the Sharia Court of Appeal Law".[2] Here, then, is a kind of limitation on the jurisdiction of area courts in custody-guardianship matters.

Moreover, the High Courts nevertheless have some original jurisdiction in certain cases of guardianship and custody even within the limitation list. It would appear misleading to suggest that "the High Court does not <u>in any circumstances</u> have original jurisdiction in (guardianship and custody) matters unless the Military Governor otherwise orders or the matters are transferred to the High Court under the Area Courts Edict."[3] It is

---

1. Native Courts Law, No. 6 of 1956, Cap. 78, Laws of Northern Nigeria, 1963 ed. section 2.
2. Section 2(1) Area Courts Edict, North-Central State No. 2 of 1967.
3. Obilade, "Jurisdiction in Customary Law Matters in Nigeria: A critical Examination" (1973) 17 J.A.L. 227, at 233. Emphasis supplied.

true that in the Western Nigeria High Court case of Omodion v. Fasoro[1] where a habeas corpus application for custody of a child of customary marriage was made, the High Court refused the application. Notwithstanding that this was a high writ - a habeas corpus - application, the High Court brushed aside the question of the paramountcy of the child's welfare in denying the application. This is regrettable. The decision - and the Western Nigeria Infants Law[2] upon which it is based - has the effect that the law "discriminates among children mainly on the form of marriage contracted by their parents."[3] As against this decision may be set the welcome decision of the Northern Nigeria High Court in 1965. In that case which also involved an application for a writ of habeas corpus to recover the custody of a child, Williams, J. began his judgment by observing that "such an application in this country is very uncommon and there is no authority at all on the subject." His Lordship then continued to observe as follows:

> "This procedure is especially uncommon in this country in respect of persons subject to native law and custom (as in this case) in view of section 17(1)(b) of the High Court Law which forbids the High Court to exercise jurisdiction originally in any suit or matter which is subject to the jurisdiction of a native (now area) court relating to guardianship

---

1. (1960) W.N.L.R. 27.
2. Cap. 49, Laws of Western Nigeria, 1959.
3. Oloyede, op. cit. p. 379.

> of children. At one stage I had some doubt as to my jurisdiction in respect of this matter, but habeas corpus proceedings are exclusively within the jurisdiction of this court, and it would be wrong, in my view, for this court to refuse jurisdiction in respect of this most important and historic writ because a matter referred to in section 17 was involved. In any event it does not appear that an application for this writ is a 'suit or matter which is subject to the jurisdiction of a native (area) court'."[1]

And as Dr. Ijewere has said, the original jurisdiction of the High Courts in customary guardianship matters is ousted only "so long as there are customary (or area) courts in the State and these have jurisdiction over these causes or matters."[2] Instances readily come to mind in which area or customary courts may not have jurisdiction: for example, such courts may not have been created, or they may be abolished or they may have their warrants temporarily suspended such as happened during the mass suspension of customary courts warrants in the Mid-Western State in 1966.

Furthermore, there may in fact be customary or area courts which would nonetheless not have jurisdiction over the matter of guardianship-custody. When, for example, one looks at Section 4(1) of the Area Courts Edict,[3] it is there provided that

---

1. Diri v. Nyikwa (Unreported) Suit No. K/M.91/1965 of 25 October, 1965.
2. Ijewere, Mid-Western Nigeria: Family Law, with special reference to marriage and divorce, (Unpublished) Ph.D. Thesis, Univ. of London (1970) p. 25.
3. E.g. North-Central State, No. 2 of 1967.

> "All questions of Moslem personal law shall be heard and determined by any member of an area court learned in Moslem law sitting alone."

As we have noted earlier, the Edict only refers to unlimited jurisdiction in cases of custody "under native law and custom". There would thus be a clear limitation where the subject-matter relates to guardianship under "Moslem personal law". In the courts of the "pagan" areas (that is, the less overwhelmingly moslem areas) of the Northern States, as in parts of Kwara, Benue Plateau and North-Eastern States, a guardianship case may arise under moslem law before an area court in which there is no member "learned in moslem law".[1] Whilst it is true that in such a case the limitation upon area courts jurisdiction operates in favour of the Sharia Court of Appeal rather than the High Court it does at least underline the substance in Ijewere's remarks that to hold customary and area courts as possessing virtually unlimited original jurisdction in customary guardianship-custody matters would create, in certain instances, a situation where "there would now be rights in the State without remedies."[2] Clearly such would be an absurd and untenable situation.

---

1. s.4(1) Area Courts Edict, North-Central States No. 2 of 1967. Emphasis supplied. We are not aware that the Northern States (uniform) Judicial Department has such a scheme as "voluntary" service out-of-state for the lower grade area court judges "learned in Moslem law."
2. Ijewere, op. cit. p. 33.

(b) Jurisdiction in non-customary law guardianship cases

The main sources of non-customary law of guardianship in Nigeria are those that spring from local Nigerian legislation and from the relevant English legislation introduced into Nigeria. There are no local legislation specifically on guardianship at the national or federal level, apart from the few provisions in the Matrimonial Causes Decree, 1970. The most important local legislation on guardianship is the Infants Law of the Western and Mid-Western States of Nigeria. The introduced or received English law of guardianship are mostly the English guardianship legislation passed before 1900 which have been imported into Nigeria by reference only: that is, by a Nigerian Statute stating simply that the English statute on guardianship (and other subjects) as of a particular date shall be in force in Nigeria, rather than an explicit re-enactment of the relevant English legislation.[1] Therefore where a guardianship suit arises under the Infants Law or the pre-1900 English statutes, the suit must be commenced in the High Court. This result may also be implied from the High Court provisions examined earlier which state that the High Court shall not exercise original jurisdiction in any guardianship matter which is subject to the

---

1. The Infants Law of the West and Mid-Western States is, however, mainly a re-enactment of the 1925 U.K. Guardianship of Infants Act.

jurisdiction of a customary or area court. So that if the guardianship is not "subject to the jurisdiction of a customary (or area) court", the High Court would possess jurisdiction.

The converse is also true, that the customary and area courts for their own part cannot entertain custody-guardianship suits arising under the Infants Law of the Western and Mid-Western States or arising under the received pre-1900 English statutes of general application in force in the rest of the Federation outside the West and Mid-West. Nor can these courts entertain guardianship and custody proceedings which arise under the Matrimonial Causes Decree.[1] Section 7 of the Infants Law, moreover, provides that the Law shall not be applied "to children who are subject to the customary law relating to the guardianship of children." And "Court" was defined in the Law as meaning the High Court of the State.[2] Thus only the High Court may exercise guardianship and custody jurisdiction under the Infants Law and the Matrimonial Causes Decree as well as under the received pre-1900 English guardianship statutes of general application.

Conclusion: The present position of Nigerian law and practice on jurisdiction in guardianship matters is that questions relating to guardianship and custody of children

---

1. No. 18 of 1970. The definition of "court" or "the court" in section 114(1), read with section 2 of the Decree, excludes the customary and area courts.
2. Infants Law (Cap. 49) Laws of Western Nigeria, s.2.

born of a Christian (i.e. monogamous or statutory) marriage are adjudicated upon by the High Courts while questions of guardianship of children born of customary, islamic (i.e. polygamous) unions are adjudicated upon by the customary or area courts.

Therefore, in so far as the legislative provisions on guardianship surveyed above are premised on the type of marriage, they reveal considerable lack of foresight. For there certainly would be guardianship and custody cases which are not connected with any type of marriage, and there appears to be no reason why the High Courts should not exercise jurisdiction in such cases. One may go further and question what justification there is for making jurisdiction turn on the form of marriage. In the past this question was the theme of a lively controversy in the field of interstate succession.[1] In the case of Cole v. Cole,[2] Griffith J., held that a Christian marriage "clothes the parties to such marriage and their offspring with a status unknown to native law and custom."[3] But in Smith v. Smith[4] decided some twenty five years later, Van der Meulen J., was of the opinion that Nigerians who adopt the Christian faith and form of marriage may not have

---

1. See the critical examination of this problem by Salacuse, "Birth, Death and the Marriage Act: Some Problems in the Conflict of Laws" (1963) 1 Nig. L.J. 59.
2. (1898) 1 N.L.R. 15
3. Ibid at 22. This was followed in Adegbola v. Folaranmi (1921) 3 N.L.R. 89; Gooding v. Martins (1942) 8 W.A.C.A. 108.
4. (1924) 5 N.L.R. 105.

attained the "Western" way of life as to make it just and equitable to suppose that their lives would be wholly governed in accordance with English laws and standards. He noted, however, that a Nigerian may have opted for the "Western" style of life having regard to his education, among other things. The manner of life of the person concerned is crucial in such matters. His Lordship summed up the position in these words:

> "Any such general proposition (i.e. that a Christian marriage clothes the parties and their offspring with a non-customary status) would in my opinion be no less unjust in its operation and effect than the converse proposition - with which I think the court in Cole v. Cole was concerned - that because a man is a native the devolution of his property must be regulated in accordance with native law and custom, irrespective of his education and general position in life."[1]

In our view, it is objectionable to look to the manner of life of a parent when dealing with the custody or guardianship of a child in the way that some Nigerian statutes and cases might suggest; it also appears objectionable to refer to children - as the Infants Law of Western Nigeria does - who are "subject to the customary law" of guardianship.

---

1. Ibid, at 107. Cf. Coleman v. Shang 1961 A.C. 481 (P.C.).

B. Private International Law Sources

A comprehensive statement of the sources of the conflict of laws is given in the American Restatement (Second) Conflict of Laws. In the Restatement view, the sources of conflict of laws derive

> "from constitutions, treaties and statutes, from precedent, from considerations of ethical and social need and of public policy in general, from analogy, and from other forms of legal reasoning."[1]

We shall not, however, be considering all these sources. Of interest to us are those sources having direct bearing on guardianship law.

The main sources of private international law in Scotland, England and Nigeria are broadly similar, all being derived principally from judicial decisions, juristic writings and legislation. The Nigerian sources, however, once again evince peculiar features and for this reason we consider these after an examination of the English and Scots law sources.

I. English and Scots Law

The sources of private international law in general are not different from the sources in the specific field of custody and guardianship. But as is usual in considering sources of law, a convenient starting point is Roman law.

---

1. Restatement (Second) Conflict of Laws, (1971) s.5 comment (b).

Within the context of private international law, the late Dr. Goadby made too large a claim when he wrote that "It is a common place that even a slight acquaintance with Roman law enables us to find numerous survivals of that mighty system in the bodies of law actually administered today. Protions of the Code Napoleon, indeed, are patently Roman; Scots law preserves many Roman doctrines; less openly English equity has borrowed Roman ideas; moslem law, more obscurely but beyond reasonable doubt, owes much to Roman tradition."[1] Among the "law actually administered today" Dr. Goadby omits Jewish law (Talmud) and African customary laws which latter, in truth, have nothing to do with Roman law. In any case, it is generally accepted that Roman law had no developed theory of conflict of laws.[2]

Although an ideal condition for the growth of private international lae existed in the Roman Empire due to the coexistence of a number of conflicting territorial laws, one overriding Roman law was recognised as applying throughout the Empire.[3] Cicero, Ulpian and other Roman lawyers, it has been maintained, had no conception of the private international law as we know it today.[4] This is

---

1. Goadby, "Orthodox Law of Divorce" (1931) 13 Jo. Comp. Leg. (3rd series) 268.
2. Graveson, The Conflict of Laws, 6th Ed. pp. 30-31.
3. Cheshire and North, Private International Law, 8th ed. pp. 16-18.
4. Fraser, The Conflict of Laws in Cases of Divorce pp. 73-74; see also F. Harrison, On Jurisprudence and the Conflict of Laws (1878) pp. 105, 107.

Lord Brougham's summary of how the situation partly came about that the Roman philosophical saga city never evolved conflict of laws rules:

> "When the Roman citizen carried abroad with him his rights of citizenship, and boasted that he could plead in all the courts of the world 'civis Romanus sum', his boast was founded not on any legal principle, but upon the fact that his barbarian countrymen had overrun the world with their arms, reduced all laws to silence, and annihilated the independence of foreign legislatures. Their orators regarded this very plea as the badge of universal slavery which their warriors had fixed upon mankind."[1]

With respect, this represents an acceptable statement about the historical source of private international law as far as it pertains to Roman law. In accepting this statement we are appreciative of the indictment[2] which has often been directed against Lord Brougham who was wont to ramble and expatiate freely over every topic under the sun.

We have already noted, in turning now to more modern sources, the predominant role of the opinion of jurists in the development of rules of Anglo-Scottish conflict of laws.[3]

---

1. Warrender v. Warrender (1835) 2 Sh. & M'L. 151 at 207.
2. E.g. Vessey Fitzgerald in (1948) Current Legal Problems p. 224 noted that when Warrender's case was decided "it was fashionable at the time for judges to 'expatiate' free overall this scene of man."
   And Sir D. Fitzpatrick in (1900) 2 Jo. Comp. Leg. p. 375 observed that Lord Brougham "was apt to be somewhat discursive at times; ideas presented themselves to his mind with a rapidity which was truly phenomenal, and he was occasionally given to pouring them forth without stopping to put them to shape."
3. See Chapter 1.

In this connection "both systems have drawn heavily upon the same sources in continental juristic writings".[1] We shall not dwell further on this here.

Judicial decisions furnish by far the most significant sources of English and Scots conflict of laws and it has been said that "in no branch of (law) have (judges) contributed more than in the conflict of laws."[2] In both the common and civil law systems, this pattern of the dominance of judicial decisions is evident.[3] And again in the words of the Restatement (Second) Conflict of Laws, "In the United States, and in other Anglo-American countries, Conflict of Laws rules generally form part of the common law ... conflict of laws rules are as subject to change by the courts as are other common law rules."[4]

---

1. Anton, Private International Law (1967) p.9.
2. Graveson, The Conflict of Laws, p.9. Elsewhere the same learned author writes that "very few English statutes deal exclusively or even substantially with questions of conflict of laws;... a survey would underline more than anything the judge-made character of the English conflict of laws." see "Philosophical Aspects of the Conflict of Laws" (1962) 78 L.Q.R. 337, 349. But it should be stressed that within the last 25 years legislation has started to play a significant role in the development of conflict of laws. See Graveson, "The Special Character of English Private International Law" (1972) 19 Neth. Int'l. L. Rev. 31 at 36.
3. See Rabel, The Conflict of Laws: A Comparative Study (1958) Vol. I, p. 42.
4. Restatement, (Second) Conflict of Laws, s.5 comment C.

In the United Kingdom judicial contribution to the rules of conflict of laws has been particularly marked through the opinions of the House of Lords. The existence of the House of Lords and the Judicial Committee of the Privy Council have brought about a much closer assimilation of the English and Scots conflicts law sources emanating from cases. In Scotland therefore, as a Scottish judge has said, English decisions are invariably "regarded with respect and if the principle on which they are decided is in harmony with the view of private international law accepted by a Scottish court, they will very readily be followed here."[1] It would not be a surprise to read similarly fraternal pronouncements from English judges with respect to principles of Scots private international law being applied South of the border. The best statement in this connection is Professor Anton's: "many decisions in English appeals have become naturalised in Scotland and so many decisions in Scottish appeals have become naturalised in England."[2]

---

1. McElroy v. McAllister 1949 S.C. 110 at 126 per Lord Russell.
2. Anton, Private International Law, p.9, citing, inter alia, Udny v. Udny (1869) L.R. 1 H.L. Sc. & Div. 441; Bell v. Kennedy (1868) L.R. 1 H.L. Sc. & Div. 307; Hamlyn & Co. v. Talisker Distillery 1894 A.C. 202.

In stressing the dominant place of judicial decisions as a source of the rules of conflict of laws, we must add an important qualification as regards the older authorities. As Lord Wilberforce has said, "age (is) a debilitating factor in private international law".[1] So that a decision of only a hundred years old may very easily be condemned, as it has been done in at least one Scottish case, that it was "decided at a time when the principles of private international law as accepted in Scotland were less developed than they have since become."[2] This has led to extreme reaction on the part of some writers who have argued that the older cases, especially those decided by the House of Lords before that House was reconstituted[3] have "only a waste-paper value".[4]

It should be observed, however, that some of the leading cases[5] in the guardianship field were decided over one hundred years ago, at a time when the private international law rules of guardianship were still at their formative stages.

---

1. Indyka v. Indyka (1967) 2 W.L.R. 511 at 550 (H.L.), (1969) 1 A.C. 33 at 95. Brackets removed.
2. McElroy v. McAllister 1949 S.C. 110 at 135, per Lord Cooper, referring to McLarty v. Steele (1881) 8 R. 435.
3. By the Appellate Jurisdiction Act, 1876.
4. D.M. Walker, "Some Characteristics of Scots Law", (1955) 18 M.L.R. 321 at 333.
5. E.g. Johnstone v. Beattie (1843) 10 Cl. & Fin. 42; 8 E.R. 657; Stuart v. Moore (The Bute Guardianship Case) (1861) 4 Macq. 1.

These cases have, in our opinion, proved very durable as they have laid down some of the most far-sighted propositions relating to guardianship in private international law. Therefore while one must be cautious in one's use of the earlier judicial authorities in the conflict of laws, they cannot all be summarily jettisoned. Perhaps the least that one might justifiably say of these earlier decisions - especially the less durable ones - is that sufficient unto the day were the judgments thereof.

Finally we must mention the role of legislation as a source of conflict of laws. So predominant are judicial decisions in private international law that Professor Graveson could conclude that Parliament's role in this entire field is legislating intersticially. As he puts it:

> "Parliament in fact has sought to fill the gaps, to remove hardship, and to correct injustices, and it has occasionally created innovations, but broadly speaking its role has been completely subordinate to that of the courts, and in this instance even to that of juristic writers."[1]

But there is every likelihood that with the increasing importance of the Law Commissions through their many thorough Reports on different aspects of the law in both England and Scotland, greater parliamentary intervention in the conflict

---

1. Graveson, "Philosophical Aspects of the Conflict of Laws" (1962) 78 L.Q.R. 337, at 349; but see note 2 at p. 142 supra.

of laws may be witnessed in the future. And cogent illustrations of this trend have already been provided by the Matrimonial Proceedings (Polygamous Marriages) Act,[1] 1972, as well as the Recognition of Divorces and Legal Separations Act, 1971.

We are now in a position to turn to the sources of the Nigerian private international law.

II. Sources of Nigerian Private International Law

As we indicated earlier, it is possible to discuss the sources of Nigerian conflict of laws in the wide terms of the Restatement (Second). We have refrained from doing this and instead have concentrated on those representative sources which illustrate adequately the nature and the problems associated with the Nigerian private international law sources. Apart from the sources derived from juristic writings mentioned earlier, we have proceeded with our discussion of the problem in the following manner.

1. Nigerian Judicial Precedents

English rules of private international law apply in Nigeria via the doctrine of judicial precedent. Nigerian courts have adopted the legal methods and techniques

---

1. Cap. 38 (Matrimonial Proceedings (Polygamous Marriages) Act 1972). The Act was based on a joint Report by the Law Commissions. See Law Commission No. 42. Report on Polygamous Marriages, Family Law (1970).

prevailing in England, including the common law doctrine of judicial precedent.[1] The traditional approach to precedent as adopted by the Nigerian courts is that these courts consider themselves bound by the previous decisions of courts of co-ordinate or superior jurisdiction.[2] But often the Nigerian courts have had no specifically Nigerian precedent because, as Dr. Elias has said, many problems in private international law "have not yet begun to trouble Nigerian courts".[3] Therefore, since the Nigerian previous decisions were themselves based on decisions of English courts, which courts in turn

> "have conflict of laws cases before them far less frequently than local law cases, ... rarely feel equally at home with the conflict cases, and ... do not decide them and write their opinions with the same assurance and dependability as in other fields,"[4]

this consequence ensues: that Nigeria has totally integrated the English system of conflict of laws - with all its shortcomings - into her own law. Little wonder that even at the height of experimentation with "depecage" or "picking and choosing" in the field of tort conflict of laws,[5] we still find the Nigerian Supreme Court relying on a leading

---

1. See Olawoyin v. Attorney-General of Northern Nigeria (1960) N.R.N.L.R. 53 per Brown C.J.; also Aguda "The Role of the Judiciary in the Development of the Law" in Selected Law Lectures and Papers (1971) p.28.
2. See e.g. Young v. Bristol Aeroplane Co. (1944) 1 K.B. 718.
3. Elias, The Nigerian Legal System, p.275.
4. Cheatham, "Problems and Methods in Conflict of Laws" (1960) Recueil Des Cours II, p.237 at 247.
5. See Morris, The Conflict of Laws, pp. 544-545.

English torts case of over a hundred years ago.[1] Brett, J.S.C., laying down simply that

> "The rules of the common law of England on questions of private international law apply in the High Court of Lagos."[2]

However, although it may be correct to say that at some time past "the Nigerian courts tend slavishly to follow any English decision",[3] modern trend points to a departure from mechanical adherence to English (private international law) decisions.[4]

2. The "Received" English Law

The Constitution of the Federal Republic of Nigeria 1963[5] implicitly provides for the reception and application of English rules of conflict of laws. Section 156(1) of that Constitution provided that:

> "All existing law, that is to say, all law which, whether being a rule of law (or not) is inforce immediately before the date of the commencement of this Constitution ... shall, until that law is altered by an authority having power to do so, have effect with such modifications (whether by way of addition, alteration or omission) as may be necessary to bring that law into conformity with this Constitution and the Constitution of each (State)."

By the broadness of its scope, this provision practically inherited the English common law rules of private international law. In practice, however, there does not seem

---

1. Philips v. Eyre (1870) L.R. 6 Q.B. 1.
2. Benson v. Ashiru (1967) N.M.L.R. 363 at 365.
3. Nwabueze, The Machinery of Justice in Nigeria (1964) p. 37.
4. See, for example, Cottrell, "An End to Slavishness? A Note on Alli v. Okulaja" (1973) 17 J.A.L. 247.
5. No. 20 of 1963.

to have been any conflicts of law cases in which the courts have had to specifically consider this Constitutional provision. But there seems to be little doubt, as will be evident from our next discussion, that the Nigerian courts would consider the provision as giving them full scope to apply the English rules of conflict of laws unless those rules have been overridden by clear rules of Nigerian statutory or judge-made law. We shall now turn to the provisions in the reception statutes in so far as immediately relevant to our present purposes.

(i) The Reception Statutes

This is a term normally used to describe those federal and state legislations which have explicitly imported or "received" English law into the various Nigerian jurisdictions, with or without a limiting date as to the imported English law.

The federal enactment that has expressly imported assorted English law wholesale into Nigeria is, without going back into distant history, the Law (Miscellaneous Provisions) Act, 1964.[1] Section 45 of the law provides, so far as relevant, that

> "(1) the common law of England and the doctrines of equity, together with the statutes of general application that were in force in England on the 1st day of January, 1900, shall be in force in Lagos and,

---

1. Cap. 89, Laws of the Federation of Nigeria and Lagos, 1958 edition. This enactment was replaced by the 1964 Act

> in so far as they relate to any matter within the exclusive legislative competence of the Federal legislature, shall be in force elsewhere in the Federation.
> (2) Such Imperial laws shall be in force so far only as the limits of the local jurisdiction and local circumstances shall permit and subject to any Federal law.
> (3) For the purpose of facilitating the application of the said Imperial laws they shall be read with such formal verbal alterations not affecting the substance as to names, localities, courts, officers, persons, moneys, penalties and otherwise as may be necessary to render the same applicable to the circumstances."

At this point it may be in order to set out some of the State provisions before proceeding to comment on the reception statutes as a whole. We have given the provisions (both State and Federal) in full because some of the arguments set out subsequently in this chapter weave into one or the other of the numerous clauses in the provisions.

The Northern States High Court Law[1] provides in section 28 as follows:

> "Subject to the provisions of any written law ...
> (a) the common law;
> (b) the doctrines of equity; and
> (c) the statutes of general application which were in force in England on the 1st day of Janaury, 1900,
> shall, in so far as they relate to any matter with respect to which the Legislature of the Region is for the time being competent to make laws, be in force within the jurisdiction of the court."
>
> "28 A(1) All Imperial Laws declared to extend or apply to the jurisdiction of the court shall ... be in force so far only as the limits of the local jurisdiction and local circumstances permit ..."

---

1. Cap. 49, Laws of Northern Nigeria 1969 edition.

Subsection (2) of this section then goes on to provide, as is usual, that the received laws shall be applied in Nigeria after subjecting them to necessary verbal changes.

The legal basis for the application of some of the English rules of private international law is different in the Western and Mid-Western States. These two states alone have evolved a formula which jettisons the English statutes of general application. The relevant provision in the Western State is as follows:

> "From and after the commencement of this Law and subject to the provisions of any written law, the common law of England and the doctrines of equity observed by Her Majesty's High Court of Justice in England shall be in force throughout the (State)."[1]

(ii) Issue of Construction

With academic writers in particular and judicial personnel to a lesser extent, the interpretation of the phrase "the common law, theddoctrines of equity and the statutes of general application in England" has been a most troublesome source of controversy. Are the Nigerian Courts required to apply the English common law and equity? If so, the common law and equitynas of what date? What is the scope of the "statutes of general application" in England? Which parts of the phrase "common law and doctrines of equity" have imported English private international law relating to guardianship and custody?

---

1. Law of England (Application) Law, Cap. 60, Laws of the Western Region of Nigeria, 1959 edition.

Some of these questions are not just of theoretical interest. For example, the common law rules as known to Sir Edward Coke and Professor Blackstone have been developing throughout the ages. In the guardianship field in particular, giant strides have been made in the updating of the common law rules since the late 19th century. And these advances express the current English rules on these topics. Consequently the rules of by-gone ages may, in their application today, hamper the enjoyment of the full benefits derived from the common law as a system.[1] Therefore some of the answers to these questions would be useful as such answers would furnish us with an idea as to whether, for instance, it is the English conflict rules of jurisdiction, choice of law and recognition of foreign guardianship decrees which are operative in Nigeria or a universal system of private international law.

(a) <u>Have private international law rules of guardianship been introduced by way of the "common law" or the "doctrines of equity"</u>?

<u>Equity</u>: Guardianship and custody is one main area of private law which is grounded principally on equitable considerations. Private international law as a whole is, of course, founded on the equitable considerations of doing justice in cases with foreign elements and on

---

1. See Roscoe Pound, "Common Law" (1931) 4 Enc. Soc. Sci., 53.

convenience.[1] So that even if the reception of common law rules of private international law is objectionable, the importation of equitable rules of conflict of laws would not be abominable in the guardianship and custody field.

But first of all it should be noted that the term "equity" is used in three different senses[2] in Nigerian law. In one sense, the "doctrines of equity" as well as common law of England are said to be in force within the jurisdiction.[3] In a second sense the courts are asked to apply native law and custom provided it is not repugnant to "natural justice, equity and good conscience".[4] In yet a third sense, the courts are asked, in a choice of law situation where there is no express rule applicable, to be governed by "principles of justice, equity and good conscience."[5] If the last two forms of "equity" are taken in a non-technical sense as coterminous with "justice" or "fairness"[6] then such "equity" would still be capable

---

1. See e.g. Hessel E. Yntema, "The Objectives of Private International Law" (1957) 35 Can. B. Rev. 721; Graveson, "Judicial Justice as a Contemporary Basis of English Conflict of Laws" in Twentieth Century Comparative and Conflicts law (1961) pp. 307-320; also, Graveson, "Philosophical Aspects of English Conflict of Laws" 78 L.Q.R. 337.
2. For a full discussion of these, see Ekow Daniels, The Common Law in West Africa (1964) Chapter 10.
3. E.g. s.45(1) Law (Miscellaneous Provisions) Act, Cap. 89, Laws of the Federation of Nigeria and Lagos, (1958 ed.)
4. E.g. s.12(1) High Court Law, Western State, Cap. 44, Laws of Western Nigeria (1959 ed); see also sections 20(2) and 21(1) Area Courts Edict, North-Central State (No. 2 of 1967).
5. E.g. s.34(4) High Court Law, Northern States, Cap. 49, Laws of Northern Nigeria, 1963 ed.
6. Professor Allott thinks that this is so. As he says, "In the repugnancy clause 'equity' retains its more generalised and less technical meaning of 'fairness'". New Essays in African Law pp. 36, 44.

of importing English rules although such "equity" is not specifically tied to English equitable rules as the first version does. And it is with this first form of "equity" that we are directly concerned. We shall take the reference to "doctrines of equity" to be the "body of principles developed by the English Court of Chancery from medieval times as a gloss upon the common law."[1]

It may be thought that this artificial and complex doctrines of equity "developed in the context of a capitalist society, and directed primarily to protecting the wealth of the property-owning classes"[2] would be irrelevant to Nigeria's predominantly customary social life. But it seems to be agreed generally by most commentators that it is the technical doctrines of equity that have in fact been received into Nigeria.[3] Jibowu, J. once said in a Nigerian case involving succession that the only equity he knew was English equity. He was, however, overruled by the Judicial Committee of the Privy Council in Dawodu v. Danmole.[4]

---

1. Allott, op. cit. at 36.
2. Cretney, "The Application of Equitable Doctrines by the Courts in East Africa" (1968) 12 J.A.L. 119.
3. See Jegede, "Equity and Nigerian Law" (1969) 3 Nig. L.J. 57; Daniels, note 2 (p. 153) supra.
4. 1962 1 W.L.R. 1053, at 1060 per Lord Evershed.

The Privy Council observed that:

> "In their Lordships opinion the principles of natural justice, equity and good conscience applicable in a country where polygamy is generally accepted should not in a matter of this kind be readily equated with those applicable to a community governed by the rule of monogamy."

It is no doubt unjustifiable to seek equity in English law sources alone. For like Scots law, equity exists in Nigerian customary law quite apart from its importation and with a totally independent existence of its own. Outside its peculiar English connotation, equity does not need the common law or any other law before its own rules can come into operation. In other words, equity need not have only a supplemental or auxiliary role to a more "basic" law. This is the position under Scots and customary law. As to this latter Dr. Elias has said:

> "In the sphere of African law, fiction, equity and legislation seem to be concurrent influences making for legal change. The King, the Chief and the Village Headman are each in his turn regarded as the father of his people and fountain of justice ... In Chiefless communities the inevitable interplay of counter-balancing segments which are so far a regular feature of all their social and cultural activities renders the free application of equitable considerations of fairness and impartiality absolutely necessary among these highly equalitarian peoples."[1]

And in Scots law there never was a distinct body of equitable doctrines different from common law rules, so there was never

---

1. Elias, The Nature of African Customary Law, p. 188.

any need for a separate court to administer equity. Consequently, conflict between equity and law never arose in Scots law as is the case in English law. This is as it should be. The Scottish jurist, Erskine, whose works are of great authority has said:

> "The Session (Court) is a court of equity as well as law, and as such may and ought to proceed by the rules of conscience in abating the rigour of the law ... This power, which is called the nobile officium of the judges, is inherent in the supreme adjudicatory of every State, unless where separate Courts are established for law and equity, as in England."[1]

However, to return to the received English equity, since it is generally accepted that it is English equity that imports (along with common law) rules of conflict of laws, one further statutory enactment should be noted. In all the High Court Laws in the Nigerian Federation, there is provision that:

> "law and equity shall be administered by the High Court concurrently and in the same manner as they are administered by Her Majesty's High Court of Justice in England."[2]

Coupled with this is the further provision that "Subject to the express provisions of any other law in all matters not particularly mentioned in this law, in which there was

---

1. Erskine, Institutes of the Law of Scotland, Vol. I, Title iii, 22.
2. See e.g. Section 30 High Court Law (Northern States); s.13 High Court Law (Lagos State); s.19(1) High Court Law (Eastern States). The Eastern Nigeria provision is different in the sense that it contains no reference to Her Majesty's High Court of Justice in England as a guide in these matters .

formerly or is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter the rules of equity shall prevail in the Court so far as the matter to which those rules relate are cognizable by the Court."[1]

It must be emphasised, however, that this continuing distinction between equity and common law is, for practical purposes, unimportant since not only are the rules of both administered as if one in conflicts of law cases but also the same rules and techniques of judicial precedent apply to equity as to common law. Moreover, there are no reported Nigerian cases on this provision as to the prevalence of equity over common law in cases of conflict or variance and this indicates, says Mr. Park, "how few genuine conflicts there are between the two systems."[2] But absence of reported cases is not a necessary or only indicium of the actualities of non-conflict between equity and common law. Rather, it would seem that if there are no reported cases, it is not because of an absence of conflict but because, where such a conflict would arise, as Lord Upjohn has said, "equity too dutifully followed the law."[3] It is of little practical

---

1. Section 16 High Court Law (Western State); s.19(3) High Court Law (Eastern States); s.15 High Court Law (Lagos State); s.31 High Court Law (Northern States).
2. Park, The Sources of Nigerian Law, p.9.
3. J. v. C. 1970 A.C. 668 at 721.

consequence, therefore, whether private international law rules of guardianship came into Nigeria by way of equity or common law.

We may therefore conclude this brief discussion of equity and its bearings to conflict of laws rules of guardianship-custody by observing as follows:

(i) The field of received equity is one where "local circumstances" rule appears to have a valid scope of operation. Thus, although the equitable doctrine of the paramountcy of the child's welfare prevails over any contrary rules of customary law of custody, there is always "the overriding condition that local circumstances must be considered in assessing what is for the child's welfare."[1] Hence the various Local Authority Declarations of customary law of custody in parts of the Northern States of Nigeria generally emphasised the "interest and welfare" of the child, "having regard to local custom".[2] This may explain why received equity often fails to have effect as to supersede a rule of customary law as illustrated in the case of Amachree v. Goodhead[3] which we discuss more fully in chapter five.

(ii) Nevertheless, it must be admitted that the paramountcy and near inviolability of the father's customary law right to the custody of his child could only be tempered by the

---

1. Cretney, "The Application of Equitable Doctrines by the Courts in East Africa", (1968) 12 J.A.L. 119 at 145.
2. See, e.g. Idoma L.A. Declaration paragraph 15(2), supra.
3. (1923) 4 N.L.R. 101.

justice, equity, and good conscience phrase, which phrase is "a convenient term that is ready to hand for the re-fashioning of certain outdated rules of customary law."[1]

The Common Law

In discussing the reception of common law into Nigeria it should be remembered that private international law occupies only a small segment of the huge field of common law. With this short caveat we are now in a position to comment briefly on the different views regarding the received common law. The question to be asked here is whether it is the common law in its exclusively English form or a universal system of common law that has been received.

The view that commands majority approval is that it is the common law of England and its rules of private international law which has been received into Nigeria. And the best account of this majority view has been stated elsewhere by Professor Allott.[2] We have designated this as the "majority" view first, in light of the practice of the Nigerian judges - local and expatriate - who have all been trained in English law and for a long time were nearly all English and who therefore regularly consider only English common law; and

---

1. Elias, "Towards a Common Law in Nigeria", in Law and Social Change in Nigeria at 266.
2. Allott, "The Common Law of Nigeria" in Nigerian Law: Some Recent Developments (1965) I.C.L.Q. Supplementary Publication No. 10 p.31. Also Allott, New Essays in African Law pp. 31-35.

secondly, the federal and southern States reception statutes all speak of the "common law of England".[1] The six northern States High Court Laws, however, contain a provision which is not specifically and explicitly tied up with the common law "of England".[2]

The serious drawback to the majority view is that it effectively "prevents the development of a uniquely Nigerian common law and equity."[3] But Professor Allott does not agree with this "pessimistic view of the circumscribing effect"[4] of the federal and southern States provisions.

The majority view has provoked a strong reaction from other writers, based on the pragmatic need for the development of a Nigerian common law. The view held here is that the common law which should be applied in Nigeria is the common law as "applied to the common law countries"[5] in the sense of "the legal system and habits of legal thought that Englishmen have evolved. In this sense it is contrasted with systems of law derived from Roman law".[6] But too much should not be made of the expression "English system and habits of legal thought", because it would be "wrong

---

1. E.g. Law (Miscellaneous Provisions) Act, s.45(1) (Federal); Law of England (Application) Law, s.3 (Western Nigeria).
2. High Court Law, Northern States, s.28.
3. Park, The Sources of Nigerian Law, p. 19.
4. Allott, "The Common Law in Nigeria" (1965) I.C.L.Q. Supp. Pub. No. 10 at p. 36.
5. Nwabueze, The Machinery of Justice in Nigeria (1963) p. 21.
6. Nwabueze was quoting from Jackson, Machinery of Justice in England, 3rd ed. p. 15.

to suggest that (the Nigerian) Courts are absolutely bound by the specifically English text or version of the common law."[1]

The basic objection to this view is its dream of a universal common law system if applied to private international law when it is too well-known that even as between England and the United States of America there exist major divergencies especially in the conflicts of law field of domicile. Furthermore, the development of Nigerian common law rules of private international law envisaged by this view cannot be achieved by the courts without almost unwarranted exercise of judicial legislation. Our view, however, is a preference for a modified version of the second view as we shall show when we discuss the needed limitations on the received law. In the meantime, it may, with respect, be rightly said that on balance for nearly a decade after Park, Nwabueze and Allott wrote their works we have quoted from, judicial attitude tends to show a swing supporting Nwabueze-Park views rather than Allotts. For in a recent Nigerian case[2] although there was disappointingly, no actual discussion by the court[3] of the expression the "common law of England" the judge, Beckley J, it has been suggested,[4]

---

1. Nwabueze, The Machinery of Justice in Nigeria, p.21.
2. Alli v. Okulaja (1971) 1 Univ. Ife L.R. 72.
3. "Not for the first time", writes Miss Cottrell, "one is struck by the fact that the things which seem to worry the academics do not seem to lose the judges any sleep." See Cottrell, note 4 below, at 249
4. See Cottrell, "An End to Slavishness? a Note on Ali v. Okulaja" (1973) 17 J.A.L. 247.

inclined more towards the Park-Nwabueze position. Yet, only if the Beckley J's approach wins adherents on the bench can it be said that the Nigerian judges have freed themselves of the "circumscribing effect" of the provision on "the common law of England." Therefore, what we have in Alli v. Okulaja is, for purposes of private international law, only a possible trend, not a settled approach.

(b) Statutes of general application.[1]

This is the third main type of received English law. The major dispute here concerns delimiting the scope of the expression 'statutes of general application in England."[2] The expression remains till today a fertile source of controversy. As Professor Allott has observed, "Seldom has a phrase given rise to so much difficulty, or been interpreted in so many different senses by the Judges".[3] The uncertainty in the law has been multiplied in this area because it is the courts, not the legislature, which defines what amounts to a statute of general application. And we do not know this until a decision is actually handed down.

---

1. A wealth of learning has accumulated around this expression: See Allott, New Essays in African Law (1970) esp. pp. 48-54; Kasumu and Salacuse, Nigerian Family Law (1966) pp. 13-16; Seidman, "A Note on the Construction of the Gold Coast Reception Statute" (1969) 13 J.A.L. 41-51; Ekow-Daniels, The Common Law in West Africa (1964) Chapter 12; Park, The Sources of Nigerian Law (1963) esp. pp. 24-29.
2. See e.g. Lawal v. Younan (1961) All N.L.R. 74 for a judicial exposition of the concept of "statutes of general application".
3. Allott, New Essays in African Law, p. 48.

And since there are as many different judicial views on the expression as there are judges, it is obvious that there can never be the one test of what qualifies as a statute of general application. It is not surprising that a Gold Coast (Ghana) Judge has condemned this "slovenly expression, made use of by the Legislature of this colony to save itself the trouble of explicitly declaring what the actual law of the colony shall be."[1] The controversy surrounding the phrase points out nicely the whole question of the unsuitability and undesirability of transplantation of the products of political institutions nurtured in a different socio-economic environment. The reception of English statutes of general application in most Nigerian jurisdictions has meant that those jurisdictions find themselves being governed by the acts of two legislatures; one based in Nigeria and the other seated decades or hundreds of years ago at Westminster. In a conflicts of law study as this we cannot indulge in an extensive analysis and discussion of the various issues. Nor is such an in-depth analysis necessary here since, in any case, until recently statutes constitute the vehicles only of interstitial legislation by Parliament in the whole field of conflict of laws.[2] But we will consider briefly the formulated tests in the Nigerian cases and their criticisms; then we will turn

---

1. Des Bordes v. Des Bordes and Mensah, (1884), Sar. F.C.L. 267 at 268, quoted in Allott, New Essays in African Law p. 49.
2. Graveson, "Philosophical Aspects of the Conflicts of Laws" (1962) 78 L.Q.R. 337, 349.

to the debates on the need for applicability of such statutes to Scotland before qualifying for exportation; and we will conclude this survey of the received law by a discussion of the limits of the received laws.

The issue of "general application"

In Nigeria, the leading[1] criterion as to the method of ascertaining a statute of general application was formulated in the case of Attorney-General v. John Holt.[2] In a famous dictum Chief Justice Osborne said:[3]

> "No definition has been attempted of what is a statute of general application, ... and each case has to be decided on the merits of the particular statute sought to be enforced. Two preliminary questions can, however, be put by way of a rough, but not infallible test, viz: (1) by what Court is the statute applied in England? and (2) to what classes of the community in England does it apply? If, on January 1, 1900, an Act of Parliament were applied by all civil or criminal Courts, as the case may be, to all classes of the community, there is a strong likelihood that it is in force within the jurisdiction. If, on the other hand, it were applied only by certain courts (e.g. a Statute regulating procedure), or only to certain classes of the community (e.g. an Act regulating a particular trade), the probability is that it would not be held to be locally applicable".

Notwithstanding that this passage has been frequently approved by Nigerian courts, the latest instance of such approval being

---

1. There are other criteria which have also been suggested, such as applicability of a statute in all the colonies.
2. (1910) 2 N.L.R. 1.
3. Ibid at 21.

in Lawal v. Younan[1], the test propounded by Osborne C.J. is, it is submitted, unduly restrictive. For instance, under the United Kingdom Guardianship of Infants Act, 1886 - in our view undoubtedly a statute of general application - the courts which had power to entertain guardianship applications in England were the High Court and the county courts.[2] Courts of summary jurisdiction were excluded. It was not until the Guardianship of Infants Act, 1925 that courts of summary jurisdiction were included among courts capable of entertaining guardianship applications.[3] Under Chief Justice Osborne's criteria, since the 1886 Guardianship Act applied only to "certain courts", in otherwords since courts of summary jurisdiction were excluded, the Guardianship of Infants Act would not be a statute of General application. It is doubtful - considering especially the long history behind the Act, a history dictated by the national cry to accord the wife the right of guardianship to her infant children - if a statute could be of more general application.[4]

---

1. (1961) 1 All N.L.R. 245 at 256. Academic writers who have also endorsed the test include Dr. Elias who said "These guiding principles are useful and, in the absence of any statutory definition, are as good a test as any". See his "The Nigerian Legal System"(1962) p. 19; see also Allott, Essays in African Law p.9.
2. see Section 9, Guardianship of Infants Act, 1886.
3. see Section 7(1) Guardianship of Infants Act, 1925.
4. Professors Kasumu and Salacuse appear to have adopted a somewhat ambivalent attitude towards the 1886 Guardianship Act. While at first stating at p.15 of their book, Nigerian Family Law that "in no reported case has it been decided whether ... the Guardianship of Infants Acts of the latter part of the nineteenth century are statutes of general application", the learned authors then proceeded at pp. 254-255 to discuss briefly all the English Guardianship and Custody Legislation of the 19th century.

A contrary opinion, such as Osborne C.J.'s test would support, shows the grotesqueness of a situation whereby West African judges are formulating criteria for statutes designed for the more salubrious English counties. As Professor Seidman has put it: "The criteria articulated by Osborne C.J. can be appreciated by a consideration of the development of early welfare legislation in England. That development proceeded by way of statutes aimed very specifically at particular groups and classes - women, children, particular kinds of industrial enterprises, and the like. To make applicability turn on the generality of its application in England was to guarantee that none of the welfare statutes would be applied in Africa".[1]

Moreover, as Mr. Park has rightly pointed out, an Act can be of general application without necessarily applying to every class of the community. "Would it not be more accurate", Mr. Park asked looking at statutes which regulated the activities of money lenders throughout England or which applied to all infants throughout the Kingdom "to say that it must apply to all the members of the class or classes which it governs?"[2] It can hardly be denied that the criterion of generality of application to persons should be "that an Act qualifies if it applies either to all classes of the community or to all members

---

1. Seidman, "The Reception of English Law in Colonial Africa Revisited" (1969) 2 E.A.L.Rev. 47 at 70. See Supra, pp 99-100
2. Park, The Sources of Nigerian Law p. 27.

of any one or more classes".[1] This view has also been endorsed by Professor Allott[2] who suggested three other tests which included this: that the statute "must be a public general Act of the English or United Kingdom legislature (as the case may be): local and private Acts of whatever date are excluded".[3] The relevance of the underlined words would be brought out when we discuss the limits to the received legislation.

In addition to these generally accepted tests certain others are not open to dispute. Thus, an English statute which merely declares the common law would be accepted as of general application. So also would be a statute which alters the common law, or are in derogation of it, or which abrogates the common law antecedent to the establishmentof a local legislature. If the latter type of statutes were not deemed to be of general application it would have the result, as Dr. Ekow Daniels points out, that "in the absence of a local legislation, the receiving country may be left without either the common law or the statute law on a particular topic".[4] It certainly would be doubtful whether England or Nigeria and any other "receiving" countries indended to create any such lacuna in the law.

---

1. Park, op. cit. at 28.
2. Allott, New Essays in African Law pp. 50-51.
3. Ibid. at p. 50. Emphasis added.
4. Ekow Daniels, The Common Law in West Africa p. 327.

A note on extension of generality of application to Scotland

In making our submission under this head we almost certainly stand being condemned for not distinguishing between "what is now the law and what one would like the law to be".[1] For there is a near-universal consensus among academic writers (and several decisions) to describe any judicial attempt to extend the test of generality of application of a statute to Scotland as a strange "aberration".[2] Yet certain cases had persisted in holding that a statute would not be of general application if it did not apply to Scotland in addition to England. This throws us back to the inquiry: what exactly does the expression "statutes of general application that (or which) were in force in England" mean? We shall comment on the relevant cases in turn.

Chief Young Dede v. African Association[3] is the earliest case in which there was a discussion of applicability in both England and Scotland as the proper test for statutes of general application. The case concerns the applicability of the English Statutes of Limitations.[4] The judge, Webber,J. drew attention to the frequent misreading of the pertinent phrase by the judges when he said:

---

1. The quotation is Allott's, in disagreeing with Nwabueze's interpretation of "the common law of England". See Allott,"The Common Law of Nigeria", in Nigerian Law: Some Recent Development (1965) I.C.L.Q. Supplementary Publication No. 10, 31 at 36.
2. See e.g. Park, The Sources of Nigerian Law, p. 25; Seidman, "The Reception of English Law in Colonial Africa Revisited" (1969) 2 E.A.L.Rev. 47 at 70.
3. (1910) 1 N.L.R. 131.
4. (1623) 21 Jac. 1, c.16.

> "all the learned judges have taken this section to refer to all statutes of general application in England as if the section reads '...the statutes of general application in England and which were in force on ...' In other words they have held that the transposition of the words 'in England' to the principal sentence after the word 'application' does not alter the meaning of the section which according to their construction refers to statutes of general application in England".[1]

Hence, although the relevant enactment under consideration by the Court - section 14 of the Supreme Court Ordinance, 1914 - speaks of 'statutes of general application which were in force in England' the court felt that all such statutes must be taken to apply to the United Kingdom as a whole. As Webber J. said: "the word 'statute' is synonymous with 'Act of Parliament' and 'Act of Parliament applying generally to the United Kingdom'."[2] Such statutes included the Sale of Goods Act of the United Kingdom, "the Scotch law retaining by saving clauses its distinct peculiarities intact",[3] but excluded the Land Transfer Acts 1875 and 1897 which are "applicable in England only and not in Scotland or Ireland."[4] Accordingly, Webber J. concluded that statutes of general application must mean those applicable in the whole of the United Kingdom. In the words of his lordship:

> "If then the section means all statutes of general application in England, then it includes all the statutes of limitations. It may be argued that the position of the words 'in England' in the section gives the key to its construction and that if the words 'statutes of general application' had the meaning I ascribed to them i.e. application throughout

---

1. (1910) 1 N.L.R. at pp. 132-133. Emphasis in the original
2. Ibid, p. 133.
3. Ibid.
4. Ibid at 134.

> the United Kingdom the words 'in the United Kingdom' would have been used instead of the words 'in England'. I do not see how the words 'in England' would have affected the meaning although I admit it would not be a scientific drafting, but if the construction adopted by my learned brothers bethat which according to them was truly intended, then the drafting is not only unscientific but grammatically unsound and vague."[1]

Having expressed this opinion, however, the learned judge proceeded to dispose of the case before him on the assumption that the Supreme Court Ordinance meant literally what it says - statutes of general application in England.

The decision has been almost universally condemned by academic writers. It is "somewhat remarkable that such a suggestion should ever have been made," opined Mr. Park.[2] The statement of Webber J. says Dr. Elias, "would have been an unduly technical twist"[3] and Dr. Ekow Daniels would consider the judge's views as "questionable".[4]

Even Professor Allott who conceded such tests as laid down by Osborne C.J. in Attorney General v. John Holt[5] to be fallacious due to "a grammatical misreading of the phrase" - thus at least in part agreeing with Webber J - nevertheless felt that applicability throughout the United Kingdom is "clearly erroneous".[6]

---

1. Ibid.
2. Park, The Sources of Nigerian Law, p.24.
3. Elias, The Nigerian Legal System (2nd ed) p. 19.
4. The Common Law in West Africa p. 322. The remarks actually related to Okpaku v. Okpaku (discussed below) which followed Dede case.
5. (1910) 2 N.L.R. 1 at 21.
6. Allott, New Essays in African Law p. 51 n.4. The case Professor Allott actually cited in support of his view is Okpaku v. Okpaku (1947) 12 WACA 137.

Next came the case of In re Sholu,[1] again decided by Mr. Justice Webber, in which it was held that the English Land Transfer Act of 1897 did not apply in Nigeria because it was not a statute of general application as it was not in force in Scotland (and Ireland). Eight years later a counter-current set in and in Young v. Abina[2] the earlier cases were overruled by the West African Court of Appeals (now defunct). As the Court puts it in Young's case:

> "It would appear that the basis of this reasoning (in re Sholu) was that the Land Transfer Act applied to England only and not to Scotland or Ireland. We are unable to agree with this view. It seems to us that the words 'of general application' are used with reference to the matter of the statutes and not only geographically. Also it seems to us that under section 14 England is the test of geographical generality."[3]

In emphasising "England" as the test of geographical generality of a statute's application, no one ever questioned the draftsman's sense in which he used the word "England".

Okpaku v. Okpaku[4] was a reversion to the older authorities upholding the test of applicability throughout the United Kingdom. In that case, Mrs. Okpaku who had married under the Nigerian Marriage Ordinance (now Act)[5] sued her husband for

---

1. (1932) 11 N.L.R. 37.
2. (1940) 6 W.A.C.A. 180. Earlier in 1884 in the Gold Coast case of Des Bordes v. Des Bordes and Mensah (1884) Sar. F.C.L. 267 at 268, it had been held, as in Young v. Abina, that applicability in the United Kingdom as a whole is not the test: "this court constantly enforces the provisions of statutes which do not apply to Scotland".
3. (1940) 6 W.A.C.A. 180 at 184.
4. (1947) 12 W.A.C.A. 137.
5. Cap. 115, Laws of the Federation of Nigeria and Lagos (1958 ed.)

the sum of £142.10s. as maintenance. There being no Nigerian local enactment which gave the wife the right to sue her husband for maintenance in an independent action, the plaintiff (Mrs. Okpaku) brought her action under the English Summary Jurisdiction (Separation and Maintenance) Act, 1895. The Nigerian Supreme Court granted her maintenance in the sum of £100, but this was reversed by the West African Court of Appeals which held that the Summary Jurisdiction (Separation and Maintenance) Act, 1895

> "was not an Act of general application as it did not even apply to Scotland and Ireland",[1]

and so it did not apply in Nigeria. The court pointed out, however, that its judgment did not affect the right to maintenance which were sought in proceedings ancillary to a matrimonial cause. Unfortunately, Okpaku's case was in turn reversed in 1961 by the Nigerian Supreme Court because the West African Court of Appeal decision in Young v. Abina[2] — that "England is the test of geographical generality" - was not cited to the same court in the Okpaku case. Hence in Lawal v. Younan[3] Brett, F.J. held that the decision in Okpaku v. Okpaku must be regarded as per incuriam.

The foregoing cases illustrate the difficulties which are caused in Nigerian law by the "slovenly expression" statutes "of general application" in England. It may be objected that

---

1. (1947) 12 W.A.C.A. 137, at 138.
2. (1940) 6 W.A.C.A. 180.
3. (1961) 1 All N.L.R. 245, at 256.

the simultaneous application of Scots and English statutory law is not desirable for Nigeria. This may not constitute such a serious obstacle. Peculiarly Scottish or English statutes could be excluded, leaving only those which apply generally in both countries. At any rate, Nigeria is a multifarious laws laboratory and in the field of tort conflict of laws the double-action ability rule[1] implies the application of more than one system of law.

Finally, it may be thought that applicability of a statute in Scotland is now ruled out of consideration in light of the weight of authority against such an extension. But some writers - whose views we share - still entertain some reservations. Professor Allott proposed the test of public general Act of the English or United Kingdom legislature, and further that the statute need not apply in all localities in the United Kingdom, "though this last may give rise to controversy in certain instances."[2] And Professor Nwabueze is still more uncertain in his mind as to the correct test. All the decisions we have had on the controversy, he says, "have failed to establish any clear test on the matter."[3] We agree with this opinion, with due respect.

---

1. See e.g. Philips v. Eyre (1870) L.R. 6 Q.B. 1, and Benson v. Ashiru (1967) N.M.L.R. 363 at 365.
2. Allott, New Essays in African Law p. 51.
3. Nwabueze, The Machinery of Justice in Nigeria p. 18.

3. Limiting the Received English Laws

To recapitulate, the English rules of private international law received into Nigeria are, principally, those of the common law, equity and the statutes of general application. In addition to these, the old law[1] tied the practice and procedure of the Nigerian courts in probate, divorce and matrimonial causes and proceedings "in substantial conformity with the practice and procedure for the time being of Her Majesty's High Court of Justice in England". This position has been substantially changed by the Matrimonial Causes Decree,[2] so that today only in probate matters is Nigerian law tied to the law and practice for the time being in force in England.[3]

At first glance these different laws cover a lot of ground but in practice there exist provisions which empower the Nigerian courts to effect drastic curtailment of the received laws both in content and quantity. In the first place, the courts have power to reject English laws the application of which cannot be deemed as permissible by reason of unsuitability to local Nigerian situation, or if the received laws are in

---

1. See e.g. Section 16, High Court Law (Lagos State); s.13 High Court Law (Northern States); s.17 High Court Law, (Eastern States).
2. No. 18 of 1970, section 8 which abolished from Nigerian law the application of the current English law and practice in divorce and matrimonial causes. But see Part IX, s.98(1) of the Decree.
3. See Elias, "Towards a Common Law in Nigeria" in Law and Social Change in Nigeria at p. 258.

derogation of local Nigerian legislation.[1] Secondly, in applying the "Imperial Laws" the court is to read them with such formal and verbal alterations which do not affect the substance of the laws as to names, localities, courts, officers, persons, moneys etc. as may be necessary to render the laws applicable to local Nigerian circumstances.[2] Thirdly, as Dr. Agbede[3] has pointed out, it is possible to limit the received English law through the non-observance of the principle of renvoi. In this case, the question what is meant by "English law" would only receive the answer that it means internal municipal law of England excluding the rules of conflict of laws. This was the approach adopted in such cases as Adegbola v. Folaranmi[4] and Gooding v. Martin[5] until the approach was reversed by the Judicial Committee of the Privy Council in Bamgbose v. Daniel[6] which held that English private international law rules cannot be ignored when reference is made to "English law".

We may next note the practice and procedure rules of the Nigerian High courts in the small area where these courts are mandated to substantially conform with English rules of practice and procedure. Since it could be argued that the English practice and procedure form part of the English common

---

1. See e.g. Law (Miscellaneous Provisions) Act, s.45(2).
2. Ibid. s.45(3).
3. Agbede, op. cit. p. 63.
4. (1921) 3 N.L.R. 89.
5. (1942) 8 W.A.C.A. 108.
6. (1955) A.C. 107. See also, Coleman v. Shang (1961) A.C. 481 and Cole v. Akinyele (1960) 5 F.S.C. 84.

law the limitations on the latter which we shall consider under the next section are applicable to practice and procedure as well. It has been suggested[1] that as practice and procedure possibly embraces cases as well as written rules, it would seem that the "local circumstances" limitation would apply to the written rules if not to cases as well.[2]

Having made these general observations on the limits to the received laws, we must now focus on some of the more controversial issues on which it is not certain whether there can be limits to the received law. These we shall group under (a) the local circumstances rule as applied to the common law and equity; (b) the limiting date of 1900 as applied to common law and equity; and (c) the need for a "lower" limiting date for the received statutes of general application (and common law). In the discussions that follow on (a) and (b) we have spoken mostly of the common law although the same conclusions apply to equity.

(a) Common law and the local circumstances rule

The unanimity which exists as to the power of the courts to exclude an English statute which is unsuitable to Nigerian conditions is lacking when one turns to common law. Here one finds that there are two schools of thought. The first is

---

1. See Cottrell, "An End to Slavishness? A note on Alli v. Okulaja" (1973) 17 J.A.L. 247 at 248-249.
2. But contrast Park, The Sources of Nigerian Law, p.37.

typified by Mr. Park[1] who writes that the Nigerian courts have no power to modify the received common law rules received into Nigeria even when such common law rules, say of private international law, fail to take account of local circumstances peculiar to Nigeria. In fairness to Mr. Park, it should be added that he admits that one's opinion cannot come down too decisively on either side of the question if such opinions were formed upon strict consideration of the relevant statutory provisions.

The Law (Miscellaneous Provisions) Act,[2] section 45 had, in subsection (1) received the common law, the doctrines of equity and the statutes of general application. Subsection (2) then goes on to state that "such Imperial Laws" shall be applicable only if permitted by the local Nigerian circumstances. And subsection (3) ordains that "the said Imperial Laws" shall be read with formal or verbal alterations not affecting the substance, etc. On the one hand, then, the reference to "Imperial Laws" appears to imply that all three received laws can be modified or limited. But on the other hand, Mr. Park points out, there is nothing like an "Imperial common law and equity" in the legal dictionary, nor is it meaningful to speak of "reading" the common law and equity with verbal alterations ... as to names" etc. The doubt created

---

1. Park, The Sources of Nigerian Law, pp. 36-40, esp. pp. 36-37.
2. Cap. 89, Laws of the Federation of Nigeria and Lagos, 1958 edition.

by this and similar provisions[1] led Mr. Park cautiously to say "there is probably no provision that gives the (courts) a similar power (of modification) with regard to common law and equity".[2] But there is no doubt in the learned author's mind that the received common law and its rules of conflict of laws with all their technicalities must be applied, and not modified, by the Nigerian courts in the interests of predictability of result and the preservation of the legal system. "It is", he writes, "highly desirable that the courts' decisions should always result in justice, but the duty imposed upon them is not a general one to administer justice, but rather to administer the rules of law that they are directed to apply by the relevant statutory enactments."[3] In adverting specifically to the issue of justice Mr. Park was answering Professor Allott[4] who had made a contrary submission elsewhere to the effect that courts can modify an unsuitable common law rule in their inherent power and duty to administer justice. Mr. Park then added that the production of unjust results is not a feature of the common law. As he stated, "the common law and equity are not full of harsh rules"[5] This, for him, would be sufficient reason why we should not be preoccupied with issues of modification of the common law.

---

1. E.g. section 28A (1) and (2), High Court Law, Northern States.
2. Park, The Sources of Nigerian Law, p. 36.
3. Park, op. cit. p. 39. Emphasis added.
4. Allott, Essays in African Law, p. 25.
5. Park, op. cit. p. 39.

Two particular objections can be raised against Mr. Park's views in so far as they relate to conflict of laws. One of these has been well expressed by Akanle who said:[1] "The statement that a court is not empowered to administer justice but to enforce law, if accepted in argument, would be a matter of surprise to a private international lawyer, not only in the common law world but also in the civilian countries. For the general policy consistantly being pursued by judges and legislatures alike in the development of conflicts rules is to ensure fairness, convenience and justice."[2]

The other objection pertains to the statement that the common law is not full of harsh rules. The English common law rules of conflict of laws do not bear out Mr. Park. To illustrate briefly, the concept of domicile which is at the heart of English private international law abundantly illustrates the harshness of the common law to women and children. Until the very recent statutory advances,[3] domicile remained for a long time one of the last "barbarous relics of a wife's servitude".[4] And in Indyka v. Indyka[5] Lord Pearce referred to the injustice

---

1. Akanle, Some Aspects of Nigerian Private International Law of Family Relations: A comparative study: (Unpublished) Ph.D. Thesis, Univ. of London (1970) p. 48.
2. See Graveson, "Judicial Justice as a Contemporary Basis of English Conflict of Laws" in 20th Century Comparative and Conflicts Law (1961) pp. 307-320.
3. See e.g. Domicile and Matrimonial Proceedings Act, 1973 which has now conceded an independent domicile to the wife and has clarified the ascertainment of the dependent domicile of the child. See sections 1,3 and 4.
4. Gray v. Formosa (1963) P. 259 at 267.
5. (1969) 1 A.C. 33 at 80. Later at p. 88 Lord Pearce said that "the situation between men and women is, for social reasons inherently untidy in the field of matrimonial jurisdiction".

involved in the use of domicile for the adjustment of differences between married people "in accordance with the community to which they do not belong". In the area of polygamous marriages the English common law conflicts rules, having drawn an artificial "charmed circle of civilised nations", for a long time denied matrimonial relief to polygamous spouses because English law rules were not designed for such types of marriages. The consequence was that many a spouse who had taken economic or educational refuge in the United Kingdom were subjected to considerable hardship.[1] Finally the whole process of statutorily as well as judicially according paramountcy to the child's interests and treating father and mother on an equal footing in guardianship and custody cases shows the harshness of the erstwhile common law rules on these matters.

The other - and certainly more desirable - school is that led by Professor Allott who maintains that undoubted power inheres in judges to modify a rule of English common law for local application if its non-modification would produce inconvenience and injustice. This power does not require the sanction of express statutory provision before it is exercised, as Mr. Park would insist upon. There can be no doubt that if the courts shirked their duty to do justice in administering the law, the legal system would,

---

1. See e.g. Sowa v. Sowa (1961) p. 70 But see now, The Matrimonial Proceedings (Polygamous Marriages) Act, 1972.

as Professor Allott rightly says, "be brought into justifiable contempt."[1]

The common law field of conflict of laws is not an area where all hopes should be rested on the legislature. Parliament, truly, does fill gaps, remove hardships and correct injustices, but essentially in the conflict of laws, "its role has been completely subordinate to that of the courts."[2] In this kind of situation where the legislature moves so slowly and only intersticially, too much faith in the removal of all common law conflict of laws ills by the lagislature would be a dream and would only lead to a widening of the gap between law in the statute books and the law in action. Therefore, if a Nigerian judge believes that the existence of a common law rule of conflict of laws causes or contributes to an unjust result, he should legitimately be able to modify or change the common law rule without waiting for express legislative authorisation. As Diplock L.J. (as he then was) rightly observed, it is better to "adapt the common law in a way that makes common sense to the common man".[3]

(b) Does the date "1900" limit the received common law and equity

There has never been a doubt that the limitation phrase "1st day of January, 1900" applies to the received statutes of general application. But does the date apply

---

1. Allott, Essays in African Law p. 25.
2. Graveson, "Philosophical Aspects of the Conflict of Laws" (1962) 78 L.Q.R. 337, 349.
3. Indyka v. Indyka (1966) 3 W.L.R. 603 at 615 (Court of Appeals).

also to the common law and equitable rules, including private international law? Again here, as in many fields of Nigerian law, two views have been vying for ascendancy and authenticity.

The first view[1] states that Nigeria has received the current English common law, not that of 1900. "It is the current common law and equity of England which is in force within Nigeria", writes Park.[2] The supporting arguments advanced are intricate and may be summarised as follows:

(i) that the statutory provision - the reception statutes - importing common law contains no provision for its dating, unlike the express limitation placed on statutes of general application and also unlike the provision on probate etc. causes which were received "timelessly", that is, according to the law and practice <u>for the time being</u> in force in Her Majesty's High Court of Justice in England;

(ii) that the English common law is immutable, that is because the common law remains changeless and limitless it would be artificial to purport to limit it to any specific date;

(iii) that the Nigerian judges themselves have in practice assumed that it is the current common law of England which is in force in Nigeria, including its rules of conflict of laws.

---

1. Park, <u>The Sources of Nigerian Law</u> pp. 20-24.
2. Park, op. cit. at p. 21.

The other view[1] argues that the common law received into Nigeria is the pre-1900 common law just as is the position with pre 1900 statutes of general application. Accordingly, a pre-1900 common law rule of private international law which is later abrogated by an English statute or overruled by a subsequent English decision continues to apply in Nigeria. The basic argument here is that if the legislature had intended the application of current English common law, it would have utilised such well-known expressions such as "the common law which shall be applied in Nigeria shall be the common law for the time being in force in England". But the legislature has not done so, and it is no use forging arguments out of the employment of punctuation marks in the various reception statutes. Based upon an analysis of the"historical factors" leading to the successive reception of English law in the different jurisdictions in Nigeria plus a consideration of the legislative history and travaux preparatoires to the reception Bills, Dr. Akanle has come out very heavily in favour of the latter (Allott's) view. Dr. Akanle writes:

> "Our conclusion, therefore, is that it is the common law of England as at 1st January, 1900, and consequently its rules of private international law as at that date that were imported into Nigeria. An interpretation that it is the current common law of England that is transported into Nigeria is undesirable and objectionable. It is contrary to constitutional principles and inconvenient in the sense that it unusually ties Nigerian courts to the apron strings of the English courts. It suggests that the Nigerian courts are not competent to develop the basic law received into the country in accordance with the national requirements

---

1. Allott, in (1965) I.C.L.Q. Supplementary Publication No. 10, p.38; see also, Allott, New Essays in African Law pp. 31-35.

> Indeed, an adoption of this view ... appears a real danger which may give rise to stagnation in legal thought. For on this basis Nigerian judges are no more than a collection of judicial instruments for the mechanical application of a ready-made English common law from day to day. It is therefore rejected."[1]

With respect, we are not so sure one can be categorical over this controversy one way or the other. The pragmatic need for an autochthonous growth of Nigerian conflicts of laws seems the main reason we can urge for favouring the view of limiting the received common law to 1900. Beyond that, every thing is fluid. For on the one hand, as Park demonstrates, Nigerian judges have followed at least one post-1900 English common law rule. Thus, the English common law rule that an employer is vicariously liable for the torts of his employee where the tort was committed purely for the servant's own benefit was first laid down by the House of Lords in 1912 in Lloyd v. Grace Smith and Co.[2] That post 1900 rule was invoked and followed 43 years later by the Privy Council in the Nigerian case of United Africa Co. Ltd. v. Saka Owoade.[3] But on the other hand, the Nigerian judges have limited their vision in some specific conflict of laws cases to the pre-1900 English common law rules. Thus, in Benson v. Ashiru[4] the Supreme Court of Nigeria in 1967 followed

---

1. Akanle, op. cit. p. 40.
2. 1912 A.C. 716, overruling Court of Appeal decision, (1911) 2 K.B. 489.
3. (1955) A.C. 130.
4. (1967) N.M.L.R. 363, at 365.

the century-old English case of Philips v. Eyre[1] notwithstanding that that decision (arguably)[2] and its progeny, the heavily criticised Machado v. Fontes[3] have been overruled.[4] If the motive for the decision of the Supreme Court of Nigeria is that the common law is immutable then, with respect, we cannot agree for, in the frank words of Diplock L.J. (as he then was), "let us not pretend that the common law is changeless."[5]

The real pity is that the Nigerian courts have, with possibly one exception, never attached any significance or advertw specifically to the date of English decisions on the common law. In an old obiter dictum Petrides, J. said:

> "The Statutes of Limitation ... were statutes of general application in force in England on January 1, 1900, and they, in common with other statutes of general application which were in force on that date, are, together with the common law and the doctrines of equity which were in force in England on the same date, in force within the jurisdiction of this court."[6]

It is submitted that this isolated obiter dictum of Mr. Justice Petrides does not advance the argument far in any particular direction. For on the one hand it may be said (and in favour of Petrides, J.) that the very setting of fixed dates by the different reception statutes is an

---

1. (1870) L.R. 6 Q.B. 1.
2. See Kartsen (1970) 19 I.C.L.Q. 24 at pp. 37-38.
3. (1897) 2 Q.B. 231.
4. See Chaplin v. Boys (1971) A.C. 356 at 377 (per Lord Hodson); 388 (per Lord Wilberforce).
5. Indyka v. Indyka (1966) 3 W.L.R. 603 at 615 (Court of Appeal).
6. Solomon v. African Steamship Company (1928) 9 N.L.R. 99 at 100. Emphasis added.

acknowledgement that judge-made law differs from date to date, it being Nigeria's preference to receive the common law as of 1900. But on the other hand, it may be argued that the reception statutes really adopted the common law system, not just a given set of rules and precedents that existed in England at some named date. On this basis one would not be concerned with the limitation date at all.

If Nigerian conflict of laws is to be freed from the "apron strings" of the English law, and if Nigerian judges are in truth, as we believe, not mere robots mechanically applying a ready-made English law, is there any justification for confining the received common law to either the pre-1900 or post 1900 rules? And this is where Professor Nwabueze comes in. Since a legitimate basis now[1] exists for doubting whether it is the common law of England that was specifically received, Professor Nwabueze was of the opinion[2] that it is irrelevant to debate the scope of the date "1st January 1900" since, he submits, it is neither the common law in force in England in 1900 nor the current common law in force in England which has been received into Nigeria.

---

1. See Matrimonial Causes Decree No. 18 of 1970 section 81(5) which provides for the recognition of foreign divorce decrees "under the rules of private international law". English rules, specifically, have been dropped.
2. Nwabueze, The Machinery of Justice in Nigeria, p. 22.

(c) Case for a lower limiting date of received statutes of general application etc.

The central submission under this section is that if there can be an upper limitation date of 1900 as regards the received laws, there exists an equally potent reason for a downward revision of the reception date, earlier than which it should be said the particular English law would not be applicable or "received" into Nigeria. Considered in light of the "current" law version of the received law, Nigeria would, under the existing arrangements, have received English common law from Adam to Armagaddon. This is not a desirable state of affairs.

If it be objected that our proposal here would lead to gaps in the received law, it need not follow that there would be gaps in Nigerian law as a whole. Indigenous customary law and equitable considerations, comparative selective borrowings from other African, Commonwealth and common law legal systems would be of assistance in such a situation. We would add, however, that we have concentrated in this discussion mainly on statutes of general application.

It might have been thought that the cases[1] of Dede, Re Sholu and Okpaku which sought to include Scotland in the test of generality of application of statutes were impelled by this logical reasoning: that if a United

---

1. These cases are discussed above.

Kingdom statute did not apply even in Scotland which is politically under the same legislature as England and which at the same time has socially, economically and culturally similar institutions and background as England, then such statute must have been so peculiar in its purposes that it would not merit being exported and applied abroad in former colonies as Nigeria which were, after all, problems jointly for England and Scotland. But Young[1] and Lawal[2] cases and leading writers proposed otherwise.

One only needs to see the consequences of the accepted test to believe the absurdity of "England as the test of geographical generality."[3] What has never been emphasised is that all the enactments speak of the received "Imperial Laws".[4] If the test of generality had extended to Scotland a wholesome effect would have been that the "Imperial Laws" in the form of statutes of general application which Nigerian enactments explicitly said were received would be confined to the two centuries period between 1707 (when the "mother" or "Imperial" country came into being) and 1900. Statutes between those dates would be more manageable and intelligible. Nigerian legal system would be saved the problems of decadent and obsolete English statutes. Without the

---

1. Young v. Abina (1940) 6 W.A.C.A. 180.
2. Lawal v. Younan (1961) 1 All N.L.R. 245.
3. (1940) 6 W.A.C.A. 180.
4. E.g. Section 45 (2) and (3), Interpretation Act, Laws of the Federation of Nigeria and Lagos, Cap. 89 (1958 ed.).

suggested drastic limitation, albeit only as a first step, courts and even the legislatures may continue to formulate tests of what amounts to statutes of general application in England over such a vast period as is currently enclosed, but it would be doubtful if such efforts would avail anything. Nigerian lawyers need to fully appreciate what it is to search for a statute of general application: hunting the haystack for the traditional needle is a trifle to it.

Mr. Park in a spirit of optimism writes that

> "perhaps the most striking feature of the practical working out of the introduction of English statutes into Nigerian law is that what would appear at first sight to have been a very sweeping measure has in fact resulted in the reception of comparatively few Acts."[1]

Mr. Park then proceeds in the same page to state that all in all only some twenty to thirty English Acts have been held or assumed to be in force in Nigeria. A statute certainly can be in force even though no specific litigation has turned upon it. This is the greatest unknown factor in the Nigerian legal situation. Since judicial declaration as to what statutes of general application apply in Nigeria proceed piecemeal, we can take neither Mr. Park's nor the Lawal v. Younan[2] conclusions on actual numbers as infallible guides. It is not even certain that those conclusions approximate to rough guides.

---

1. Park, The Sources of Nigerian Law, p. 35.
2. (1961) 1 All N.L.R. 245.

The absurdity of retaining old pre-Union English statutes in Nigerian law shows further in the fact that even if such statutes have not been repealed in England, it does not mean that the statutes' underlying policy and philosophy when first enacted has remained unchanged. The fact that a statute of general application is still on the English statute books today does not mean that English policies and interests with respect to the statutes remain unaltered. It is, no doubt, possible for the policies and interests to remain the same, but it is more probable that they do not remain unchanged.

It presumably would shock some people to learn that English statutes 900 years old are still in force in Nigeria! It would be recalled that in its migration to West Africa, English law's last port of call was Lagos, Nigeria. The cut-off date of 1st January 1900 therefore means that Nigeria is the inheritor of numerically by far the largest amount of the debris of antequated English law. The Statutes of Distribution, 1670 and 1685,[1] the Common Law Procedure Act, 1852,[2] to mention just three, have been among English statutes held to be still in force in Nigeria. One only has to ponder over what ex-Attorney-General Geoffrey Bing, found for Ghana for one to

---

1. Cole v. Cole (1898) 1 N.L.R. 15; Re Adadevoh (1951) 13 W.A.C.A. 304; Bamgbose v. Daniel (1954) A.C. 107.
2. See Ribeiro v. Chahin (1954) 14 W.A.C.A. 476.

appreciate how antediluvian Nigerian law must be. Based upon a study of one area of Ghana law this is what Bing wrote:

> "We found that, apart from the law of Succession under African custom, the administration of estates of deceased persons was governed in Ghana by no less than thirty six enactments. Of these thirty one were English statutes and five Colonial Ordinances modifying in some particular or another this British legislation. Of the English statutes which still applied in 1961 the earliest was 1285. Four others of the laws concerned dated from the same reign, that of King Edward I. Three more Statutes were from the time of Edward III, having been enacted at various dates between 1330 and 1357. Five were Acts of the Tudor Parliaments, two from the time of Henry VIII, two from that of Edward IV and one in the time of Elizabeth I. Three other enactments still applying had become law in the reign of Charles II and one during that of James II. One more came from the time of William and Mary. There was one Statute of George III, two of George IV, two of William IV and eight from the earlier part of Queen Victoria's reign. They embraced in all a legislative history of 584 years. The most recent of them had been enacted 92 years previously and the earliest of them 676 years before."[1]

If any phrase would well describe these antediluvian enactments foisted on Nigeria and other ex-colonies, it would be "strange gods."[2]

Whatever reasons there may be for not revising the reception date downwards for common law and equity, it is submitted that different considerations should apply to statutes of general application. Legislation of all laws,

---

1. Bing, Reap the Whirlwind: An Account of Kwame Nkrumah's Ghana from 1950 to 1956, at p. 200.
2. The phrase is borrowed from T.B. Smith's Inaugural Lecture: "Strange Gods: The Crisis of Scots law as a Civilian System" Inaugural Lecture, 17 Oct. 1958, University of Edinburgh, Reprinted in T.B. Smith, Studies Critical and Comparative (1962) p. 72 and in (1959) Jur. Rev. 119.

is more closely a product of particularly pressing social, economic or political needs in any country. That society's ethos and opinions serve as barometers for any piece of legislation. Realisation of this point prompted Western Nigeria in 1959 to pass its own law[1] abrogating English statutes of general application from her statute books. It is a bold and far-sighted initiative although the effort may be described as a false start in that the Western Nigeria legislation still did not apply to matters within Federal legislative competence. Such matters which are in many instances tied to English statutes of general application have force and effect in Western Nigeria. It is our plea that under the imprimatur of federal or national legislation, all statutes of general application should be abrogated from Nigerian law.

It certainly is much more in accord with common sense that the received law of guardianship and custody in Nigeria should be governed by current and ever-changing philosophies of child welfare than to be governed by the halting and half-hearted child welfare philosophy embedded in the Guardinaship and Custody of Infants Acts of the last century. In the guardianship field the "local circumstances" rule could not be relied on to abate the rigours of the father's pre-eminence in customary custody questions: that is, in the context of the customary society

---

1. Laws of England (Application) Law, Cap. 60, Laws of Western Nigeria, 1959.

in Nigeria the "local circumstances" rule does not and cannot ameliorate the "dreadful" rule of the near-inviolability of the father's rights.

In advocating a precise or general downward revision of the received statutes of general application, we have taken account of an uncontrovertible political reality: Nigeria's political ties were with Britain, not with England.

When Professor Allott suggests his tests of statutes of general application to include

> "Public general Act of the English, or United Kingdom legislature (as the case may be)",[1]

he takes us to pre-Union English enactments. The legitimacy of this may be questioned. How, logically, can a pre-Union English legislation have force in Nigeria when Nigeria only recognised the legislative acts of the "Queen of Great Britain."?[2]

It may be objected that when a foreign law is received, it can only be received as a whole and not in arbitrary segments. But there is no evidence that even without limiting the "limiting" date to 1707 all the English statutes of general application which are capable of application have been received into Nigeria. Professor Seidman[3] has demonstrated that there can be - and there

---

1. Allott, New Essays in African Law, p. 50.
2. See Treaty of Cession of Lagos 1861, Art. 1. It should be added that although the "Queen of Great Britain" is used in all the Articles of the Treaty, there is also one (incongruous?) reference in Article 1 to the "Queen of England".
3. Seidman, "The Reception of English Law in Colonial Africa Revisited", (1969) 2 E.A.L.R. 47.

has been - the reception of English law in Africa only in form, not wholly in substance. Professor Seidman must have the last word:

> "The (English) Welfare statutes required a whole body of administrative officials charged with their enforcement - factory inspectors, workmen's compensation officials, and the like. To 'receive' British law without making affirmative provision for these activities was to ensure that the Welfare State legislation would not be received in Africa at all."[1]

Again, "the ameliorative social welfare statutes of Great Britain were not imported into Africa under the reception statutes. What was received was a truncated, limited version of English law - and a version not merely old-fashioned, but skewed in a particular direction."[2]

And finally,

> "English law may have nominally been the general law of the colonies; but it was a peculiar form of English law that had excised from its corpus any of the democratic forms or economic protections which are claimed to be the brightest jewels in the English legal Crown."[3]

It may be said that our submission on the need for fixing a lower (in addition to the existing upper) reception date is irrelevant since conflict of laws is, in any case, of recent origin and is unencumbered by legal problems originating in the distant past. This may be conceded. But looking at a wider terrain, there is an urgent need for delimiting further the very wide dates of

---

1. Ibid at 71.
2. Ibid at 72.
3. Ibid at 78.

the reception statutes. The ultimate legal need of Nigeria in this connection, we submit, is to expurge completely from her statute books the troublesome "statutes of general application."

In conclusion, the application of English statutes in Nigeria presents two fundamental problems: the first is of a political character and the second pertains to the theoretical foundations of the conflict of laws. First, then, while we may see little political objection to accepting and applying decisions of English courts as persuasive authority in Nigeria, the same cannot be said about statutes. For the application of the legislative enactments of the legislature of another country calls into question the sovereignty of the "receiving" country. And this leads to our second comment. The theoretical questions that have for years been debated in private international law is on what basis foreign law is applied by the courts of an independent nation. In answering this question, a number of theories were evolved, all of which were aimed at reconciling the principle of territorial sovereignty with the application of foreign law. These theories - the comity[1] theory, the vested

---

1. Among the vast literature on comity, the following is but a sample: Story, Commentaries on the Conflict of Laws (1834), Lorenzen, Selected Articles on the Conflict of Laws (1947) , Cheathem (1945) 58 Harv. L. Rev. 361, 373-378, Yntema, (1966) 65 Mich. L. Rev. 1.

rights[1] theory and the local law[2] theory - recognised the incongruence of a situation where a sovereign state applied the law of another foreign sovereign, and each of the theories represented linguistic devices to overcome the hurdle of territorial sovereignty and the application of foreign law.[3] For example, as Dicey once wrote:

> "English judges never in strictness enforce the laws of any country but their own, and when they are popularly said to enforce a foreign law, what they enforce is not a foreign law but the right acquired under the law of a foreign country."[4]

In private international law, to expressly apply the law of another foreign sovereign without rationalisation is detestable enough. But when Nigerian law takes over the statutes of two foreign legislatures - the pre-Union English and post-Union British parliaments - it ignores completely basic theoretical objections raised in conflict of laws to the application of foreign law.

---

1. See e.g. Dicey, The Conflict of Laws; Beale, Treatise on the Conflict of Laws Vol. III.
2. See e.g. Cook The Logical and Legal Bases of the Conflict of Laws (1942) Cap. 1; Nygh, Conflict of Laws in Australia 2nd ed. pp. 82-83.
3. These theories have been discussed by Morris, Conflict of Laws 518-526; Anton, Private International Law 21-33.
4. Conflict of Laws, 5th ed. p. 184.

4. The Federal Constitution

(i) General

Since Nigeria abandoned a unitary form of government with a centralised legal and judicial system on October 1st, 1954 (when federalism was established) the country many times witnessed periods of considerable emphasis on Regional or State autonomy in the legislative spheres. A situation of excessive Regionalism or state-centredness creates the danger that radical divergencies in the forms and contents of the law might ensue. And this would, naturally, lead to the evolution of a type of conflict of laws the resolution of which would require, in the words of Professor Elias, "professional knowledge of a kind for which the traditional training at the English Bar would soon become hopelessly inadequate."[1] This trend to over-capitalise on the State's legislative competence was, however, checked in January 1966 when Military rule was introduced into Nigeria. But even before this momentous event the Nigerian Constitution-makers had sought to devise means of keeping potential Federal-state or inter-state conflicts at a minimum by appropriate provisions which reinforced the carefully worked-out division of legislative powers.

---

1. Elias, The Impact of English Law on Nigerian Customary Law, 31-32.

As far as guardianship law is concerned, the 1963 Republican Constitution[1] provided that the Federal Parliament shall have exclusive powers to make laws with respect to

(i) Marriages other than marriages under Moslem law or other customary law; annulment and dissolution of and other matrimonial causes relating to, marriages other that marriages under Moslem law or other customary law;[2] and

(ii) Any matter that is incidental or supplementary to any matter mentioned in the exclusive legislative list or to the discharge by the Government of the Federation and its functionaries - the courts, officers etc. - of any function conferred by the Constitution.[3]

It is evident that a dexterous interpretation of the Constitutional provision would bring so many matters within the legitimate embrace of the federal government's incidental or supplemental powers.

Under the constitutional provisions quoted above, "marriage" referred only to monogamous marriage which was regulated by the Marriage Act.[4] Matrimonial Cause was not

---

1. No. 20 of 1963.
2. Item 23, Exclusive Legislative List, Part I of the Schedule.
3. Item 45, Exclusive Legislative List, Part I of the Schedule.
4. Cap. 115, Laws of the Federation and Lagos, 1958 edition.

defined in the constitution but it had, by virtue of the State Courts (Federal Jurisdiction) Act[1] and the High Court of Lagos Act,[2] the same meaning as "matrimonial cause" under the English Supreme Court of Judicature (Consolidation) Act, 1925, section 225. This meaning of "matrimonial cause" has now been abrogated by section 114 (1) of the Matrimonial Causes Decree, 1970, which, in addition to maintaining the usual meaning of matrimonial cause under English law now extends that term, for Nigerian purposes, to include matters normally considered to be incidental or supplementary to matrimonial cause as provided by Item 45 of the Exclusive Legislative List of the 1963 Constitution. Thus, under section 114 (1) of the Matrimonial Causes Decree, 1970, "matrimonial cause" includes

> "(c) proceedings with respect to ... the custody or guardianship of infant children of the marriage."

Because of the ambiguity surrounding the term "children of the marriage" as employed (and defined) in the Matrimonial Causes Decree it could be argued that matrimonial cause now extends to regulating some custody-guardianship under

---

1. Cap. 177, Laws of the Federation and Lagos, 1958 edition, s.4.
2. Cap. 80, Laws of the Federation and Lagos, 1958 edition, s.16. This law applied in the former federal territory of Lagos. The two laws mentioned in notes 1 and 2 provided that the jurisdiction of the High Courts in, among other things, matrimonial causes shall "be exercised by the Court in conformity with the law and practice for the time being in force" in England. The Matrimonial Causes Decree, 1970, s.8 which abolished these provisions has also removed the controversy surrounding the meaning of the term "for the time being" whether it has an ambulatory effect or not. See Taylor v. Taylor (1935) 2 W.A.C.A. 248; Godwin v. Crowther (1934) 2 W.A.C.A. 109.

Islamic and customary law. This should not altogether be surprising, in view of the wide powers conferred by Decree No. 1 of 1966 on the Federal Military Government to make laws on "any matter whatsoever".[1] Therefore, what Kasumu and Salacuse wrote some years ago that "An independent action for custody ... of a child is not a matrimonial cause"[2] is no longer a true reflection of the law. It does not appear that the Matrimonial Causes Decree draws any distinction between custody suits brought as ancillary relief and custody suits instituted as an independent proceedings. The marginal notes to Section 71 of the Decree reads "power of court in custody etc. proceedings" and the section goes on to provide for the rule of the paramountcy of the welfare of the child.

We may now turn to a consideration of the specific conflicts of laws dimensions of the preceding general survey of relevant federal enactments. And we focus only on a provision which has immense potential for the future course of development of Nigerian private international law.

(ii) <u>The Constitution and Conflicts of Legislative Competence in Private International Law</u>.

Under the 1963 Republican Constitution the fear of conflict between Regional and Federal enactments was obviated by the provision on the supremacy of federal law in case of conflict. Section 69(4) reads:

---

1. Constitution (Suspension and Modifications) Decree, No. 1 of 1966, s.3(1).
2. Kasumu and Salacuse, <u>Nigerian Family Law</u> (1965) p. 252.

> "If any law enacted by the legislature of a (State) is inconsistent with any law validly made by Parliament, the law made by Parliament shall prevail and the (State) law shall, to the extent of the inconsistency, be void."

The State constitutions seldom, if at all, have any bearing on choice of law problems and even if they do have a bearing, the matter is now rendered almost academic.

Since the Military era in 1966, we now have the following provision as contained in section 3(1) of the Constitution (Suspension and Modifications) Decree.[1]

> "The Federal Military Government shall have power to make laws for the peace, order and good government of Nigeria or any part thereof with respect to any matter whatsoever."

Subsection (3) provides for the power of the State Military Governors to make laws with respect to the Concurrent Legislative List but only with the prior consent of the Federal Military Government. The same supremacy of Federal Military Government's Decrees over State Edicts in case of conflict between the two is, as under the 1963 Constitution, preserved.[2]

The words "peace, order and good government" might at first sight appear to exclude legislation on such a subject as the conflict of laws. But there does not seem to be any justification for such a restrictive interpretation. Judicial interpretation of the phrase "peace, order and good government" has endowed it with very wide

---

1. No. 1 of 1966.
2. Ibid, s.3(4).

constitutional law-making powers vested in a sovereign.[1] Private international law is not an excluded sphere. Examining the provision under section 3(1) Dr. Aihe has argued that "this is no doubt a blanket provision under which the Federal Military Government could take refuge any time by means of Decree. It could issue any Decree on any matter or subject whether or not such matter or subject has been covered by a State Edict."[2] In other words, unlike the pre-1966 position under the Constitution, the present Federal Military Government is no longer a "government of enumerated powers".[3]

Dr. Akanle has also made the same point when he considered the effect of s.3(1) of the Constitution (Suspension and Modifications) Decree, 1966. He said:

> "The effect of section 3 of the Decree No. 1 of 1966 is obscure. For if the Federal Military Government has powers to make laws for any part of Nigeria 'with respect to any matter whatsoever', nothing remains for the States to legislate upon. The provisions as to the legislative competence of the States are either nugatory or at least window-dressing. Indeed, on this basis Nigeria is a Federation only in name, and a unitary State in practice."[4]

Not satisfied with this view of section 3(1), Dr. Akanle proceeds[5] to offer what he calls a "better interpretation"

---

1. See Ibralebbe v. The Queen 1964 A.C. 900 at 923; Liyanage v. The Queen 1967 A.C. 259 at 272.
2. Aihe, "Fundamental Human Rights and the Military Regime in Nigeria: What Did the Courts Say?" (1971) 15 J.A.L. 213 at 215.
3. Kansas v. Kolorado (1907) 206 U.S. 46.
4. Akanle, op. cit. p. 58.
5. Ibid at pp. 58-59.

of the provision which is to the following effect: that the civil crisis and war in Nigeria from 1966 to 1970 have necessitated the conservation of reserve powers by the Federal Military Government who may utilise this power "to override State laws which undermine the interests of the nation as a whole". Thus, while States still have legislative competence on both the residual and concurrent lists there is now introduced the important qualification that States can only legislate on the concurrent list "with the prior consent of the Federal Military Government". The purpose of this arrangement being, he says, "to ensure a greater degree of co-ordination between Federal and State laws on matters falling within the concurrent list". Furthermore the arrangement prevents the "shifting of categories between Federal and State laws in that it precludes the possibility of some matters of State law becoming Federal law through subsequent Federal legislation on them." The provisions are therefore "a welcome and fundamental change in practice without in the least affecting the autonomy of the States."[1]

These different views on the effects of the Constitutional Decrees may (and may not) well be so. The truth is that judicial interpretations of the provisions are not yet forthcoming. And as Decrees have cascaded since the Military regime, many of which have important bearings on the

---

1. Ibid. p. 59.

Constitution, no one at the moment can be categorical on any particular viewpoint because the Constitutional picture is, at the moment, highly fluid. *

In any case, it was the 1963 Republican Constitution which gave the States their legislative competence. But the Federal Military Government has, since 1966, suspended certain provisions of that constitution leaving the un-suspended parts subservient to Federal Military Government Decrees. So that in Nigeria today Decrees promulgated by the Federal Military Government are superior to the Constitution. This has the effect in our view, first, that nothing can be claimed by the States under the Constitution except what is conferred by Decrees; and secondly, it seems that "there is now nothing left against which to test the validity of Decrees promulgated by the rulers."[1] That surely is a heavy price to pay for opting out of normal constitutional processes. But it may be doubted whether the provision will survive after the Military regime comes to an end.

Nevertheless there seem to be certain considerations which justify the framing of section 3(1) of Decree No. 1 of 1966 in deliberately wide terms. The provision is particularly useful in the field of conflict of laws and

---

1. See Aguda and Aguda, (1972) 16 J.A.L. 130, at 140. See also Lakanmi v. Attorney-General (Unreported), Suit No. S,C. 58/69 of April 24, 1970.

* The implications, from a constitutional point of view, of the military coupe d'etat in Nigeria on July 29, 1975, are yet to be seen.

public policy associated with it. It was Professor Goodrich who aptly observed that "conflict of laws rules become less workable ... if the sinister spectre of local public policy may deflect the otherwise appropriate reference to the law of a sister state".[1] Before the Military revolution in Nigeria there was little doubt that excessive regionalism had acted as a clog on the aspirations of the nation as a whole. This clog often found expression in Regional public policy which, for example, led to the constitutionally permitted discrimination as regards ownership of private immovable property;[2] another example was the preservation of the (customary) offences of adultery and drinking of alcohol which, while being in accordance with islamic sentiments and policies of abstinence, punishes those moslems who indulge in these things as to which other (non moslem) persons are at liberty.[3]

But with the ensuing crisis and civil war, in theory at least, a period was ushered in "where state boundaries no longer mean separate business, separate culture, separate ways of looking at things".[4] The provision in Decree No. 1 of 1966 pre-empting the State legislative competence in favour of the Federal Military Government on "any matter

---

1. Goodrich, "Foreign Facts and Local Fancies" 25 Virg. L. Rev. 26, at 35.
2. See section 27(3) Nigerian Constitution, 1963, No. 20 of 1963.
3. See sections 387, 388, Penal Code Law, Northern States.
4. Goodrich, "Foreign Facts and Local Fancies", 25 Virg. Rev. 26 at 34.

whatsoever", therefore, can be seen as a new-found formula for securing a more effective operation of private international law in our federation. For with this new expansion of federal power the function of state law is bound to decrease in some areas. In sanctioning such measure of expanded federal jurisdiction which has potentially major consequences for conflict of laws,[1] the Federal Military Government may be removing the necessity for Nigerians to answer the question whether the Nigerian conflict of laws has become a branch of constitutional law.[2]

The Federal Military Government has accordingly thought it fit to arrogate to itself an effective means of getting done whatever it willed. It is to be hoped that the Federal Government will make an imaginative use of this power in such areas where friction or conflict between State laws is most likely to arise. Accordingly, section 3(1) of Decree No. 1 of 1966 is a welcome provision.

5. The Interaction of Customary and English law

(a) Customary law and private international law.

The burden we have to discharge under this section is a general one of the possibility of resolving a true private international legal problem within a customary court and a customary law setting. Upon the answer would depend what

---

1 e.g in the treaty-making powers of the Federal Government.

2. Compare, Ross, "Has the Conflict of Laws Become a Branch of Constitutional Law?" (1931) 15 Minn. L. Rev. 161.

justification if any, there is for erecting two distinct bodies of laws of conflict - one English, the other customary - within the one field of guardianship in Nigeria, or whether to fuse both systems into one body of private international law. This issue we shall consider in the second half of this concluding section. Naturally, the co-existence of English and customary law has given rise to these problems and in their resolution rather meticulous provisions exist particularly in the High Court Laws[1] in the various jurisdictions. We are not directly concerned with this broader field of co-existence of English and customary laws. Our inquiry is directed at how customary law and courts would solve cases with foreign elements.

It is appropriate to begin with an historical statement pertaining to the explorers. Our submission is that if Dr. David Livingstone, Mungo Park, H.M. Stanley and a host of others had had disputes with natives in the course of their expeditions and missionary journeys, these explorers would most certainly have had to appear before native institutions or "courts" where the differences would be composed in mostly legal and non-political manner. The explorers may plead their British law, but it is equally clear that these native "courts" would not rush to judgment based upon what solutions would normally be yielded up in a

---

1. e.g. S. 34 High Court Law (Northern States); S.27 High Court Law (Lagos State); S. 27 High Court Law (Eastern States); S.12 High Court Law (Western State).

purely "internal" customary legal situation. That this was the practice we can only surmise inferentially from the few pronouncements that exist on indigenous African legal system prior to British rule. The Scotsman, Mungo Park, who explored the Niger River and died in Nigeria during the late 18th century, has given an account of the functioning of the legal system and the skill of the lawyers as he found among the Mandigo Muslims of present day Guinea. What he found was not different from what one would find in Europe. Mungo Park's words which are applicable equally to the Muslims of Northern Nigeria were as follows:

> "The frequency of appeal to written laws Koran and Sharia, with which the Pagan natives are necessarily unacquainted, has given rise in their palavars[1] to (what I little expect to find in Africa) professional advocates, or exponents of the law, who are allowed to appear and plead for plaintiff or defendant, much in the same manner as Counsel in the law courts of Britain. They are Mohammedan Negroes, who have made, or affect to have made, the laws of the Prophet their peculiar study; and if I may judge from their harangues, which I frequently attended, I believe that in the forensic qualifications of procrastination and cavil and the arts of confounding and perplexing a cause, they are not always surpassed by the ablest pleaders in Europe."[2]

The practice of law includes the practice of conflict of laws. And the above statement indicates that the Sharia lawyers would be perfectly at home with issues involving "Lawyers' Law", private international law.

---

1. Defined as a court of justice.
2. Mungo Park, Travels in the Interior District of Africa Vol. I, (Travels in 1795, 1796 and 1797) pp. 18-19.

Having said this as regards Sharia law, we must next note that it is commonly assumed that customary law, in stricto sensu, is irrelevant to private international law mainly because whilst conflict of laws is made up of considerable amount of rules, customary law has nothing comparable to offer - being an unwritten and mostly uncertain system. That contention is not sustainable even within the context of dynamic and highly commercialised economic activities where rules would be most essential. To hold that customary law knows no system of rules would be to ignore such consequences as arose from the introduction of commercial agriculture such as cocoa and groundnut farming into African traditional economy.[1] This, together with mining activities shot up the value of land and consequently traditional notions of land holding were revolutionised in several African ex-colonies. Furthermore, when human activities take place within the family-guardianship field where the touchstone of proper decision is principally equitable considerations, strict "rules" pale into insignificance and it would be sheer self deception to imagine that customary law is not capable of unravelling knotty problems of guardianship in private international law. Since the child's welfare can only mean one and the same thing within any particular setting the same guardianship-

---

1. See Asante, "Interests in Land in the Customary Law of Ghana: A New Appraisal" (1964-65) 74 Yale L. J. 848.

custody case should not produce different outcomes depending as to whether the suit was instituted under customary courts applying customary law, rather than under English-type courts applying the (general) English-type law.

Professor Alexander Neekam has vigorously protested at the assumption that "customary law does not have or is not able to have a conflicts orientation: that customary law is essentially a non-conflicts approach."[1] What conflict of laws prescribes is essentially that when certain law-fact pattern is presented, that is, when foreign elements are involved in any fact situation, what normally would be a solution under a purely internal law of the court should be made to yield to solutions built on other and foreign standards. Existence of "rules" may facilitate this goal, but "rules" are not a sine qua non. What is important is for a legal system to possess "conflicts sensitivities".[2] And there is no evidence that customary law lacks this quality. To dismiss customary law as irrelevant to private international law then becomes a matter of which perspective one adopts: the Euro-American or the African-customary perspective. As a keen observer has stated:[3]

---

1. Neekam, Experiences in African Customary Law, p.6.
2. Ibid at p. 1.
3. Ibid at 5.

> "It is the rule conscious attitude of the Western observer which, it seems to me, makes it so difficult for him to realise the conflicts potentialities of customary law. If it is true that customary law manipulates no rules in the articulated sense, then it must also be true that it can have no law of conflicts in our sense of the word. There is no law of conflicts in this sense without the manipulation turning on rules. But, though there is no law of conflicts, there may be conflicts sensitivity. Just as one can make decisions within the field of internal law without one thinking in terms of rules, one also can have conflicts sensitivities and one can emotionally find solutions taking foreign values into account without one having the least idea that one is making a conflicts decision or any consciousness of following rules about it."

The compartmentalisation of guardianship into the customary and non-customary legal spheres had to do with the fact that when the British type courts were established, there already existed a strong tradition of "domestic jurisdiction" in respect of guardianship and a few other matters which coincided with the British colonial policy of general aloofness from "native institutions". Thus, in furtherance of his indirect rule system Lord Lugard had instructed his political officers in Nigeria that

> "the British courts shall in all cases affecting natives ... recognise native law and custom when not repugnant to natural justice, and humanity or incompatible with any ordinance, <u>especially in matters relating to marriage, land, and inheritance</u>."[1]

Guardianship and land cases were added to the list of protected "native institutions" by the Supreme Court Ordinance of 1943[2] the provision of which is now substantially

---

1. Lugard, <u>Political Memoranda</u>, 1913-1918, p. 83, Emphasis added.
2. Cap. 211, Laws of Nigeria, (1948 ed.).

represented by section 17(1) of the High Court Law,[1] Northern States of Nigeria.

Such a situation as this - meant ostensibly to preserve customary law - was not conducive to the development of private international law rules within a customary law sphere.

The official attitude was firmly that all customary law was insensitive to conflict of laws situations and, progressively, that customary law was irrelevant altogether. This is how Professor Neekam summed up the whole situation:

> "From the very beginning the treatment of customary law foreshadowed its eventual disappearance: it was tolerated only, never encouraged, was relegated to a reservation, as were later the big game of the land, wherefrom it could not expand but where it could still be poached upon. It was put under the supremacy of a statutory system, highly motivated, but alien to it nonetheless, which automatically rendered obsolete whatever became inconsistent with it. It was put under the appellate jurisdiction of a common law court, of a court essentially foreign to it, the standards of which, openly different, meant continuous encroachments and limitations."[2]

And speaking about "rules" and customary law, it is fascinating to observe that the existing statutory choice of law provisions in the various customary courts laws[3] and area courts edicts[4] contain rules for resolving true private international law cases through the concession these provisions accord to systems of law other than customary

---

1. Cap. 49, Laws of Northern Nigeria, 1963 edition.
2. Neekam, Experiences in African Customary Law, p. 7.
3. e.g. Sections 19 and 23, Customary Courts Law, Western State, Cap. 31 Laws of Western Nigeria.
4. e.g. North-Central State, No. 2 of 1967.

law which may dictate the desired solution to a given problem with foreign elements. This belongs more appropriately to choice of law which is the theme we take up in Chapter Six. In the meantime we may illustrate customary laws' conflicts sensitivities by turning briefly to a few of the relevant provisions in the Area Courts Edicts.

It must be conceded at the outset that the Area Courts Edicts restrict the class of persons who are subject to the jurisdiction of area courts and in so doing it becomes unlikely that many cases involving "non-natives", that is, true private international law cases, would be heard by area courts.

It should be added that in Nigerian law "native" (and correspondingly, "non-native") is not a term of fixed legal meaning. It has different shades of meaning from one enactment to another. It is not the purpose of the present discussion to go into the details of this. But the following definition should be noted. Under the Federal Law (Miscellaneous Provisions) Act[1] "native" has the following definition:

> "Section 3. 'Native' includes a native of Nigeria and a native foreigner.
> 'Native of Nigeria' means any person whose parents were members of any tribe or tribes indigenous to Nigeria and the descendents of such persons; and includes any person one of whose parents was a member of such a tribe.
> 'Native foreigner' means any person (not being a native of Nigeria) whose parents were members of a tribe or tribes indigenous to some part of Africa and the descendents of such persons; and includes any person one of whose parents was a member of such a tribe."

---

1. Cap. 89, Laws of the Federation of Nigeria and Lagos, 1958 ed.

These definitions apply also to the law of the Northern States of Nigeria.[1] It is clear that under these definitions anyone outside Africa[2] would be a "non-native".

The substance of these definitions has been carried into the Area Courts Edicts which is our immediate concern. Area Courts have jurisdiction, according to section 15, over the following persons:

> (a) any person whose parents were members of any tribe or tribes indigenous to some part of Africa and the descendents of any such person;
>
> (b) any person one of whose parents was a member of such tribe; and
>
> (c) any other person in a cause or matter in which he consents to the exercise of the jurisdiction of the area court.

What amounts to consent under paragraph (c) is not clear. But the Area Courts Edicts furnish one indicator. There is provision that any person who institutes or prosecutes any cause or matter in an area court shall be deemed, in such cause or matter to be subject to the jurisdiction of the area court. This amounts to a kind of "consent".

---

1. See Park, The Sources of Nigerian Law pp. 102, 149.
2. The applicability of the definitions to Negroes of the diaspora in America and elsewhere is more arguable, as is the applicability to Arabs and whites of Northern and Southern Africa respectively.

To return to more immediate consideration, it is evident that area courts would not have jurisdiction in cases involving non-Nigerians, in a broad sense; and since non-Nigerians must be involved in a suit before normal private international law rules are called into operation, the possibility of applying private international law rules seems excluded. But in fact this is not so. When one turns to the law to be applied in a conflict of laws situation, reference must be made to sections 20-25 of the Edicts. A consideration of these sections indicate that they do not exclude the possibility of application of English or other systems of law. For example, section 20 which deals with applicable law in "unmixed" civil causes and matters stated in subsection (3) that

> "Nothing contained in this section shall be deemed to preclude the application by an area court of any principle of English law which the parties to any civil cause agreed or intended or may be presumed to have agreed or intended should regulate their obligations in connection with the transaction which are in controversy before the court."

That is the law for "unmixed cause" as may arise out of contractual "transaction". "Mixed cause" and "mixed civil cause" has been defined[1] as "a cause in which two or more of the parties are normally subject to different systems of native law and custom."

If party autonomy is permitted in an "unmixed" civil cause whereby the parties can freely choose complicated principles or

---

1. Section 2(1), Area Courts Edict, North Central State, No. 2 of 1967.

rules of English contract law as the governing law, it becomes clear how truly illogical the position would be if English or Scots common law rules of private international law cannot be chosen by the parties to be the applicable law in an area court where the civil case is "mixed"—such as a guardianship dispute arising from inter-racial marriage.

(b) Conflict of laws in Nigeria: customary, English or mixed?

The central question here is: should the private international law rules of guardianship in Nigeria operate at two levels - the customary and the English? Most commentators on conflict of laws and guardianship fields in Nigeria have come out overwhelmingly in support of an amalgam of the applicable rules in these fields. With respect, we see no justification for dissenting from such welcome suggestions. Customary law is deeply embedded in the fabric of social and legal life of Nigeria. English and Islamic law as the principal imported laws have interacted with customary law over the years,[1] but neither has succeeded in wholly supplanting or superseding customary law which continues to govern the lives of the majority of Nigerian people. The country's legal system appear to have settled for a perpetual coexistence of laws. It was this fact which recently led Professor Elias to suggest a most pragmatic approach to law in Nigeria. "What is both necessary and desirable", Dr. Elias writes, "is that there should be a

---

1. See e.g. Ajayi "The Interaction of English Law and Customary Law in Western Nigeria" (1960) 4 J.A.L. 48.

deliberate aim, especially at the national level, to foster the eventual harmonisation of the principles of English common law and statutes with those of locally enacted laws and of customary law into a general law for the whole country."[1]

In no country is private international law static. In the United States of America, for example, efforts are unrelenting especially through the American Law Institute's various Restatements of the Law and the efforts of the Conference of Commissioners on Uniform State Law "to reintroduce uniformity of laws and procedures into the bewildering conflicts borne of the free play of forces of pure federalism in the legal sphere".[2] And in the United Kingdom the polygamous marriage and other institutions have already been "received" into the private international law of Scotland and England - these countries being alive to the social fact that their doors had always been opened to the reception of different ways of life. Likewise, Nigeria which has at least two main streams of jurisprudence concurrently in force and flow - whether or not the waters have wonderfully mixed is beside the point[3] - should fashion a "mixed" system of private international law (rather than striving to forge a conflicts system under the beguiling title of "common law" of Nigeria). It is our submission

---

1. Elias, Law in a Developing Society (Inaugural Lecture). (1969) p 25
2. Elias, "Towards a Common Law in Nigeria," in Law and Social Change in Nigeria p. 255.
3. See Coker, Family Property Among the Yorubas 1st ed. p. 13.

that Nigeria has already taken a worthy step by promulgating the application of some rules of "private international law"[1] simpliciter.

With respect, Dr. Akanle is correct when he said that for purposes of private international law

> "the actual dualism of the Nigerian legal system should be considered immaterial. Being an all-prevading subject, one of the facts which Nigerian private international law must deal with and put into effect is that customary law is part of the Nigerian law. Its rules should be part of the substantive sources - the energising forces - which are constantly remaking the body of Nigerian private international law".[2]

Whatever justification there may be for not mixing the customary and non-customary rules into one private international law in Nigeria, it is particularly weak in the field of guardianship and custody where the one common denominator that dominates the field is the principle of the paramountcy of the interest and welfare of the child. The present position is to assign private international law and non-customary law jurisdiction in guardianship to the English-type High (and Magistrate and District) Courts, whilst assigning the customary law jurisdiction in guardianship to the customary and area courts. The fact, as we have pointed out, that in some situations that distinction is hard to maintain argues against any such artificial measures in guardianship law. As Dr. Oloyede rightly observed, "the division of jurisdiction over children

---

1. See s.81(5) Matrimonial Causes Decree, No. 18 of 1970.
2. Akanle: Some Aspects of Nigerian Private International Law of Family Relations: A comparative Study (Unpublished) Ph.D. Thesis, Univ. of London (1970) p. 72.

mainly on the ground of the form of marriage is undesirable and should be abandoned. The interest and welfare of the children must not mean different things in different courts".[1] We would add that the interest and welfare of the children should not mean different things under different laws.

It may be objected that our proposal for a mixed or fused private international law for all the legal regimes in Nigeria is bound to be patchy and undesirable. It may be patchy, but we submit that it is practicable and sound. The Right Honourable Lord Denning, M.R. some fifteen years ago urged the harmonisation of the African legal systems. The "discordant pieces" he urged, must be "fitted together into a single whole." And his Lordship added:

> "The result is bound to be patchwork, but we should remember that a patchwork quilt of many colours can be just as serviceable as one of a single colour, and is often more to be admired because of the effort needed to make it".[2]

Applying this statement to the "welfare" rule which is now a universal principle of law dominating the guardianship, custody as well as other fields of law, it would be artificial to compartmentalise the child's welfare within the customary and non-customary legal spheres in Nigeria. The two "discordant pieces" must be fitted together for the better realisation of a most desirable goal.

---

1. Oloyede op. cit. p. 244.
2. Foreword, (1957) 1 J.A.L. 1.

One obtains further enlightenment on this need for fusion of customary and English law of custody when one looks at the field of criminal law. The Criminal Code,[1] for instance, in proscribing the abduction of little girls, enacts:

> "Any person who unlawfully takes an unmarried girl under the age of 16 years out of the custody or protection of her father or mother or other person having lawful care or charge of her, and against the will of such father or mother or other person, is guilty of misdemeanour, and is liable to imprisonment for two years".[2]

It is interesting to note that this provision, among others, made no differentiation between children of customary marriages and those begotten out of Christian, Act or English-type unions. It would be no defence that a child so abducted is one under customary law and not under "English" law. The same policy, we respectfully submit, should be carried into the guardianship and custody fields, so that for private international law purposes, only one rule would apply - whether the guardianship case be one under native law and custom or under Islamic or the received English law.

---

1. Criminal Code cap 42, Laws of Federation of Nigeria, 1958 ed. See also Criminal Code, cap 28, Laws of Western Nigeria, 1959 ed.
2. Section 362 (Federal); s.302 (Western State).

CHAPTER THREE

THE CONCEPT OF THE PARAMOUNTCY OF THE WELFARE OF CHILDREN

A

1 Statement of the Rule or Principle

The Western Nigeria Infants Law, [1] Section 24, is phrased in similar words to those of Section 1 of the United Kingdom Guardianship of Infants Act, 1925, [2] upon which the former is based. Section 1 of the 1925 Act spells out in clear terms the principle of the paramountcy of the welfare of the child as follows:

> "Where in any proceedings before any court (whether or not a court within the meaning of the Guardianship of Infants Act, 1886) the custody or upbringing of an infant, or the administration of any property belonging to or held on trust for an infant, or the application of the income thereof, is in question, the court, in deciding that question, shall regard the welfare of the infant as the first and paramount consideration, and shall not take into consideration whether from any other point of view the claim of the father, or any right at common law possessed by the father, in respect of such custody, upbringing, administration or application is superior to that of the mother, or the claim of the mother is superior to that of the father."

Three preliminary points should be noted in connection with this provision. First, the Western and Mid-western Nigerian provision has a narrower definition of "court". There, the welfare provision applies only to the High Court

---

[1] Cap 49, Laws of Western Nigeria, 1959 ed. (Also in force in the Mid-West State).

[2] Cap 45 (15 and 16 Geo. V). The provision is in force in both England and Scotland although in England it is now consolidated in section 1 of the Guardianship of Minors Act 1971. The Act corresponds substantially to legislation in most parts of the Commonwealth. See J.W. Greig, "The Joint and Equal Guardianship of Infants in Various Legal Systems" (1924) 6 Jo. Comp. Leg. 238.

of Justice to the exclusion of the lower customary courts - quite unlike the position in Scotland and England. Secondly, the provision applies in, and is central to, all custody and guardianship proceedings - conflictual or purely internal. And thirdly, in England and Scotland, the reference in section 1 to "at common law" has been repealed.[1] The significance of this alteration will be seen presently.

2 Variation of the Statement of the Principle

The Scottish, English, Western and Mid-Western provisions do not represent the only method of expressing the formula of the paramountcy of the welfare of the child. All the lower courts laws in Nigeria - that is, the customary[2] and area[3] courts edicts - contain provisions on the paramountcy of the child's welfare but these have usually been phrased in a slightly different form. Thus, section 23(1) of the Area Courts Edict, North Central State enacts that

> "In any matter relating to the guardianship of children, the interest and welfare of the children shall be the first and paramount consideration."

The terms used here are discussed in a subsequent section below, but our concern now is with the phrase "relating to". It should be noted that in the United Kingdom

---

1 Guardianship Act 1973, Schedule 3.

2 e.g. Customary Courts Edict, no. 38 of 1966, s. 25(1) (Mid-Western State).

3 e.g. Area Courts Edict, no. 2 of 1967, s. 23(1) (North Central State).

Guardianship Act, 1973 [1] an analogous phrase - "in relation to" - has been resorted to when laying down the principle of parental equality in guardianship and custody.

The problem with the phrase "relating to" or "in relation to" is that it is too imprecise. Such matters as abandonment and abuse of child, adoption, alimony, divorce, annulment of marriage, bastardy, custody, juvenile delinquency, neglect and non-support of children, visitation of children, habeas corpus proceedings - all these, surely, relate in one way or the other to guardianship or upbringing of a child. Would it be conceivable that in a guardianship legislation the legislature intended to cover in one sweep all these other categories? This seems doubtful. What meaning, then, it may be asked, is one to attach to the expression "relating to" or "in relation to"?

Lord Greene M.R. in the English case of M.W. Investments v. Kilburn Envoy [2] which arose out of a tenancy agreement under the Validation of war-time Leases Act, 1944, once described the words "relate [or relating] to" as "obviously a very wide phrase". And in another English case, Brett L.J., defining the words "relating to any matter in question", said: [3] "It seems to me that every document relates to

---

[1] Chapter 29, 1973, S.1(1) [England] and S.10(1) (Scotland).

[2] (1947) Ch. 370 at 379.

[3] Compagnie Financiere v. Peruvian Guano Co. (1882) 11Q.B.D. 55, at 63.

matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose contains information which may - not which must - either directly or indirectly enable the party .... either to advance his own case or to damage the case of his adversary...."

The phrase "relating to" has also troubled the West African courts especially in connection with suits about ownership, possession or occupation of land. [1] Thus, in Kofi v. Brentuo, [2] delivering the judgment of the West African Court of Appeal in a Gold Coast [now Ghana] case, Graham Paul C.J. said the phrase "relating to" must be interpreted in a strict sense. As the Court said, "a suit relating to the ownership, possession or occupation of land must mean in this connection a suit in which some issue of fact or law is raised for the Court's decision as to ownership, possession or occupation of land". [3] In another West African Court of Appeal case [4] the Court cautioned against taking the phrase "relating to" as meaning "connected in some way or other with" the subject-matter in dispute. In the light of these problems it is surprising that the phrase continues to reoccur in Nigerian

---

1 See generally, Ekow-Daniels, "The Interaction of English law with Customary law in West Africa", (1964) 13 I.C.L.Q. 574, 586-89.

2 (1944) 10 W.A.C.A. 92.

3 Ibid. at 94.

4 Djabartey v. Awua II (1938) 4 W.A.C.A. 202 at 207 per Kingdon C.J., also at p. 209 per Webber C.J.

and United Kingdom legislation. It is respectfully submitted that the infelicitous phrase "relating to" as used in guardianship and custody legislation in the United Kingdom and Nigeria must be taken not in the sense of anything connected in some way or other with custody and guardianship etc., but in the sense of matters arising in the field of parent and child or husband - wife which have significant relationship to custody and guardianship as we defined these terms in chapter 1.

But it should be added that even in the standard formulation of the welfare rule in section 1 of the 1925 and 1971 Acts [1] where the expression "relating to" has not been used, a similar confusion and imprecision is caused by the phrase "is in question". [2] The expression "is in question" does not, within the relevant statutes, admit of qualification. So that in view of the admittedly broad range of "any proceedings", the enumerated matters to which section 1 of the 1925 Act pertains might be "in question" either directly or indirectly. In this regard, it is arguable that in all matrimonial disputes the "upbringing" of a minor necessarily must be "in question" such as, for instance, where a marriage has been terminated by death or divorce and a dispute centres around ownership, occupation or enjoyment

---

[1] Guardianship of Minors Act 1971 cap 3, s.1. (English statute).
[2] Ibid. s.1.(1).

of the matrimonial home. In such a situation, the security of a spouse in the occupation or enjoyment of the home would have a bearing on the "upbringing" of the children who are left under the care of that spouse and whose welfare is enjoined to be the paramount consideration. Yet, the prevailing judicial attitude does not reflect this thinking, and the judges have proceeded in their construction of section 1 of the 1925 and 1971 Guardianship Acts as if the section read in part "is in question directly". As Nevitt and Levin have remarked: [1] "It may well be thought that in all matrimonial disputes, whether directly related to the children or not, their welfare should be a paramount consideration for the court. At present, except where their custody is disputed, consideration of the children seems to be something of an 'also ran'."

B Origin and Meaning

1 Domestic evolution : common law and equity

(a) Introduction : In early times in English law, the property of the child rather than his welfare, was the primary concern of the state. "When a national law of guardianship developed", writes Kittrie, "its emphasis was proprietary, to protect the feudal succession and heirs against the dissipation of assets". [2] Pollock and Maitland,

---

[1] D.A. Nevitt and J. Levin, "Social Policy and the Matrimonial Home" (1973) 36 M.L.R. 345 at 347.

[2] Kittrie, The Right to be different p. 9.

after making reference to the disjointed and incomplete nature of English common law of guardianship, added: [1] "[our old law] had looked at guardianship and paternal power merely as proprietary rights, and had only sanctioned them when they could be made profitable. .... The law, at all events the temporal law, was not at pains to designate any permanent guardians for children who owned no land."

The theory of legal unity of husband and wife which, according to Blackstone, [2] comes into existence by marriage had consequences beyond the primary relationship of husband and wife. For under early English common law the father's right to custody of his children was almost absolute, [3] and the common law courts before the Judicature Acts of 1873 assumed no discretionary powers to interfere with the father's custody rights except in very extreme cases. Moreover, since the duty of child support was a corollary of custody it was always impracticable to award custody to anyone else unless the child had property of his own, or unless a trust settlement was proposed by someone who is seeking custody. Consequently the father, as the only recognised decision-maker with respect to the child had nearly absolute rights

---

1 The History of English Law (1898 2nd ed.) p. 443-444. Emphasis added.

2 W. Blackstone, Commentaries on the Laws of England (Book I, 1819 ed.) p. 176.

3 Scots common law was the same. "The father is entitled to the custody of the [legitimate] child... He can recover its person from anyone who retains it, although the person guilty of the detention should be its own mother." Fraser, Parent and Child (2nd ed. 1856) p. 67.

to the custody. In the early case of R. v. Greenhill,[1] Lord Denman stated: "When an infant is brought before the Court by habeas corpus [if he be not of an age to exercise discretion] the Court must make an order for his being placed in the proper custody. The only question then is, what is to be considered the proper custody; and that undoubtedly is the custody of the father." The custody of the father, it was said in a Scottish case before the House of Lords, "is high and sacred."[2]

So strong were the father's custody rights at common law that they could be enforced even against the claim of the mother during the child's infancy[3] and even if the child was still at the mother's breast.[4] And the father could also enforce his rights even when he was in prison by insisting that the child be brought to visit him.[5] All this was based on the father's recognised position as head of his family. Thus we hear Lord Justice James in Re Agar Ellis[6] referring to "the father's undoubted right as master of his own house, as king and ruler in his own family". It was also against this background that the judges constructed the common law priority of the father

---

1 4 Ad & El 624 at 640; 111 Eng. Rep. 922, at 927-28 (1836)

2 Symington v. Symington (1875) 2 R (H.L.) 41 at 45 per Lord O'Hagan.

3 In re Edwards (1873) 42 L.J.Q.B. 99.

4 R. v. De Manville (1804) 5 East 221.

5 Ex parte Skinner (1824) 9 Moore C.P. 278.

6 In re Agar Ellis, Agar Ellis v. Lascelles (1878) 10 Ch. D. 49 at 75 C.A.

to determine the form of education and religion of the children[1] irrespective of considerations of their welfare. Thus, in Re Agar Ellis (No. 2), Sir W. Brett, M.R. was categorical about the law when he said: "The law of England ..... is, that the father has the control over the person, education, and conduct of his children until they are twenty one years of age. That is the law."[2]

Up to 1883 "the rights of the father appear to have been predominant and he would only be disentitled to these rights if he had by his conduct shown himself unfit to exercise them. The welfare of the infant appears to have been a subsidiary consideration."[3] Again, as Lord Macdermott stated:[4] "With a father claiming custody, the welfare of the child as a test in itself was generally without relevance." The common law courts did interfere with the father's rights but the law ensured that in most cases it would be almost impossible to make out a case of unfitness against the father. It was only in the extreme case of "utmost need" that interference was permissible.[5] The nature of such extreme case of unfitness was indicated by Lord Campbell, C.J. in R. v. Clarke Re Race:[6]

---

1 See e.g. Hawksworth v. Hawksworth (1871) 6 Ch. 539; Re McGrath (1893) 1 Ch. 143.

2 In Re Agar Ellis, Agar Ellis v. Lascelles (1883) 24 Ch.D 317 at 324.

3 J. v. C. [1970] A.C. 668 at 694 per Lord Guest.

4 Ibid. at 702.

5 Re Agar Ellis (1883) 24 Ch.D. 317 at 328.

6 (1857) 7 E. & B. 186 at 198; 119 E.R. 1217 at 1221.

> "There is an admitted qualification on the right of the father or guardian, if he be grossly immoral, or if he wishes to have the child for any unlawful purpose."

Grossly immoral behaviour such as would disentitle a father to the custody of his child would be misbehaviour that clearly placed the child in danger of moral or physical harm, such as was said to exist in the famous case involving the poet Shelley,[1] or a refusal to give the children any religious education.[2] In other words, the court had to be satisfied that the father had violated a high moral standard, as viewed in that age, before the court's intervention with his right could be justified. The test, according to Sir James Knight Bruce, V.C., was that the court had to be satisfied on two things, including this - "that the father has so conducted himself, or has shown himself to be a person of such a description, or is placed in such a position, as to render it not merely better for the children, but essential to their safety or to their welfare, in some very serious and important respect, that his right should be treated as lost or suspended - should be superseded or interfered with. If the word 'essential' is too strong an expression, it is not much too strong."[3]

Besides the jurisdiction of the common law courts to interfere with the rights of the father in the interest of

---

1 Shelley v. Westbrooke, Jacob 266; 37 E.R. 870.
2 See Re Besant (1879) 11 Ch.D. 508.
3 In Re Fynn (1842) 2 DeG. & Sm. 457 at 474, 475.

the child there was the jurisdiction of the Court of Chancery exercised from time immemorial. That jurisdiction was a paternal jurisdiction exercised "on behalf of the Crown, as being the guardian of all infants, in the place of a parent, and as if it were the parent of the child, thus superseding the natural guardianship of the parent."[1] In the exercise of that jurisdiction the court was to act "in the manner in which a wise, affectionate, and careful parent would act for the welfare of the child."[2] These statements of Lord Esher, M.R., point to the origin of the parens patriae jurisdiction of the Chancellor and later the Court of Chancery and the Chancery division. Following the fusion of the administration of law and equity in 1873, it became the duty of the common law courts, too, to exercise the Chancery jurisdiction.

The nature of the parens patriae jurisdiction itself has been spelled out by Mr. Justice Cardozo in Finlay v. Finlay[3] as follows:

> "The chancellor in exercising his jurisdiction .... does not proceed upon the theory that the petitioner, whether father or mother, has a cause of action against the other or indeed against anyone. He acts as parens patriae to do what is best for the interest of the child.... He is not adjudicating a controversy between adversary parties, to compose private differences. He is not determining rights 'as between a parent and a child' or as between one parent and another.....

---

1 R. v. Gyngall (1893) 2 Q.B. 232 at 241.

2 Ibid.

3 240 New York 429, at 433.

> Equity does not concern itself with such disputes in their relation to the disputants..... Its concern is for the child."

It sounds well enough to assert that equitable jurisdiction of parens patriae which emphasises the interest and welfare of the child is henceforth to be exercised by all courts. But unfortunately, the Court of Chancery itself was not setting any good example to be followed by the common law courts. "The Court of Chancery exercised a wider and more benevolent discretion, but in this equity usually followed the law to the extent of accepting that the discretion to interfere was limited to certain types of cases."[1] In other words, in the frank language of Lord Upjohn, [2] "equity too dutifully followed the law."

The English and Scots municipal law regards the parens patriae doctrine as the ultimate foundation of, and the justification for, jurisdiction over all cases of guardianship of infants. But it is our submission that English, Scots and Nigerian private international law need not take an identical view. It is the burden of the succeeding section to briefly discuss the parens patriae doctrine and its relevance to custody law.

---

[1] J. & C. [1970] A.C. 668 at 702.

[2] Ibid. at 721.

(b) The Parens patriae doctrine

(i) Philosophical and Legal foundations

"Because of the economic and political structure of mediaeval England," write[1] Inker and Perretta, "the State had a clear and definite interest in whom land titles vested or could vest. This state interest extended to all forms of wealth and any person, minor or adult, who was a possible conduit of that wealth was of direct concern to the Crown." In other words, early English law, as we have seen, evinced no interest in children who owned no land. As a result, such children were accorded what has been termed "second best treatment"[2] - parens patriae. This doctrine which is often spoken of today as a manifestation of the state's "solicitude for a child's welfare, was in fact created as an expediency."[3]

The precise origin of the doctrine itself can not be fixed. It seems probable that the doctrine came into being with the gradual development of the common law - especially with the common law concept of the benevolent role of the Sovereign as the guardian and father of his people. Blackstone speaks of the King as "the supreme guardian of all infants, as well as idiots and lunatics",[4] and goes on to state that "The Sovereign, as parens patriae, has the general superintendence of all charities in the Kingdom."[5]

---

1 "A Child's Right to Counsel in Custody Cases" (1970) 55 Mass L.Q. 229 at 230.

2 Ibid.

3 Ibid. at 232.

4 W. Blackstone, Commentaries (Book I, 1819 ed.) p. 184.

5 W. Blackstone Ibid. (Book III, 1857 R.M. Kerr, ed.) p. 482.

The doctrine appears to be the state's answer to the Roman doctrine of patria potestas which, in English law, "passed away long before the days of Bracton".[1] Pollock and Maitland seem to regard the parens patriae doctrine as an arrogant assertion of the King's justices in an over-governed country: "That the King should protect all who have no other protector, that he is the guardian above all guardians is an ideal which has become exceptionally prominent in this much governed country. The King's justices see no great reason why every infant should have a permanent guardian, because they believe that they can do full justice to infants."[2]

Philosophical foundations: Political philosophers have traditionally taken seriously the Biblical warning that God will visit the iniquity of the fathers upon the children. In The Republic, Plato regarded the details of raising up children as issues of fundamental concern and importance to society as a whole.[3] And in Aristotle's conception of parental power, the welfare of the child, rather than the welfare of others in the society or the benefit of the parents, is paramount.[4] Hence State intervention with the

---

1 Pollock and Maitland, History of English Law 2nd ed. p. 438, Vol. 2.

2 Ibid. p. 445 (1898).

3 Plato, The Republic (Cornford ed. 1945) pp. 235 - 264.

4 The Politics of Aristotle (E. Barker ed. 1946) pp. 32, 33, 316.

otherwise natural and inalienable[1] and sacred[2] rights of the parents to bring up their children has usually been explained by the doctrine of parens patriae which embraces the notion that the State ought to protect all those who cannot protect themselves and that this duty requires the protection of infants from their parents and from others who may cause the children harm. In so doing, the State as a whole is securing society's best interests. Goldstein, Freud and Solnit have recently expressed this idea of state intervention in these words:

> "Each time the cycle of grossly inadequate parent-child relationship is broken, society stands to gain a person capable of becoming an adequate parent for children of the future." [3]

Legal foundations: Malina and Blochman have traced the legal foundation of parens patriae doctrine to the royal prerogative of ancient days. "In the course of English constitutional system's development from its feudal beginnings, the King retained certain duties and corresponding powers, referred to as the 'royal prerogative'. He was said to exercise these powers and duties as 'father of the country' or parens patriae."[4] The royal prerogative with respect to infants has been traced back to the demise of feudalism by William Blackstone who noted that although the King's

---

1 See Sayre, "Awarding Custody of Children" (1942) 9 U.Ch. L.Rev. 672.

2 In re Agar Ellis (1878) 10 Ch.D. 49, at 71 - 72. Symington v. Symington (1875) 2 R (H.L.) 41 at p. 45.

3 Beyond the Best Interests of the Child (1973) p. 7.

4 Malina and Blochman, "Parens Patriae Suits for Treble Damages under Anti-Trust Laws" (1970-71) 65 North-Western Univ. L. Rev. 193 at 197.

power in this connection reached all infants within the realm, its exercise was confined to those infants having no other guardians. The scope of these royal powers included the power to take guardianless infants into custody as well as the control in certain circumstances and by designated courts, of the property of the infants.[1]

One of the earliest applications of the parens patriae doctrine to children was in Eyre v. Countess of Shaftesbury.[2] The case concerns the protection of lunatics, but the court extended the doctrine to include children because these, like lunatics, need protection since in most cases they cannot take care of themselves. Over a century later, in the House of Lords decision in Wellesley v. Wellesley[3] the parens patriae doctrine was elaborated more fully. There, a father sought to regain custody of his children from their maternal aunt, the children's mother being dead. The father's application was refused because he was of low moral character. Lord Redesdale said that parents had rights to their children only by grace of the state who, as parens patriae, is under a duty "to see that the child is properly taken care of."[4] His Lordship explained the delegation of control over children to parents as a trust - "of all trusts the most sacred "[5]- with which parents were

---

[1] Blackstone, Commentaries, Vol. II (1857, Kerr ed.) p. 544.
[2] (1722) Eng. Rep. 659 (1725) 2 P.Wms 103.
[3] (1828) 4 Eng. Rep. 1078 (H.L.).
[4] Ibid. at 1081.
[5] Ibid. at 1080.

endowed because in the normal case they would discharge that trust faithfully on behalf of the child. If that sacred trust was not faithfully discharged for whatever cause, the state would intervene on the child's behalf. It is the "King's prerogative" to interfere for the protection of infants, his Lordship concluded. A clear judicial statement of the doctrine of parens patriae was given by Lord Cranworth, L.C. in 1854 in these words: "The jurisdiction of this Court, which is entrusted to the holder of the Great Seal as the representative of the Crown, with regard to the custody of infants rests upon this ground, that it is the interest of the State and the Sovereign that children should be properly brought up and educated; and according to the principle of our law, the Sovereign, as parens patriae, is bound to look to the maintenance and education (as far as it has the means of judging) of all his subjects."[1]

(ii) The Mischief of the Doctrine of Parens Patriae

A main objection to the doctrine of parens patriae lies in its invocation as justification for the exercise of jurisdiction in every conflict of laws case involving guardianship and custody. It is our submission that the scope of the doctrine should be more limited. According to Kittrie, "The role of the Sovereign as parens patriae was rather limited in the common law tradition."[2] This was

---

[1] Hope v. Hope (1854) 4 De G.M. & G. 328 at 344, 345.
[2] Kittrie, The Right to be Different, p.9.

necessarily so because social institutions for the care of the ill and the disabled were within the ecclesiastical domain or were the responsibility of the local feudal lord;[1] and as far as children were concerned, the parens patriae power was exercised only if the child had no guardian or any other person to protect him.

In the field of private international law, parens patriae has been invoked to justify jurisdiction in a custody case where both parent and child were only transiently present within the jurisdiction.[2] Furthermore, in matters of recognition of foreign custody decrees, courts have again held that they need not be bound by the custody decree of a foreign state if the child whose custody is being litigated is physically within the forum jurisdiction. The theory here being that the State, as parens patriae, looks to the welfare of the child at the time the judicial inquiry is being made. Is there anything, it may be asked, which the state can not do to the child - for good or ill - under the umbrella of its power as parens patriae? In our view this power is so broad that the child's constitutional and other legal rights may be swept away under a formula which appears harmless and benevolent on its face. Its invocation in most situations would, no doubt, be beneficial,

---

[1] Ibid.

[2] See Re P(GE)(An Infant) [1965] Ch. 568 C.A.

but it is also capable of misuse in a minority of cases. As Kleinfeld has said, "The parens patriae doctrine was originated to deny liberty to parents, but has sometimes been applied ... to take liberty from infants."[1] Consequently, "most commentators now seem less than respectful of /the doctrine/."[2] In particular, the doctrine has recently come under severe attack in the United States of America. For example, speaking about the parens patriae rule a few years ago, the United States Supreme Court said:

> "The Latin phrase proved to be a great help to those who sought to rationalise the exclusion of juveniles from the constitutional scheme; but its meaning is murky and its historic credentials are of dubious relevance."[3]

The assumption of parens patriae jurisdiction when a child has only been transiently present within the jurisdiction and when there is no urgency for an emergency protection for the child has been a major distinction between the Scots and English rules of jurisdiction in guardianship and custody, the details of which we shall take up in [illegible] chapter 5. That contrast in the rules of the two jurisdictions is well illustrated in the custody cases of Re P(GE)(An Infant)[4] and Ponder v. Ponder.[5] In the former

---

1 A. Kleinfeld, "The Balance of Power Among Infants, their Parents and the State (Part III)" (1970) 5 Fam. L.Q. 63 at 69.

2 Ibid. at 67.

3 In re Gault (1967) 387 U.S. 1 at 16.

4 The doctrine has, however, very recently been revitalised in the Supreme Court decision in McKeiver v. Pennsylvania (1971) 403 U.S. 528. And see 57 Cornell L. Rev. 571.

4 (1965) Ch. 568.

5 1930 S.C. 233; 1930 S.L.T. 187.

case, Lord Denning M.R., deriving "no guidance [from the 1886 and 1925 Guardianship Acts] as to the geographical jurisdiction of the court,"[1] held that "even though the child was not living [in England] and only passing through on a journey",[2] the English courts would assume jurisdiction as long as the child was "physically present" in England.[3] The Scottish courts, on the other hand, have thought differently. Lord Justice-Clerk Alness in Ponder v. Ponder was emphatic that "only the court of the domicile of the spouses can deal with questions of custody and access",[4] conceding, among his two exceptions, a case where "there is reason to apprehend immediate danger to the child."[5]

The appropriateness of invoking parens patriae doctrine for a private international law case of guardianship was seriously questioned in the leading House of Lords decision in Johnstone v. Beattie.[6] In that case, a young girl of Scottish domicile and possessed of considerable property in Scotland, was left by her deceased father under the tutory and curatory of several Scotsmen. After the death of her mother and at a time when she was residing in England with her maternal grandfather a dispute arose between

---

1 (1965) Ch. 568 at 582.
2 Ibid. Emphasis added.
3 Ibid. Emphasis in original.
4. 1930 S.L.T. 187 at 190.
5 Ibid.
6 (1843) 10 Cl & Fin 42.

the latter and the Scots guardians as to her custody. The grandfather took proceedings to have the girl made a ward of the Court of Chancery so as to prevent her removal to Scotland. The English Court, ignoring the guardians appointed by her father, made her a ward of court in addition to making further orders. The Scots tutors appealed to the House of Lords which, after two hearings, upheld the action of the lower court by a majority of three to two. The decision itself involved both the question of exercise of parens patriae jurisdiction based on residence or presence and of recognition of foreign-appointed guardians. The decision on jurisdiction (with which we are here concerned) has been described as "undoubtedly sound."[1] However, since both the Scots and English (as well as Nigerian) conflict of laws rule of jurisdiction is overwhelmingly that once there is jurisdiction in the guardianship case domestic law would be automatically applied irrespective of conflicts rules,[2] it would seem, in our view, that the invocation of parens patriae jurisdiction in those cases where there is no substantial connection of the child with the jurisdiction represents an unacceptable facet of private international law rules of guardianship.

Lord Campbell, dissenting in that case said that the assumption of jurisdiction under parens patriae formula in situations where the child is only temporarily within the

---

[1] Duncan and Dykes, Principles of Civil Jurisdiction p. 246.
[2] See e.g. Dicey-Morris, Conflict of Laws, Rule 50(2).

jurisdiction and needing no protection from the state is an "absurd proposition"[1] and an "inconvenient doctrine"[2] which borders on the "officious".[3] But it was Lord Brougham (dissenting) who first opened the attack on the parens patriae doctrine. In his Lordship's view, the exercise of parens patriae jurisdiction to appoint guardians for unprotected infants arises out of the sheer necessity of the matter. "The necessity of extraordinary protection to unprotected infants leaves no doubt of the power in the Sovereign, or those to whom he has delegated it, to appoint a guardian, whensoever an infant comes before him or them, and requires protection. ..... But it does not follow that in every case the jurisdiction must be exercised. ... The Court always and in every case has the jurisdiction, but it is not always and in every case a matter of course that it should be exercised: on the contrary, though the right is absolute, its exercise is discretionary; so that in many cases the exercise of it, I hold, would be a plain miscarriage of the Court."[4] Lord Campbell was equally clear in his speech about the impropriety of assuming and exercising parens patriae jurisdiction in every situation. He observed:[5]

"To justify the appointment of guardians, it cannot

---

1 (1843)10 Cl & Fin 42 at 129; 8 E.R. 657 at 690.
2 Ibid. at 131; at 691.
3 Ibid. at 142; at 695.
4 Ibid. at 93; at 677.
5 Ibid. at 121; at 687-688.

> be enough to show that there is an infant having a temporary residence in England ..... the person of the infant requiring no care from the Court of Chancery, and the infant having no property in this country."

His Lordship continued:[1]

> "It would be ridiculous to suppose that such an appointment must invariably and inflexibly be made, without considering whether the personal safety or personal interests of the infant require the interference of the Court; although the infant has no property to be protected; and although the appointment would manifestly be injurious to the infant itself, as well as perplexing, annoying, and detrimental to its foreign guardians. The benefit of the infant, which is the foundation of the jurisdiction, must be the test of its right exercise."

These concluding remarks of Lord Campbell have the familiar ring of what Lord Denning M.R. referred to as the corrupting and corroding side of the exercise of State power.[2] There is always the danger that overzealous state officials may over-step the bounds of propriety and indulge in a course of action which hinders or is detrimental to the child, especially in such a vast and still largely unknown field as the child's welfare and best interests. If the House of Lords were to sanction an untrammelled exercise of parens patriae power, Lord Campbell said, "there may be some danger that Chancellors, in their zeal to extend to mankind the benefits of their jurisdiction, may think, ... that there can be no limit to their power, and that the exercise of it must always be beneficial for those

---

[1] Ibid. at 122; at 688.

[2] Freedom under the Law (1949) p. 126.

over whom it is exercised, although present pain and suffering may be the consequence."[1] It is essential, therefore, that the parens patriae rule should be limited to cases of urgency or to cases where the child has significant contact with the jurisdiction.

Finally, whether it be regarded as a doctrine of the common law of England or as a principle of equity, the parens patriae doctrine has been received into Nigerian law by the reception statutes.[2] The doctrine would therefore furnish in Nigeria, as is the case in England and Scotland, the ultimate justification for the State's intervention in the matter of parental guardianship and custody. But it should be added that in a country with a written constitution as Nigeria, care must be taken in resorting to parens patriae. There is a danger that its invocation may conflict with the constitutional injunction that it is a fundamental right of every Nigerian, subject to necessary qualifications,[3] to be respected in his or her "private and family life [and] his home",[4] which implies the freedom to bring up their children as best they think fit without state intervention.

---

1 (1843) 10 Cl & Fin 42 at 135; 8 E.R. 657 at 693.

2 See Chapter 2.

3 A law which is designed, inter alia, "for the purpose of protecting the rights and freedom of other persons" (which no doubt would include the rights of children) is exempt from the freedom which the Nigerian enjoys in his private and family life. See Republican Constitution, 1963 S. 23(2)(b).

4 Ibid, section 23(1).

2 Domestic Evolution : Legislation

"It was under the influence of statutory changes, which conferred on the mother rights to claim custody, that greater attention began to be paid to the child's welfare."[1] It is our purpose in this section to outline the statutory framework under which major strides were made in the matter of the child's welfare.

The starting point is the Custody of Infants Act,[2] 1839, popularly known as Lord Talford's Act. This was the first enactment which enabled the mother of an infant in the sole custody and control of its father to apply to and obtain from the Court of Chancery an order for access and also for custody until the child reached the age of seven years, provided the mother had not been guilty of adultery. Although the 1839 Act applied only to petitions in Chancery to the exclusion of proceedings in the common law courts and the age of seven was a severe limitation, it did have some influence in habeas corpus proceedings in the common law courts. Its underlying philosophy was later extended to children over the age of seven. This latter was achieved by the Custody of Infants Act, 1873 which extended the wife's rights to custody of children up to the age of 16 years. The 1873 Act also provided that an agreement in a deed of separation which allowed the transfer

---

[1] Bevan, Law Relating to Children, p. 258.
[2] Cap 54, 2 & 3 Vict.

of custody of a child from the father to the mother was not to be held invalid on that ground alone. There was, however, an important proviso that the court was not to enforce such an agreement if it was of opinion that it would not be for the welfare or benefit of the infant to do so.[1] This was the first explicit reference to the child's welfare in a specific legislation.

Two other early statutes should also be noted. The English Matrimonial Causes Act of 1857 gave the Divorce Court power to make custody orders concerning children up to the age of 21 years on such terms as it considers "just". This meant that the Court could award custody to either parent depending upon where the child's welfare and interests lay. The analogous Scottish enactment, the Conjugal Rights (Scotland) Amendment Act, 1861 provided that

> "In any action for separation a mensa et thoro or for divorce the Court may from time to time make such interim orders, and may in the final decree make such provision as to it shall seem just and proper, with respect to the custody, maintenance, and education of any pupil children of the marriage to which such action relates." [2]

The exact scope of the phrase "such provision as it shall seem just and proper" in the above section has been the subject of great debate among judges and writers.[3] But whatever may be the legislative intent regarding exactly

---

1. Section 2

2 Section 9.

3 See Clive and Wilson, The Law of Husband and Wife in Scotland, pp. 575-76; Anton, Private International Law, pp. 374-75.

when the Court of Session has jurisdiction to exercise its powers, there can be little doubt that the expression "seem just and proper" vests the Court with "the widest and most general discretion."[1] It is under such wide discretionary powers that the Outer House has held that it has power to award custody to a third party, such as a grand parent, where this was found to be in the child's best interests.[2]

In 1886 came the Guardianship of Infants act[3] which has force in both Scotland and England. The more significant provisions of this Act as far as pertains to the evolution of the concept of the child's welfare are as follows: Section 2 made the mother, if she survived the father, the guardian of her infant child either alone or jointly with a guardian appointed by the father or the court. Under section 3 the mother was conferred with powers of appointing a guardian for her child in certain cases. Section 5 provides that upon the application of the mother of any infant, the court may

> "make such order as it may think fit regarding the **custody of such infant and the right of access thereto** of either parent, having regard to the welfare of the **infant, and to the conduct of the parents, and to the** wishes as well of the mother as of the father, ... "

The court also has further powers under this section to vary, alter or discharge such orders. And to accord with

---

1 Symington v. Symington (1875) 2 R(H.L.) 41, at 43 per L.C.

2 see Pow v. Pow 1931 S.L.T. 485.

3 Chapter 27, 49 & 50 Vict.

the Victorian morality of the times which frowned on adultery and other matrimonial misconduct it was provided in section 7 that in any case where the court is pronouncing a decree of judicial separation or divorce, the court may thereby "declare the parent by reason of whose misconduct such decree is made to be a person unfit to have the custody of the children (if any) of the marriage; and, in such case, the parent so declared to be unfit shall not, upon the death of the other parent, be entitled as of right to the custody and guardianship of such children." It has been authoritatively stated that "Little use has been made of this power."[1] As far as it relates to custody proceedings, it is now overshadowed by the concept of the paramountcy of the welfare of the child, and the "notion of entitlement as of right now has no place"[2] in such proceedings.

The Custody of Children Act, 1891,[3] the next significant piece of legislation, is a United Kingdom statute with force in all jurisdictions. The Act was passed to cure the mischief which arose when parents[4] who had surrendered their children to other persons, such as Dr. Barnardo's Homes, later changed their minds, often under religious prodding

---

1 Clive and Wilson, op. cit. p. 577.

2 Ibid. at 578.

3 Cap. 3, 54 Vict. The relevant provisions of this Act have been re-enacted in the Infants Law of Western Nigeria (Cap. 49) sections 16-19.

4 The term parent had a wide definition under Section 5 where it is stated to include "any person at law liable to maintain such child or entitled to his custody" and "person" includes any school or institution.

by spiritual advisers, and sought the children's recovery. It was pointed out in Murray v. Forsyth[1] that cases under this Act often took the form of parental assertion of the patria potestas against third parties and the legislature had thus purposely empowered the Court of Session and the High Court "to interfere with the patria potestas, and to refrain, in /their/ discretion from enforcing the parents' right to the custody of the child in question with third parties."[2] Since the enforcement of parental right following the religious change of mind might be inimical to the welfare of the child, the 1891 Act was passed "to cut down the rights of the parent in such circumstances."[3] The relevant provisions of the Act are sections 1 to 4.

Under section 1, where the parent of a child applies to the appropriate court for a writ or order for the production of the child, the court may decline to issue the writ or to make the order if it is "of opinion that the parent has abandoned or deserted the child, or that he has otherwise so conducted himself that the court should refuse to enforce his right to the custody of the child."[4] By section 2 the court, "if it orders the child who is being brought up by another person to be given up to the parent", is empowered to order that parent to reimburse the third

---

1 1917 S.C. 721.

2 Ibid. at 727 per Lord Johnston.

3 Clive and Wilson, op. cit., p. 570.

4 See Gibson v. Hagen 1960 S.L.T.(Notes) 24. See also S.16 Infants Law, Western Nigeria.

party for the whole expenses incurred in bringing up the child or to pay only part of such expenses "as shall seem to the Court to be just and reasonable having regard to all the circumstances of the case."[1] Then under section 3

> "Where a parent has
> (a) abandoned or deserted his child; or
> (b) allowed his child to be brought up by another person at that person's expense, ... for such a length of time and under such circumstances as to satisfy the Court that the parent was unmindful of his parental duties;
> the Court shall not make an order for the delivery of the child to the parents, unless the parent has satisfied the Court that, having regard to the welfare of the child, he is a fit person to have the custody of the child."[2]

Finally, under section 4 if the court is of opinion that the parents' claim for production or custody of the child ought not to be granted and the child is already being educated in a religion different from that of his parents, then the court has power to order that the child be brought up "in the religion in which the parent has a legal right to require that the child should be brought up."

It should be observed that the title of the 1891 Act is misleading since the Act does not deal with strict custody[3] at all (although, paradoxically, it concentrates on the child's welfare). Instead, the Act's concern is with the "production", "delivery" and "giving up" of the child by a

---

1 See Begbie v. Nicol 1949 S.C. 158; see also, s.17 Infants Law, Western Nigeria.

2 The equivalent provision in the Infants Law (W.Nigeria) is section 18.

3 "The Act of 1891 is of limited scope. It confers no power to award a right of custody to anyone. .... Where the issue is one between a father and a mother as to which of them is to be found entitled to the custody of their child, the Act of 1891 has no application, and cannot be invoked, for it does not profess to deal with such an issue at all." Campbell v. Campbell, 1956 S.C. 285 at 290 per L.J. Clyde.

third person to a parent who has a right to the child's custody. The Court has power not to order the production of the child, and, a fortiori, it is under a duty not to order the delivery of the child to the parents if the circumstances specified in the Act are present. Furthermore it has been stated that the Act was not meant to apply in divorce cases[1] but occasionally the provisions could be invoked if a dispute between the spouses (parents) and a third party arises in a divorce action.[2] Most of the ground covered by the Act has now been rendered obsolete by the "welfare" provision in modern legislation. The important section 4 provision on reimbursement has been resorted to "with reluctance and restraint". Clive and Wilson leave us with the distinct impression[3] that the 1891 legislation is obsolete and that nothing would be lost by its removal from the statute books.

What is important for our present purposes is that first of all, the various statutes reviewed thus far "record an increasing qualification of common law rights and the growing acceptance of the welfare of the infant as the criterion."[4] In particular the 1891 Act unequivocally

---

[1] See Clive and Wilson, op. cit. p. 570.

[2] See e.g. Smith v. Smith 1964 S.C. 218; Cochrane v. Keys 1968 S.L.T.(Notes) 64; Copeland v. Copeland 1969 S.L.T. (Notes) 70.

[3] Clive and Wilson, op. cit. pp. 570 - 571.

[4] J v. C [1970] A.C. 668 at 709 per Lord MacDermott.

signalled "an end of any presumption of law respecting parental rights and wishes so far as the test of welfare is concerned."[1] We may pause to observe, in the second place, that these 19th century enactments are more than of sheer theoretical interest. We have gone into details of the provisions because they are mostly "statutes of general application that were in force in England on the 1st day of January, 1900,"[2] and these, as we saw in chapter two, have been received and are still in force in all the Nigerian jurisdictions except the West and Mid-Western States. We saw that in the United Kingdom these statutes are now largely regarded as obsolete, but the "received" Nigerian law of guardianship - custody is still wedded to them. There can be no better illustration of the statement that the law is an ass if the full vigour of these statutes were still to be preserved in the United Kingdom; and yet for Nigeria, the received law has today become an old ass which long ago ought to have been starved to death or simply denied grazing access to Nigerian legal field.

There were, between 1891 and 1925, what one may describe as the "lean years" in both the judicial and statutory development of the concept of the welfare of the child. But developments did not come to a complete halt.

---

[1] Ibid. at 714 per Lord MacDermott.

[2] See e.g. Interpretation Act, cap. 89 Laws of Nigeria, 1958 ed. s. 45(1).

An accelerating trend in the direction of paramountcy of the child's welfare was being "fashioned to a considerable degree by unreported cases heard mostly in Chambers."[1] Or, to use Lord Upjohn's equally clear statement, developments continued "behind the closed doors of the Chancery Division."[2] And in Scotland,[3] "by the end of the period between 1886 and 1926 much less weight was being placed on the father's rights, particularly in cases where he had been guilty of cruelty or other misconduct. There was also an increasing emphasis on the importance of the child's welfare, especially in cases between third parties or between a parent and a third party." We shall now review briefly two main statutory developments in the welfare concept since 1925.

The Guardianship of Infants Act 1925 Section 1 of the Guardianship of Infants Act 1925 is now the pivot of custody and guardianship law in the United Kingdom as well as Western and Mid-Western Nigeria. That provision which we have set out at the beginning of this chapter was re-enacted, with slight modification, in the English Guardianship of Minors Act 1971.[4] The 1925 Act is the culmination of a legislative process begun in 1839 and is

---

1 J v. C [1970] A.C. 668 at 703 per Lord MacDermott.
2 Ibid at 723.
3 Clive and Wilson op. cit. p. 581.
4 Cap. 3 1971.

designed to give primacy to the welfare of the child. The courts are now not merely to have "regard" for the wife's wishes on her application for custody (as under the 1886 Act), or to have "regard" for the child's welfare in custody cases; instead, the courts, without taking into account from any other point of view whether the father or mother has a superior claim in custody and guardianship, must now overwhelmingly regard the welfare of the child as the first and paramount consideration.

Considering the amount of controversy generated in J. v. C.[1] by section 1 of the 1925 Act which "now states the relevant law for all purposes",[2] Professor O'Connell would be justified in his statement that section 1 "can scarcely be described as the epitome of legislative wisdom."[3] It is true that from the wording of the section the child's welfare is not the sole criterion of an award of custody. Still there are many questions which the provision raises. Obviously, where the welfare of the infant will clearly be better served by an award of custody to one rather than the other parent the court's discretion will be circumscribed. But what is meant by "welfare" and best "interests" and what considerations enter into the ascertainment of these? What course would the Court adopt if the welfare of the infant

---

1 [1970] A.C. 668.

2 Ibid. at 724 per Lord Upjohn.

3 D.P. O'Connell, "Rival Claims of Parents in Custody Suits", Vol 1. Univ. Queensland L.J. p. 187.

will be equally served by a grant of custody to either parent in an interparental custody dispute? Where the rival claims or considerations are evenly balanced, will the decision be essentially arbitrarily reached by the tossing of a coin? Or are there still some common law priorities which begin to operate when the question of welfare is neutralised? If there are priorities, of what do these consist, and to what extent do they bind the court? And if there are no priorities, are the competing claims of the parents inter se or as against third parties in any sense relevant? Are there any hidden overriding considerations apart from welfare? A variety of approaches exist to these questions, and the courts evince considerable reluctance to commit themselves. These various issues we shall take up later in this chapter.

Matrimonial Proceedings (Children) Act, 1958 [1] This enactment which was the sequel to the recommendations of the Report of the Royal Commission on Marriage and Divorce, [2] 1951-1955, carried further the welfare concept into the specific field of matrimonial proceedings involving husband and wife, be it in divorce, nullity of marriage or judicial separation. The Act introduced two major matters of principle which are now dominant in the laws of England and Scotland, and have been introduced into Nigeria. In the

---

[1] 6 & 7 Eliz. 2, c.40.

[2] (1956) Cmnd. 9678, paras. 413-420.

first place, section 7 of the 1958 Act enables the court to deal not only with the legitimate children of the marriage in question but also with any child who

> "(a) is the legitimate child of both parties to the marriage, or
> (b) is the child of one party to the marriage (including an illegitimate or an adopted child) and has been accepted as one of the family by the other party."

The exact scope of the children covered by the analogous Nigerian provision is not clear.[1] Under Part IV of the Matrimonial Causes Decree,[2] 1970, the Nigerian High Courts can deal with custody involving the following children of a monogamous marriage:

> (a) any child adopted by both spouses or by either of them with the consent of the other;
> (b) any child of both spouses born before the marriage, whether legitimated by the marriage or not; and
> (c) any child of either the husband or wife (including an illegitimate child of either of them and a child adopted by either of them) if, at the relevant time, the child was ordinarily a member of the household of the husband and wife.

"Ordinary membership of the household of the spouses" in the Nigerian provision is a novel expression used in place of "membership of family" in the United Kingdom statute. "Family" in the Nigerian context would almost defy definition, and so the word was wisely avoided. Whether the new (or substituted) expression is free from all ambiguity is yet to be seen.[3] Under sections 2 and 8 of

---

[1] See above, Chapter 2.

[2] No. 18 of 1970.

[3] The English Court of Appeal has expressed the opinion that while the word "house" "relates to something physical", the word "household""has an abstract meaning" although it "essentially refers to people held together by a particular kind of tie even if temporarily separated." Santos v. Santos [1972] Fam 247 at 262.

the United Kingdom Act of 1958 and section 57(1) of the Nigerian Decree of 1970, the courts in the three countries have a duty not to grant matrimonial relief unless and until it is satisfied as to the proper arrangements which have been made for the children's care and upbringing, or as the Nigerian provision states, "for the welfare ... advancement and education"[1] of the children.

Section 11 of the United Kingdom enactment[2] and section 71(2) of the Nigerian equivalent enables the court to obtain reports on the child's circumstances from local authority social workers or what in Nigeria are referred to as government "welfare officers". Under sections 6 and 10 of the U.K. law and section 71(3) of the Nigerian counterpart, the court has power to order that the child be committed to the custody of a third party who is not a party to the marriage. In the United Kingdom provision there is the additional authority to commit the care of the child "to a local authority". Section 14(2) of the United Kingdom enactment confirms the power of the court to award custody to a third party not a parent and provides further that the court can deal with access even if it does not deal with custody. The similar provision in the Nigerian Decree reads:

> "Where the court makes an order placing a child of a marriage in the custody of a party to the marriage, or

---

[1] No. 18 of 1970, S. 57(1)(a).

[2] As amended by Social Work (Scotland) Act, 1968, Sch. 8 para. 43.

> of a person other than a party to the marriage, it may include in the order such provision as it thinks proper for access to the child by the other party to the marriage, or by the parties or a party to the marriage, as the case may be." [1]

There are some divergencies between the United Kingdom and the Nigerian provisions. For example section 12 of the U.K. Matrimonial Proceedings (Children) Act, 1958 enables the court to place the child under supervision of the local authority, while the court has power under section 13 to grant an interim interdict (order or injunction) prohibiting the removal of a child out of either Scotland or England or out of the control of the person in whose custody the child is. The Nigerian provisions, on the other hand, have conferred powers on the High Courts to make orders in proceedings with respect to settlement of property as the court considers "just and equitable in the circumstances" for the benefit of the children of the marriage.[2] The reporter who investigates and produces a report on the arrangements pertaining to the child's care and upbringing as enjoined by section 11(1) of the United Kingdom enactment may be required to appear in court and be examined on oath (and cross-examined) concerning any matter dealt with in the report (S.11(4)). The court alone has to arrive at its decision for "it is not for the reporter to say how the case should be disposed of, though in some cases it will be difficult for him to

---

[1] Section 71(4) Matrimonial Causes Decree 1970.

[2] S. 72 (1).

avoid expressing a preference."[1]

As will be evident from the above survey of relevant sections of the Matrimonial Proceedings (Children) Act 1958 and the Matrimonial Causes Decree 1970, the many provisions pertaining to children of the marriage were deliberately framed so as to ensure that maximum consideration is given to the "welfare" of the children before the spouse is granted any matrimonial relief. Accordingly, it would be no exaggeration to say that the concept of the child's welfare attained new water marks in the field of matrimonial proceedings.

C Terminological Clarifications

The current wording of the United Kingdom statutes[2] on the welfare rule provides that the "first and paramount" consideration in all matters of custody, upbringing etc. shall be the "welfare" of the child. The Infants Law[3] of Western Nigeria adopts the same phraseology. The various customary and area courts edicts[4] in the different states in Nigeria

---

1 Clive and Wilson, op. cit. p. 574; see also MacIntyre v. MacIntyre, 1962 S.L.T. (Notes) 70.

2 e.g. the Guardianship of Infants Act 1925, S.1; the Guardianship of Minors Act 1971, S.1.

3 Cap. 49, Laws of Western Nigeria 1959 ed. S. 24.

4 e.g. Customary Courts Edict (No. 38 of 1966) Mid-West State, S. 25(1); Area courts Edict (No. 2 of 1967) North Central State, S. 23(1).

contain a further provision on the welfare rule and this provision we shall regard as standard for the present discussion. In those enactments it is stated that in any matter relating to the guardianship of children the "first and paramount" consideration shall be the "interest and welfare" of the child. In the recent Nigerian Matrimonial Causes Decree,[1] however, a different phraseology has been adopted. There the words "first" and "welfare" have been omitted and the relevant section enacts simply that in any matter relating to the custody, guardianship, upbringing etc. of children, the "paramount" consideration shall be the "interest" of the child. The gloss of the Nigerian courts on this provision has been far from satisfactory.[2]

The question that arises is whether the omission of "interests" from the Scottish and English enactments or the change in wording of section 71 of the Nigerian Matrimonial Causes Decree which has deleted the words "first" and "welfare" from each of the twin phrases has effected any change in the law. It is important, in our view, to clarify these expressions since they are capable of promoting speculative litigation which counsel would be

---

[1] No. 18 of 1970, S. 71 (1).

[2] Mr. Justice Agbakoba in the East Central State High Court case of Akparanta v. Akparanta (1972) 2 E.C.S L.R. 779 at 788 erroneously, it is respectfully submitted, referred to section 71(1) of the Matrimonial Causes Decree as requiring that in all cases of custody the "welfare" of the child is to be "the first and paramount consideration". The same error was made by Adefarasin J. in Somorin v. Somorin in the Lagos High Court when he spoke of the duty of the court in a custody case to have regard to "the welfare of the children as the first and paramount consideration". CCHCJ/11/72.

best advised to avoid.

1. "First and paramount": Lord Upjohn has observed that "paramount" is a "curious word"[1] which was first mentioned in Re A and B (Infants)[2] where Lopes L.J. said that the judge in a custody case "must look primarily ... to the welfare of the infant, then to the conduct of the parents, and then take into consideration the wishes - not of the father, which, it is suggested to us, are paramount - 'as well of the mother as of the father'."[3] A plain, ordinary dictionary meaning of paramount is "superior to all others in ... importance; pre-eminent."[4] Lord Simonds captured this meaning well in McKee v. McKee[5] when, in his Lordship's advice concerning the welfare rule he said, "To this paramount consideration all others yield." But as Lord Denning M.R. made quite plain in Re L (Infants), "paramount" does not mean "sole".[6] In the same manner, Lord Evershed M.R. in Re Aster[7] recognised that "paramount" was not synonymous with "exclusive" and he gave effect to the provision that the child's welfare is to be "first and paramount". As Finlay states,[8] "The expression 'paramount consideration' is meaningless except in relation to other, subordinate considerations. Other considerations are therefore not

---

1 J. v. C. [1970] A.C. 668 at 722.
2 [1891] 1 ch. 786.
3 Ibid. at 792.
4 Oxford English Dictionary.
5 [1951] A.C. 352 at 365 (P.C.)
6 [1962] 1 W.L.R. 886 at 889.
7 (1955) 1 W.L.R. 465 at 468.
8 H.A. Finlay, "'First' or 'Paramount'? The Interests of the Child in Matrimonial Proceedings" (1968) 42 Aust. L.J. 96 at 97.

excluded from evaluation by the court, provided they are put into their proper, that is subordinate, place." What, then, of the expression "first" which the Nigerian Matrimonial Causes Decree has deleted? Is the word redundant? Now, there is a general presumption that an alteration in the language of a subsequent statute on the same subject as an earlier statute is intended to produce an alteration in meaning and law.[1] Is this the change contemplated by section 71(1) of the Matrimonial Causes Decree? If so, what was the effect of the old "standard" formula under the customary and area courts laws and what is the effect of the new?

In the first place it should be observed that the phrase "first and paramount" in the customary and area courts laws has always been considered as a whole and as inseparable and as possessing a single meaning. Courts do not split the twin words into their component parts, and then ascribe a separate interpretation to each part. Secondly, it should be emphasised that section 71(1) of the Nigerian Matrimonial Causes Decree was based verbatim on section 85(1)(a) of the Australian Matrimonial Causes Act of 1959. The Australian provision has omitted the word "first" from the formula "first and paramount" and has also substituted the word "interests" for the word "welfare". The significance of these changes has been litigated in the

---

[1] See E.G. Malomo v. Olusola (1954) 21 N.L.R.I., (1955) 15 W.A.C.A. 12.

Australian courts and two opposing interpretations have ensued. As there are no Nigerian cases on these questions, it would be in order briefly to cast a look at the Australian judicial decisions.

In the Victoria case of Priest v. Priest,[1] the Chief Justice of the State's Supreme Court expressed the opinion that "the federal Parliament, in framing S.85(1)(a) of the Matrimonial Causes Act 1959 did not intend to effect any alteration in the prevailing law. The adoption of the single word 'paramount' in place of the words 'first and paramount' really effected no change, for a consideration that is paramount must necessarily come first."[2] On the other hand, in Cuartero v. Cuartero[3] Barry J., after referring to Herring C.J.'s judgment in Priest v. Priest above went on to comment on section 85(1)(a) and said:[4]

> "The change of language was deliberate and significant. The word 'first' was omitted so there would be no basis for an interpretation that though the interests of the children are paramount, there are interests other than those of the children which the Court may recognise and to which it may give effect even when they compete with the interests of the children."

Based upon a full and detailed analysis of the relevant Australian cases Mr. Finlay aired the view that "section 85

---

1 (1963) 9 F.L.R. 384.

2 Ibid. at 392 per Herring C.J., cited in Finlay, op. cit. at 96.

3 (1968) V.R. 230.

4 Ibid. at 235. A similar view has been expressed by Myers J. In the New South Wales Supreme Court case of Re An Infant T.L.R. (1967) 87 W.N. (N.S.W.) 40, cited in Finlay, op. cit. p. 96.

effects no material changes" in the law.[1] The apparent contrariety of opinion between Barry J. in the Cuartero case on the one hand and Herring C.J. in the Priest case on the other represents "a distinction without a difference."[2] As the learned author puts it: "Whether their Honours say that the altered formula represents a departure from the old, or whether they advance a contrary view, the interpretation which they give to the two formulae are in essence the same. More particularly, the considerations to be applied in questions of custody under the two formulae are the same."[3]

It is respectfully submitted that the retention of the expression "first and paramount" in the United Kingdom legislation and in Nigerian statutes excepting the Matrimonial Causes Decree is to be preferred to the new formula introduced by the latter enactment. "Welfare" is such a slippery word that a single-dimensional approach to its interpretation may not be adequate. As Blom Cooper, Q.C., has rightly pointed out, some effect must be given to the word "first", otherwise "it becomes tautologous."[4] Latham C.J. in the Australian case of Lovell v. Lovell[5] indicated that the retention of "first" is not insignificant. In the Chief Justice's opinion,[6] "The word 'paramount' it is true,

---

1 Finlay, op. cit. at p. 96.
2 Ibid. at 103.
3 Ibid.
4 L.J. Blom-Cooper, "The Paramountcy of the Child's Welfare" (1955) 18 M.L.R. 490 at 492 n. 13.
5 [1957] 81 C.L.R. 513.
6 Ibid. at 521-522.

creates a difficulty. A strict interpretation of this word would mean that the welfare of the infant should overcome all other considerations of any kind. Such a view, however, would attach no importance whatever to the use of the word 'first', which, as already stated, shows that other considerations than the welfare of the infant may properly be regarded."

It is submitted that the coupled phrase "first and paramount" relates to the method of approach to, and the priorities of the factors to be considered amongst, the bundle of considerations which enter into custody determinations - such as welfare and interest itself, wishes, guilt or innocence of the spouses etc. In a recent House of Lords decision, Lord MacDermott adverted to the phrase "first and paramount" in the relevant United Kingdom legislation. This is how his Lordship's view on that troublesome expression was formulated:[1]

> "Reading these words in their ordinary significance, and relating them to the various classes of proceedings which the section has already mentioned, it seems to me that they must mean more than that the child's welfare is to be treated as the top item in a list of items relevant to the matter in question. I think they connote a process whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child's welfare as that term has now to be understood. That is the first consideration because it is of first importance and the paramount consideration because it rules

---

[1] J. v. C. [1970] A.C. 668 at 710-711.

on or determines the course to be followed."

Although J. v. C. was an English appeal case the questions it raised turned on the construction of a statutory provision applying in identical terms to both Scotland and England. Therefore, the decision and the major pronouncements of the Law Lords "must be regarded as an irresistibly persuasive authority"[1] in Scotland. It may be expected that their Lordship's interpretation of these terms will be highly persuasive in Nigeria as well.

2. "Interest and welfare". We now turn to a consideration of the second pervasive formula in custody legislation - the "interest and welfare" of the child. As pointed out above, the United Kingdom guardianship statutes[2] do not employ the word "interests". But the term "interests" or the "best interests" of the child has been used for years in English and Scots[3] custody cases. In J. v. C. Lord MacDermott speaks of "the best interests of the child's welfare".[4] And in Chipperfield v. Chipperfield,[5] Pearce J. (as he then was) referred to section 1 of the 1925 Guardianship of Infants Act as "deliberately framed in the widest terms to secure consideration of the infant's interest in any court where its custody or upbringing is at stake."[6]

---

1 Clive and Wilson op. cit., p. 572.

2 The Children Act, 1948 (S.12) does however employ the term "best interests".

3 See e.g. Lang v. Lang (1869) 7 M. 445 at 447 per L.J.-C. Paton ("the Court has to look to ... the interests of the children"): Christison v. Christison 1936 S.L.T. 275 at 276 per L.J.-C. Aitchison ("The only question in this case is, what is best in the interests of the child").

4 J. v. C. [1970] A.C. 668 at 713.

5 (1952) 1 All E.R. 1360.

6 Ibid. at 1361.

However, the more controversial matter pertains to the Nigerian provisions where, as we have seen, the Matrimonial Causes Decree has deviated from the "standard" customary and area courts formulae and substituted "interest" for the word "welfare". Again here we may ask whether this change has brought about any change in the law.

There could be conceivable circumstances in which this change of formula would produce different results. For instance, it has been suggested[1] that in most custody cases involving poor parents and rich strangers, it would seem to be more appropriate to rely on the child's "interests" in his natural family rather than his "welfare" as justification for denying custody to the affluent stranger where the impecunious parents are not otherwise manifestly unfit or unsuited as custodiers. However, to date it does not appear that any case has yet been decided either in the United Kingdom, Nigeria or a Commonwealth country, in which anything turned on this change in terminology.

---

[1] Finlay, op. cit., 96 at 100 n. 33.

D Some Judicial Interpretation

1. General: In this part and the succeeding ones of the present chapter we shall endeavour to examine some of the questions which have plagued the courts in custody and guardianship proceedings. What, for example, does "welfare" mean and what is its place in international legislation and case law of guardianship? Is welfare simply a rule of public policy or discretion and nothing more? Are there any general principles of custody and upbringing between parents and between parents and strangers? What are the criteria used in determining custody in a particular case? And is the adversary nature of custody proceedings the most appropriate for arriving at the child's true welfare? If the welfare of the child is, according to statute, the first and paramount consideration, what are the other considerations and how important are they, especially in private international law cases? What is the place of the child's welfare in pre-custody (divorce) and post-custody determinations?

It should be observed, in the first place, that judicial pronouncements are unanimous that guardianship and custody cases pose very considerable difficulty[1] and

---

[1] See e.g. Symington v. Symington (1875) 2 R(HL) 41, 42 ("very difficult" and "painful"); McClements v. McClements 1958 S.C. 268, 289 ("troublesome and always difficult" per L.J.-C. Thomson); In re O (Infants) [1962] 1 W.L.R. 724 at 725 ("difficult" and "distressing" per Lord Evershed M.R.); Re E (D)(An Infant) [1967] Ch. 761 at 768 ("peculiarly difficult problem" per Willmer L.J.)

2

cause very great anxiety. "This case," Lord Evershed once confessed in a custody opinion, "has caused me the greatest possible anxiety, a statement which is applicable to most cases concerning young children."[1] And a Nigerian judge has expressed his "anxiety" over "any matter on the question of the custody of young children."[2] What makes a guardianship - custody case particularly anxious and difficult to decide is that the factors with which the judge must deal are not susceptible of precise interpretation. As these cases involve helpless and innocent children, the judge must pick and choose most carefully from the evidence in arriving at an arrangement which will best satisfy the interest of the child. A multiplicity of factors have to be considered and the line between what is relevant and what is irrelevant is a narrow one. "The final decree," it has been said, "initiates an experiment in human relationships",[3] and because of the experimental or conjectural nature of custody decrees, courts emphasise that the problem is a difficult one, and that such decrees are never final but are alterable with changed circumstances.

We must in the second place comment briefly on the issue

---

1 In re B (An Infant) [1962] 1 W.L.R. 550 at 551; see also Lord Denning M.R. in W. v. W. and C. (1968) 1 W.L.R. 1310 at 1311

2 Somorin v. Somorin, C.C.H.C.J./11/72 p. 101 per Adefarasin J. (High Court of Lagos).

3 See Note, "The California Custody Decree" (1960) 13 Stan. L. Rev. 108.

of the proper test of "welfare". Should this be subjective or objective? Can the law derive any help from other disciplines in striving to determine the child's welfare? In Re C Lord Justice Harman said that the ways in which the interests and welfare of a child have been viewed have "varied according to the prevailing fashion from generation to generation."[1] But this does not tell us whether the proper test of welfare should be arrived at objectively or subjectively. Medical, psychiatric and other social scientific information which might have introduced objective criteria are not given much weight by the courts in custody cases,[2] in spite of Professor Goldstein's suggestion that "psychoanalysis may provide insights to prompt modification of the ways and means by which society, through law, seeks to fulfil its goals"[3] in custody cases. The courts fear that expert evidence might in effect usurp the judicial function apart from the ever-present danger, in Harman L.J.'s words, of "letting advocacy creep into expert evidence".[4] The judge often relies, instead, on his general knowledge, commonsense and experience in infancy matters as the primary

---

1 As quoted in New Law Journal (July 25, 1968) vol. 118 p. 698.

2 See the discussion of this problem by Naomi Michaels, "The Dangers of a Change in Parentage in Custody and Adoption Cases" (1967) 83 L.Q.R. 547; see also J. v. C. [1970] A.C. 668, at 726 per Lord Upjohn.

3 Cited in Finlay & Gold, "Paramount Interest of the Child in Law and Psychiatry" (1971) 45 Aust. L.J. 82 at 83.

4 Re C.(M.A.) [1966] 1 All E.R. 646 at 675.

guides to a proper decision. When statutes and judges state that the predominant concern in custody should be the "welfare" or "best interests" of the child, the answer to these question-begging expressions often depends on the judge's own point of view. The subjective nature of the test in custody cases is further underlined by the unanimity in the oft-repeated view that the trial judge wields very broad discretionary powers in making his award. The judges, however, often endeavour to formulate the welfare test in as objective a language as possible, always insisting that regard must be had to non-subjective circumstances. In the words of Lord Hunter, "the Court, in determining the question of custody must take a broad view of the situation ... and should not determine the question /of best interests of the child/ on off-hand principle."[1] And in R. v. Gyngall, Kay L.J.[2] was of the opinion that "The term welfare in this connection must be read in its largest possible sense, that is to say, as meaning that every circumstance must be taken into consideration, and the court must do what under the circumstances a wise parent acting for the true interests of the child would or ought to do. It is impossible to give a closer definition of the duty of the court in the exercise of this jurisdiction."

---

[1] M. v. M. 1926 S.C. 778 at 785-786.

[2] (1893) 2 Q.B. 232 at 248. See also the Scottish case of McClements v. McClements, 1958 S.C. 268 at 289 where Thomson L. J.-C. said that the welfare of the child "must be looked at from all angles."

2. Application

(a) Mode of Invocation (or how custody claims are made)

Custody proceedings in the higher courts in England, Scotland and Nigeria whether between parents or between parents and strangers usually take place in two main ways: (a) as an independent application, and (b) as an ancillary to another action. We now consider these in turn.

(i) Independent application: At common law the writ of habeas corpus has always remained available for procuring the release of a child from the custody of any person who is alleged not to have authority for such custody.[1] Habeas corpus proceedings do not, however, account for a significant number of the ways of bringing a custody proceeding about. In Nigeria, the procedure, it has been said, "is especially uncommon ... in respect of persons subject to native law and custom."[2] While in England the appearance of statutory methods of dealing with custody disputes have rendered the writ of habeas corpus largely "otiose".[3] English law, however, has another variant to the ways of initiating independent custody proceedings. This comes by means of the uniquely English wardship of court proceedings which are now governed by the Law Reform (Miscellaneous Proceedings)

---

1 See e.g. R. v. Greenhill (1836) 4 Ad & El 624: 111 E.R. 922; Barnardo v. McHugh /1891/ A.C. 388 H.L. (involving an illegitimate child).

2 Diri v. Nyikwa (Unreported) Suit No. K/M.91/1965 per Williams J.

3 See Bevan, The Law Relating to Children pp. 268-69.

Act, 1949.[1] Here, a parent who desires to invoke the inherent jurisdiction of the Family Division of the High Court by way of wardship proceedings and in the absence of other matrimonial proceedings will present his or her application under the Guardianship of Minors Act. Non-parents and non-guardians can also use wardship proceedings to obtain care and control of a child, whilst a parent may also apply to have a child made a ward of court - "a procedure which has the advantage that either parent may be given care and control whilst the exercise of his parental rights will remain under the supervision of the court."[2] Independent custody proceedings at common law in Scotland, which has no wardship proceedings, were dealt with by the Inner House of the Court of Session in the exercise of its nobile officium.[3] But as Clive and Wilson state,[4] "The Rules of Court have transferred this common law jurisdiction to the Outer House, which now deals generally with 'petitions for the custody of children brought under any Act of Parliament or at common law'". Proceedings may also be brought under the Guardianship of Infants Act 1886 as extended and amended.

---

1 Section 9, cap. 100.

2 Bromley, Family Law 4th ed. p. 281.

3 S. v. S. 1967 S.C. (H.L.) 46; Clive and Wilson op. cit. p. 568.

4 The Law of Husband and Wife in Scotland p. 568, citing Rules of Court 189 (a), as amended by Act of Sederunt of January 30, 1970; see also Syme v. Cunningham 1973 S.L.T. (Notes) 40.

(ii) Custody as an ancillary to another action: The Court of Session was first given jurisdiction to deal with custody of children "as it shall seem just and proper" in actions of divorce or judicial separation by section 9 of the Conjugal Rights (Scotland) Amendment Act, 1861. Such ancillary custody orders may take the form of "interim orders" or may come "in the final decree".[1] The Guardianship of Infants Act 1886 also gave power to the Court of Session to make custody orders in an action of divorce or judicial separation. There is specific provision in section 7 that the court can declare the guilty party in a matrimonial suit "unfit to have the custody of the children". It has been said,[2] as we noted earlier, that not much use has been made of this power which, in any case, is now largely redundant since the rule of the paramountcy of the child's welfare supersedes any notion of entitlement as of right to custody. Therefore it would not make any difference if the provision was excised from the statute book. The more significant legislation is the Matrimonial Proceedings (Children) Act 1958. The Act's more important provisions have been dealt with above.[3] We only need to emphasise here the duty imposed on the Court by section 8 to have

---

[1] See Clive and Wilson, op. cit. p. 575 for discussion of the term "final decree".

[2] Clive and Wilson, op. cit. p. 577.

[3] supra, at 255-259

regard to the interests of children in a divorce action and the extension of the class of children over whom the court has jurisdiction.[1] There are analogous provisions in Nigerian Law.[2]

Finally, the 1958 Act has conferred jurisdiction on the courts in matters involving access as an ancillary to another action. It is provided in section 14(2) that "any power exercisable by the court to make provision as to the custody of a child shall include power ... to make provision as to access whether or not provision is made for legal custody."[3] The current English legislation on the courts' jurisdiction in custody as an ancillary to divorce or judicial separation is the Matrimonial Causes Act, 1973. It should also be noted that the 1973 Domicile and Matrimonial Proceedings Act has conferred jurisdiction on the Scottish courts to make ancillary orders of custody in all cases where the courts have jurisdiction in the principal action for divorce, separation, etc.[4]

(b) Scope of Application

(I) Structural Analysis of Section 1: We have seen that the overriding criterion of the paramountcy of the welfare

---

[1] Section 7

[2] See The Matrimonial Causes Decree, 1970, section 69.

[3] See Huddart v. Huddart 1960 S.C. 300; 1961 S.C. 393.

[4] cap. 45, section 10(1) and Schedule 2.

of the child in guardianship and custody cases has been emerging slowly in legislation and in judicial decisions before its culmination in the principles enshrined in section 1 of the Guardianship of Infants Act 1925. The more modern statement of the welfare principle is contained in section 1 of the English Guardianship of Minors Act, 1971,[1] which is in almost identical words as the 1925 Act. It should be observed, however, that the significant difference between the 1925 and 1971 Guardianship Acts lies in the omission of the preamble to the 1925 Act from the 1971 enactment. It would be recalled that the preamble featured prominently in the case of J. v. C., and its omission from the 1971 Act thus removes doubts from English law as to the proper scope of section 1. But it does not appear that a definitive answer can be given for the scope of section 1 of the 1925 Act as far as it appertains to Scots law under which the preamble still forms part of Scottish guardianship enactment.

(i) Background to section 1. The provision in section 1 cannot be taken in isolation and analysed out of its proper context. Guardianship and custody law today could be seen as part of that larger movement of legal emancipation of women which began about 1857 with the English Matrimonial Causes Act of that year. Before then, it would be recalled, the

---

[1] Chapter 3, 1971.

woman was subject to servitude under the fiction of marital unity. The woman had not yet received the right to vote, and upon marriage she and all her possessions and children belonged to the husband. If she left her husband he could force her to return to the matrimonial home no matter what were the merits of her case or the demerits of the husband's who, in addition, could refuse her support and access to her children. "The wife", in the words of Lord Upjohn, "was a mere chattel for all practical relevant purposes."[1] Beginning with the Married Women's Property Acts of the 1870's and 1880's, and culminating in the 1973 Domicile and Matrimonial Proceedings and Guardianship Acts, the legal emancipation of women could be said today to be substantially accomplished.

(ii) Interpretation : The Underlying Principles. Certain principles which are basic to both internal municipal and private international law are embedded in section 1. Some of these we now proceed briefly to examine.

Legal equality: The wording of section 1 which eschews any claim of superiority by either father or mother as far as guardianship and custody matters are concerned underlines the philosophy of equality which the law pursues. This is emphasised still further by the provision in section 2 which gave the mother "the like powers to apply to the court in

---

[1] J. v. C. [1970] A.C. 668 at 720.

respect of any matter affecting the minor as are possessed by the father." This philosophy of parental equality[1] was carried to its logical conclusion by the Guardianship Act, 1973.[2] Section 1(1) of the Act which applies to England and Wales provides that

> "In relation to the custody or upbringing of a minor, and in relation to the administration of any property belonging to or held in trust for a minor or the application of income of any such property, a mother shall have the same rights and authority as the law allows to a father, and the rights and authority of mother and father shall be equal and be exercisable by either without the other."

The Scottish provision in section 10(1) is in identical terms. For the Scots mother, that equality means that she can "hold the office of tutor to a pupil or, as the case may be, curator to a minor" just as the father.

It will be noticed that these provisions in the 1973 Guardianship Act are not directed at the child's welfare but to equality between the parents. Also, the equality provision is not confined to proceedings before a court. Equal rights are possessed as to custody and other 'parental rights' even in the absence of court proceedings. Therefore, the parental equality principle would apply in situations involving, for example, the choice of name for a child,[3]

---

[1] This discussion of parental equality is mostly of relevance to the U.K. By its very nature polygamy in Nigeria presupposes basic inequality. It has been declared that "There shall be no statutory limit to the number of wives a man may have. It shall be an offence for a woman to have more than one husband at one time." See Declaration of Borgu Native Marriage Law & Custom Order, S.6. Quaere: Is this and other inequality legal positions in Nigeria constitutional?

[2] Cap. 29, 1973.

[3] See Registration of Births, Deaths and Marriages (Scotland) Act, 1965, S. 43.

the right to chastise a child,[1] the control of the education of the child,[2] the control of the child's religious upbringing,[3] and the control of the child's residence, in so far as this is not already covered by custody and guardianship.[4]

Private international law: It has often been asserted that the principle contained in section 1 of the Guardianship of Infants Acts, 1925 - 1971 is not capable of generating rules of the conflict of laws and that the section merely states a "general principle of public policy."[5] Such assertions lend weight to Dr. Zweigert's statement that private international law "/has/ been nationalised by domestic legislation".[6] Some of the arguments for excluding private international law considerations from the ambit of section 1 are usually focussed on the reference in section 1 to the father's right "at common law", which seems to indicate the irrelevance of private international law considerations to the section. For as Professor Otto Kahn-Freund has said, "The common law was the negation of the conflict of laws."[7] It must be conceded, no doubt, that the

---

1 See e.g. Children and Young Persons (Scotland) Act, 1937, S.12(1); McShane v. Paton 1922 J.C. 26.

2 See e.g. Education (Scotland) Act, 1962, s. 31; Kennedy v. Clark, 1970 SLT. 260.

3 See e.g. Custody of Children Act, 1891, S.4; Education (Scotland) Act, 1962, sections 8-10; McNaught v. McNaught, 1955 SLT.(Sh.Ct.) 9.

4 See Harvey v. Harvey (1860) 22 D. 1198.

5 Anton, Private International Law, p. 371; Morris, Conflict of Laws, p. 180;

6 K. Zweigert, "Some Reflections on the Sociological Dimensions of Private International Law or What is Justice in Conflict of Laws (1973) 44 Colo. L. Rev. 283, at 286.

7 The Growth of Internationalism in English Private International Law (1960) p. 10.

Guardianship of Infants Acts 1925-1971 which "amend" and "consolidate" previous enactments relating to the guardianship and custody of minors were patently conceived from the standpoint of the ordinary, internal municipal, law of England and Scotland, as evidenced by the reference to the claims of the father, at common law.[1] But in spite of such reference to common law, it is submitted that an internal law-oriented construction is not of an overriding essence of section 1 which, in fact, is top-heavy with private international law considerations. In the first place, it is no longer open to courts to place an "internal law only" construction on section 1 because a major premise for such a view - i.e. the reference to "common law" - has now been removed.[2] In the next place section 1 relates to "any proceedings" without qualifications. In Clarke-Jervoise v. Scutt.[3] Eve J. said that

> "'any' is a word with a very wide meaning, and prima facie the use of it excludes limitation."

Lord Upjohn in J. v. C. after quoting section 1 of the 1925 Act added that "That Act now states the law for all purposes."[4] Furthermore, the term "welfare" itself introduces a value judgement. Choice of law in conflicts law today is usually made in the context of exercising value-

---

1 A.B. Keith, Foreign Guardianship and English Control of Wards" (1940) 22 Jo. Comp. L. 234.

2 See Guardianship Act, 1973, cap. 29, Schedule 3.

3 (1920) 1 Ch. 382 at 388.

4 [1970] A.C. 668 at 724.

judgments. When a foreign rule of law is rejected as contrary to public policy or natural justice, or when the rules of "procedure and evidence" are invoked to exclude foreign law, value judgements are inevitably brought into play. And the whole conflicts law theory of "principled preferences" which looks beyond a chosen jurisdiction to a chosen law[1] is premised on the philosophy that choice of law is not simply a mechanical exercise but is a process in which reasoned judgment should be brought to bear on the competing values, interests and policies in any given conflicts of law situation. Finally, the principle of equality or non-discrimination between husband and wife represents one side of a coin the reverse side of which is represented by the principle of justice between father and mother. Justice as a major basis of the conflict of laws is widely acknowledged by jurists[2] as well as in the ratio decidendi of numerous cases.[3] "With regard to the English conflict of laws (and the position in other systems may be similar)", Professor Graveson writes, "the dominant motivating principle is the desire to do justice in cases involving a foreign element."[4] And in the words of

---

1 Cavers, Choice of Law Process. Chapter 5

2 e.g. Anton, Private International Law, p.1. "A legal system's rules of private international law emerge from the desire to dispense justice in civil cases with a foreign element." Graveson, The Conflict of Laws, 6th ed. esp. pp.7-12.

3 e.g. National Bank of Greece and Athens S.A. v. Metliss [1958] A.C. 509, at 525.

4 Graveson, op. cit. p. 8.

Professor Neuhaus, justice has always been "struggling for supremacy" over legal certainty in the conflict of laws.[1] In Starkowski v. Attorney General,[2] the House of Lords was faced with deciding which of two ceremonies of marriage - and this has an incidental effect on the status of a child - should be held valid. Lord Reid stated the principle of decision in these words: "To my mind the best way of approaching this question is to consider the consequences of a decision in either sense. The circumstances are such that no decision can avoid creating some possible hard cases, but if a decision in one sense will on the whole lead to much more just and reasonable results, that appears to me to be a strong argument in its favour."[3] Lord Reid then decided on "the balance of justice and convenience."

It may be noted, by way of summary, that the principle of equality is not without significance in the conflict of laws as a policy guideline.[4] Unequal treatment or consideration of foreign and domestic law which may both have a bearing on a guardianship case, through invocation of public policy, runs counter to the general philosophy of private international law which starts off with the assumption that all laws have prima facie equal claims to application until

---

1 P.H. Neuhaus, "Legal Certainty versus Equity in the conflict of Laws" (1963) 28 Law and Contemp. Prob. 795 at 796.

2 [1954] A.C. 155.

3 Ibid. at 170.

4 see Wilheim Wengler, "The Significance of the Principle of Equality in the Conflict of Laws" (1963) 28 Law and Contemp. Prob. 823-859.

excluded by proper conflict of laws rules. Accordingly, the underlying principle of private international law in section 1 ought to be given its due emphasis no less than that accorded to the other principle of equality.

(iii) A comment on J. v. C.[1] /or the Rule in J. v. C./

The House of Lords decision in the English case of J. v. C. illustrates a particularly nice problem of interpretation. The facts of the case, briefly, were as follows. In 1958, a son was born to Spanish parents, both Roman Catholics in humble circumstances, who were living temporarily in England for employment reasons. The mother was ill at the time the child was born. When only four days old, the child was placed with an English protestant foster mother - a middle class wife of a solicitor. In 1959 the child was returned to the parents who in 1960 returned to their country in Spain, to live in rather unfavourable circumstances. The child became unwell and in 1961 it was returned to the foster mother temporarily but indefinitely. The parents left Spain for employment in Germany. In 1963 the parents again returned to Spain where their employment and housing conditions improved very considerably. In the same year a demand was made by the natural parents for the return of the child, but this was refused by the foster parents. Litigation which began in 1963 was accompanied by severe

---

[1] /1970/ A.C. 668.

delays, so that the House of Lords decision was not given until the end of 1968 - some five years later. The foster parents were warm and affectionate: the natural parents were unimpeachable in morals and general character. Considering the structure of section 1 of the 1925 Guardianship Act, the question presented was whether or not the unimpeachable parents were to be preferred to and to prevail over the foster parents.

There was little or no doubt that section 1 was originally taken to apply only to disputes between parents, first because the section was worded in terms of the superior rights or claims of mother and father; secondly because of the preamble[1] to the Act which had spoken about the goal of securing equality between the mother and father; and thirdly because when one looks at the concluding words of the section against the background of the practice of awarding custody of very young children to their mothers, it becomes clear that the section was aimed at equalising the rights of the parents. It was not surprising, then, that in the Scottish case of McLean v. Hardie[2] Lord President Clyde said that "the Act of 1925 .... applies only to the rival claims of father and mother." And in Pow v. Pow

---

[1] The preamble reads: "Whereas Parliament by the Sex Disqualification (Removal) Act, 1919, and various other enactments, has sought to establish equality in law between the sexes, and it is expedient that this principle should obtain with respect to the guardianship of infants and the rights and responsibilities conferred thereby ....."

[2] 1927 S.C. 344. "We are not dealing with a case under the Act of 1925 which applies only to the rival claims of father and mother." 1927 S.L.T. 340, at 341

Lord Fleming stated[1] that "The Act of 1925 applies - primarily at all events - in a contest between husband and wife." Similarly, the English Court of Appeal in Re Carroll[2] held that the second part of the statutory principle contained in section 1 was directed only to the regulation of the rights of the parents inter se, so that the section would have no application in the case of an illegitimate child. In the words of Slesser L.J., "This statute ... has confined itself to questions as between the rights of father and mother which I have already outlined - problems which cannot arise in the case of an illegitimate child."[3]

Counsel in J. v. C. sought to limit the scope of section 1 to interparental disputes so that unimpeachable parents would be preferred to strangers. In what must surely rank as an instance of unalloyed judicial legislation, the House of Lords held that the section cannot be confined to disputes between parents inter se.* Lord MacDermott asked himself whether section 1 is "to be read as referring only to disputes between the parents of the child"[4] and his Lordship returned a negative answer. He said:

> "The latter part beginning with the words 'shall not take into consideration' does not call for or imply any such constriction for it does not necessarily apply to all the possible disputes which the earlier part is capable of embracing."[5]

---

1 1931 S.L.T. 485.
2 (1931) 1 K.B. 317.
3 Ibid. at 355.
4 [1970] A.C. 668 at 709-710.
5 Ibid. at 710.

* The House of Lords unanimously held that the infant involved in the case should remain with its English foster parents.

After citing with approval Eve, J's dictum in Clarke-Jervoise v. Scutt,[1] Lord MacDermott elaborated on his view as to the "true construction" of the section and he added:[2]

> "Thus read the section would apply to cases, such as the present, between parents and strangers. This construction finds further support in the following considerations. In the first place, since (as the Act and authorities already mentioned by way of background show) welfare was being regarded increasingly as a general criterion which was not limited to custody disputes between parents, it would be more than strange if the earlier part of section 1 were meant to apply only to that single type of dispute. Secondly, the questions for decision which are expressly mentioned - custody, upbringing, administration of property belonging to or held in trust for the infant, and the application of the income thereof - are of a kind to suggest the involvement not only of parents but of others such as guardians or trustees. And thirdly, there is nothing in the rest of the Act to require a limited construction of section 1. Section 6, indeed, would seem to point the other way for it provides for the settlement by the court of differences between joint guardians affecting the welfare of an infant and there is no apparent reason for confining this relief to differences between parents or for taking proceedings therefore out of the ambit of section 1."

Lord Guest, for his part, got round the difficulty presented by the preamble to the 1925 Act by stating that "The preamble of an Act cannot control the ambit of sections of an Act."[3] In so stating, his Lordship was relying on Attorney General v. H.R.H. Prince Ernest Augustus of Hanover,[4] a leading case on the place of preambles in the construction of statutes. Lord Guest concluded that section 1 is "of universal application and is not limited in its application to questions

---

1 (1920) Ch. 382 at 388.
2 [1970] A.C. 668 at 710.
3 Ibid. at 697.
4 [1957] A.C. 436.

as between parents."[1] As far as Lord Upjohn was concerned, the issue was a clear one. Section 1 of the Guardianship of Infants Act has stated the law for "all purposes".[2] The principle laid down in the 1925 Act "applied wherever the custody of an infant is in issue and whoever are the parties."[3]

But too much should not be made about the view concerning the breadth of judicial law-making in J. v. C. It is true that as Clive and Wilson state, "The last words [of section 1] have caused a certain amount of difficulty"[4] especially because "it is not clear in what respect the claim of the mother would have been regarded in the absence of the Act as superior to that of the father."[5] However, it is submitted, in the first place, that a proper interpretation would be to read the section as a whole.[6] In so doing, only the second limb of the section would be reflecting the legislature's intent as recorded in the preamble. And since the first limb is separated from the second limb by the conjunction "and" there is strictly no room for limiting the apparent effect of the opening words of the section. Such limitation would have been justifiable

---

1 [1970] A.C. 668 at 697.
2 Ibid. at 724.
3 Ibid. at 724.
4 The Law of Husband and Wife in Scotland, p. 582.
5 Ibid.
6 See L.J. Blom-Cooper "The Paramountcy of the Child's Welfare" (1955) 18 M.L.R. 490, esp. 491-492 for a brief but useful discussion of this problem.

if, instead of the conjunction "and", we had had an "id est" before the words "shall not take into consideration etc...". But this is not the case. Secondly, even before the decision in J. v. C. Scottish courts in some cases did not think that section 1 applied only to rival claims between father and mother. This was the position supported by counsel's arguments in Nicol v. Nicol[1] and Cochrane v. Keys.[2] As Lord Strachan said in the first of the two cases, he arrived at his decision on other grounds "Assuming that section 1 of the Guardianship of Infants Act, 1925, does not apply."[3] And in Cochrane v. Keys Lord Robertson derived assistance from section 14(2) of the Matrimonial Proceedings (Children) Act, 1958 in answering the contention that section 1 of the 1925 Act referred only to the competing claims of father and mother and he stated that "now the same considerations apply to a contest between grandparents and parent, as between parent and parent."[4]

Parental versus third-party (stranger) suits in Nigeria will almost always be decided in favour of the parents[5] unless these latter are over-whelmingly unfit to look after the child's welfare. It is clear, therefore,

---

1 1953 S.L.T. (Notes) 67.
2 1968 S.L.T. (Notes) 64.
3 1953 S.L.T. (Notes) 67.
4 1968 S.L.T. (Notes) 64.
5 The term "parents" is given a broader interpretation in Nigeria than is the case in the United Kingdom. See below.

that Nigerian courts interpreting analogous statutory provisions are not likely to reach a decision like that in J. v. C., a decision which has carried third party "rights" in United Kingdom law to a point far beyond what Nigerian courts would deem legitimate. For example, in Oyedu v. Oyedu[1] the High Court of the East Central State was faced with a dispute between parents over the interim custody of children of the marriage. At one time the children had been placed by the father with a foster parent, one Mrs. Okeke at Enugu, but the father had resumed factual custody of the children at the time of the litigation. Aniagolu, J., adverted to a situation in which custody might be left with foster parents and said:

> "However benevolent the said Mrs. Okeke /foster parent/ might have been it is an inalienable right for parents to look after their children and their custody must be preferred, when they are able to look after the children, to that of a foster parent however good the foster parent may be. The applicant /mother/ cannot stand by and see her children fostered at Enugu when she is alive, healthy, has the means with which to look after the children, and is not otherwise disqualified." [2]

---

[1] (Jan.-June 1972) II E.C.S.L.R. 41.

[2] Ibid. at 44.

(II) Types of Suits

The principle laid down in section 1 of the Guardianship of Infants Act 1925 is applicable to different types of suits. These are considered in the following order.

(i) Custody as between father and mother: As was noted above, the 19th and earlier century common law right of the father to the custody of his children were almost absolute and inviolable. This right was progressively whittled away by the Guardianship of Infants Acts 1886-1973. Section 1 of the 1925 Act, as we have seen, lays down the rule of the paramountcy of the welfare of the child in any court proceedings. But in the absence of court proceedings "the father of a legitimate child continued, as at common law, to be entitled to its custody, to the complete exclusion of the mother."[1] Thus, in spite of statutory language which at first appears very broad, the father continued to enjoy some advantage over the mother.[2] Today, however, interparental guardianship and custody disputes - with or without court proceedings - are to be resolved on a strict equality basis. The Guardianship Act 1973, Schedule 3, has not only repealed the expression "or any right at common law possessed by the father" which occurs

---

[1] Clive and Wilson, op. cit. p.572.

[2] See e.g. McLean v. McLean 1947 S.C. 79 at 89; Douglas v. Douglas 1950 S.C. 453; 1950 S.L.T. 302 at 304, per L. J.-C. Thomson who said that "The position of a father as head of a family with the resulting obligations and duties is not .... infringed by the Guardianship of Infants Act 1925."

in section 1 of the 1925 Act, it has also stated expressly that in relation to a pupil or minor child "a mother shall have the same rights and authority as the law allows to a father" and that such rights and authority shall be equal and be exercisable severally and jointly.[1] In contrast to this, the Nigerian law of custody still displays subordination of the mother's claim to the father's. First, the Infants Law of Western Nigeria has expressly preserved the "right at common law possessed by the father, in respect of such custody, upbringing" etc. of the children.[2] And secondly, customary law of custody in general prefers the father's claims to those of the mother.

(ii) Custody as between parent(s) and third parties: Disputes between parents or a parent and a stranger over the custody of a child is a universal and very frequent occurrence. Such strangers could be grandparents, foster parents, step-parents and other relations or even an institution, and in many instances the dispute arises after the death of one of the parents to the marriage out of which the child was begotten. The rule as to this type of dispute was quite clear. At common law the parents had very strong prima facie claim to the custody, although such claims could be denied in the interests of the child's welfare. In

---

[1] See S.1(1) [England] and S.10(1) [Scotland].

[2] Infants Law, Cap. 49, Laws of Western Nigeria (1959 ed.) S.24.

Re Thain[1] a father had given his only daughter to the custody of his late wife's sister and her husband at a time the father was in the Royal Air Force Service. The child lived with her aunt for some seven years, and the father now sought to regain the custody. Eve, J. (approved by the Court of Appeal) held that under the circumstances, as the father had never surrendered his parental right, it was the well settled practice that the father's claim must prevail. The Court was satisfied that the father "did what was best for the child in committing her to the care of his late wife's relative", and that the father should not be precluded "from now insisting on his rights."[2] It was the court's view that the child's welfare would not suffer if the father was given the custody.[3] In Macallister v. Macallister[4] a mother after the death of her husband whom she had deserted sought to recover custody of her child from the child's half-sister who had nursed it for eight years from the age of four months. In Lord Guthrie's opinion,

---

1 (1926) Ch. 676.

2 Ibid. at 683.

3 Dr. O.M. Stone has described the decision as "curious" in that "there appears to have been no examination of the attitude of the father's second wife, which might have had some importance in the day to day life of the child", in Parental Custody and Matrimonial Maintenance (1966 B.I.I.C.L.) p.30 n. 124. But the criticism seems unjustified. Eve, J. did say that no question of "unfitness on either side is involved" and was "satisfied the child will be as well cared for and be the object of as much solicitude in the one home as in the other." (1926) Ch. 676, at 682. Re Thain was followed as regards parental wishes in the Nigerian cases of Cole v. Cole (1944) 16 N.L.R. 9, and Oyedu v. Oyedu (1972) (1972) 2 E.C.S.L.R. 41. (But these did not involve a situation of one parent who had died.)

4 1962 S.C. 406.

the mother "was not primarily concerned with the welfare of the child, but more with the assertion of her right as mother against [the child's] half-sister who had brought him up over a period of years."[1] Where the third-party claimant was a step-mother, the latter, vis-à-vis the actual mother, often had a weak claim, especially where the children were very young. As Lord Cohen said in Willoughby v. Willoughby,[2] " ... we are dealing with a child of two years, and to a child of that tender age I do not think a step-mother, however anxious to do her best for the child - and it is accepted that the father's second wife can be so described - can take the place of the mother. We are bound to take into consideration the possibility that both families may have more children and in those circumstances it seems to me that the mother is more likely to give the attention to this child that the child needs, than a step-mother who, however anxious to perform her duties, will naturally be more interested in the needs of a child who is her own child."

Parents versus third-party custody suits arise commonly under two forms: (a) following the death of the spouse to whom custody was awarded; and (b) as an aspect of the religious education and upbringing which a child

---

1 Ibid. at 413.

2 (1951) P. 184 at 190-191. And at p. 191 Singleton L.J. said, "She has the opportunity of a step-mother's care, but that is not always the same thing [as a mother's care]."

should receive. A brief consideration of these two will be followed by some more general remarks.

Death of Spouse to whom custody was awarded

At common law a woman after the death of her husband had a legal title to the custody of the child and her claim would usually be enforced by the court against a person who was not so closely related to the child. A fortiori, the father as sole surviving parent of the children had an enforceable claim to custody at common law.

In many of these death-of-one-spouse cases procedural and substantive questions are posed. In Scots law, the main procedural question has been the method of dealing with the custody problem - whether by minute in the divorce proceedings or by independent application by the surviving party. We are not directly concerned with that here.[1] The substantive question in such cases is to explore the competing claims and assess all the relevant considerations. The answer often returned is that no real preference is accorded blood relations of the child over strangers. In all cases the interest and welfare of the child is the paramount consideration. Having said this, we must add that an examination of the Scottish cases would indicate that it is sometimes difficult to reconcile the different

---

[1] See Sutherland v. Sutherland 1959 S.L.T. (Notes) 61; and Copeland v. Copeland 1968 S.L.T. (Notes) 101; (1969) S.L.T. (Notes) 70 (Second Division) for a discussion of the procedural questions.

opinions in somewhat similar fact situations. In Nicol v. Nicol[1] the divorced wife sought to recover custody of three children from the relatives of the deceased former husband and she succeeded. But in Sutherland v. Sutherland[2] a divorced wife similarly sought to recover custody of a child from a child's step-mother (i.e. second wife of deceased husband) and she failed. In yet a third case, Macallister v. Macallister[3] a former wife attempted to regain custody of a child from the child's half-sister (i.e. deceased ex-husband's daughter) but she was not successful. How, for instance, does one reconcile the Nicol decision with that in Macallister? In the former case where three children were involved, Lord Strachan said "it would not be desirable to separate them"[4] and so awarded custody of all three children to the mother, despite the fact that "the children's own wishes differ"[5] - the youngest two children (girl and boy, ages 11 and 10) stated their preference to remain with their grandmother, and the eldest son (14 years) expressed a wish to go to his mother. But in Macallister where the claimant-mother had two sons for the deceased husband, herself retaining the custody of the youngest son, the court held that the child (Douglas) should not be separated from his half-brothers and half-

---

1 1953 S.L.T. (Notes) 67.
2 1959 S.L.T. (Notes) 61.
3 1962 S.C. 406.
4 1953 S.L.T. (Notes) 67 at 68.
5 Ibid.

sister (defender), even though the holding would mean separation of Douglas from his full brother, Ian. In Lord Guthrie's words, "Douglas and Ian are strangers to each other."[1]

The ratio decidendi in Nicol[2] appear to rest in the "better accommodation", "better financial advantages" and "suitable educational facilities" which the natural mother offered to the children. And in Macallister[3] it turned on the "better circumstances of the home" offered by the half-sister to the child. These decisions, then, appear to turn upon factors of wealth and the material welfare of the children. If this is so, it further illustrates the inconsistencies in some of these decisions. For in Cochrane v. Keys[4] where a maternal grandmother sought to recover custody of the twin children from the divorced father (the mother-wife having died) the maternal grandmother succeeded. "Materially", said Lord Robertson, "the children would be no worse off, and perhaps a little better off, with the respondent /father/ and his /second/ wife."[5] Yet the respondent father was refused custody. Presumably the court had in mind the consideration that a decision in favour of the father in this typical conflicts of laws case would mean the

---

1 1962 S.C. 406 at 413.
2 1953 S.L.T. (Notes) at 68.
3 1962 S.C. 406.
4 1968 S.L.T. (Notes) 64.
5 Ibid. Emphasis supplied.

removal of the children out of Scotland to Dudley, Worcester in England where the father and his new wife had now established their residence. Beyond these conjectures, the decisions do not offer any positive conclusions as to the underlying secondary considerations.

Religion and custody: Religion, material wealth and other considerations that enter into a custody determination are examined more fully below in the section headed "criteria applied in awarding custody". We will only mention here to what extent the courts will take into account the deceased mother's or father's religious wishes in a dispute between a parent and third parties. The problem normally arises in the case of mixed marriages where one spouse (usually upon the death of the other spouse) bases his or her custody claim either on ante-nuptial agreements regarding the religious upbringing of the children or upon the children involved having already been baptised into one particular denomination. The attitude of the courts has generally been that while such agreements are not strictly binding[1], proper weight will be given to them. And where a child has attained an age where he can appreciate matters of religious upbringing a change from one denomination or religion to another will not, in the interest of the child, be ordered.[2]

---

[1] See D.P. O'Connell, "Rival Claims of Parents in Custody Suits", 1 Univ. of Queensland L.J. 187 esp. 199-205.

[2] See, e.g. Ward v. Laverty [1925] A.C. 101 at 109; Re Collins (An Infant)(1950) 1 Ch. 498 at 505; Re G (an Infant)(1962) 2 Q.B. 141 at 146; D'Alton v. D'Alton (1878) 4 P.D. 87; Re Besant (1879) 11 Ch.D. 508 at 519.

We may now observe by way of general comments that although the notion of near-inviolability of parental right to custody against strangers had long been exploded, the achievement of this was not without vicissitudes. The "progressive thinking" in custody matters represented by the principle of the paramountcy of the child's welfare suffered a judicial set-back at least three times during the last 100 years. In all of the three cases - first in Re Agar Ellis,[1] then in R. v. New[2] and finally in Re Carroll (No. 2),[3] - "the courts attempted to put back the clock" several years.[4] Re Agar Ellis which has been described as a "dreadful"[5] case concerned the claim of a father against a mother, not a parental claim against a stranger. But in that case "a good deal of discussion has turned upon the exact limits of parental authority".[6] That authority is only interfered with in favour of a stranger "when the natural guardian of the child ceases to be the natural guardian, and shows by his conduct that he has become an unnatural guardian."[7] The necessity for giving effect to the father's parental custody rights against the

---

1 (1883) 24 Ch.D. 317.
2 (1904) 20 T.L.R. 583.
3 [1931] 1 K.B. 317.
4 J. v. C. [1970] A.C. 668 at 725 per Lord Upjohn, and at 699 per Lord Guest.
5 Ibid. at 721 per Lord Upjohn.
6 (1883) 24 Ch.D. 317 at 335 per Bowen L.J.
7 Ibid. at 337.

whole world was explained by Cotton, L.J. who said:[1] "... this Court holds this principle - that when, by birth, a child is subject to a father, it is for the general interest of families, and for the general interest of children, and really for the interest of the particular infant, that the Court should not, except in very extreme cases, interfere with the discretion of the father, but leave to him the responsibility of exercising that power which nature has given him by the birth of the child." In both R. v. New and Re Carroll, the disputes centred around the religious upbringing[2] of children. Their Lordships in J. v. C. were particularly incensed by the fact that in such feuds the infant's welfare tended almost always to be sacrificed. Hear what Lord Upjohn said:[3]

> "My Lords, it is, I think, a sad commentary on the attitudes of some members of the Protestant and Roman Catholic faiths, that in so many of the reported cases over the last hundred years the real contest has been as to the religious upbringing of the infant and orders have been made with scant regard to the true welfare of the infant."

Accordingly, the House of Lords overruled these earlier cases because they "disregarded the relevance of S.1 and looked on the rights of the mother as absolute rather than qualified in the sense that they only become effectual if in accord with the best interests of the child's welfare."[4]

---

[1] Ibid. at 334.

[2] It has been said that "it is notorious that custody and religious upbringing are frequently interwoven issues". J. v. C. /1970/ A.C. 668 at 708 per Lord MacDermott.

[3] Ibid. at 717.

[4] Ibid. at 713 per Lord MacDermott.

At any rate successive statutes had recognised that where the child's welfare demands it, parental rights to custody as against strangers can be ignored. The Guardianship of Infants Act 1886 enacted that the court granting a decree of divorce or judicial separation can declare a parent to be unfit to have custody of the child.[1] And as we have seen earlier, the provisions of the Custody of Children Act 1891 weakened considerably the position of a parent who seeks production or delivery of a child whom he or she had abandoned, deserted or neglected.[2] And in spite of the statutory reference in the 1925 Guardianship Act to the "rights" of mother and father, J. v. C., as we have seen, has now held that the principle enshrined in section 1 of that Act applies not only in inter-parental suits but also in suits between parents and third parties. The proper place of the principle of parental preference as against strangers was spelled out clearly in J. v. C. This can be summarised by saying that the claims or wishes of unimpeachable parents only come first among the secondary considerations. In the words of Lord MacDermott, "The rights and wishes of parents, whether unimpeachable or otherwise, must be assessed and weighed in their bearing on the welfare of the child in conjunction with all other factors relevant to that issue."[3] Again,[4] "While there is now no

---

1 Section 7.
2 e.g. Sections 1 and 3.
3 J. v. C. [1970] A.C. 668 at 715.
4 Ibid.

rule of law that the rights and wishes of unimpeachable parents must prevail over other considerations, such rights and duties, recognised as they are by nature and society, can be capable of ministering to the total welfare of the child in a special way, and must therefore preponderate in many cases. The parental rights, however, remain qualified and not absolute for the purposes of the investigation." Lord Upjohn puts the issue succintly in a way that appeals to the ordinary parent. He said:

> "The natural parents have a strong claim to have their wishes considered; first and principally, no doubt, because normally it is part of the paramount consideration of the welfare of the infant that he should be with them, but also because as the natural parents they have themselves a strong claim to have their wishes considered as normally the proper persons to have the upbringing of the child they have brought into the world."[1]

Where unequivocably it would be in the interests of the children to be in the custody of the parents, the latter will prevail over strangers. But where the claims or wishes of the parents conflict with the interests and welfare of the child, the parents would not win just because they are parents. In such a case, having given due attention to the rights of the parents, the courts will nevertheless find in favour of the stranger on the basis of the interests and welfare of the child.

---

[1] Ibid. at 724.

Therefore, in Anglo-Scots law, as against third parties when considering the secondary matters in custody, "The wishes of an unimpeachable parent undoubtedly stand first,"[1] Eve J. said in Re Thain. But it "cannot be correct to talk of the pre-eminent position of parents, or of their exclusive right to the custody of their children, when the future welfare of those children is being considered by the court."[2]

The parents versus strangers custody suits which have caused English and Scottish judges so much worry present an interesting contrast with the position in Nigerian law. Fostering[3] in the European sense is not common in Nigeria, and, apart from situations involving step-parents, Nigerian courts would not regard grand parents, uncles and other close relatives of the child as strangers. These would usually be classified as parents. In Re Agboruja[4] the High Court referred to the Urhobo native law and custom which is of universal application in most parts of Nigeria according to which a brother (half or full) inherits everything left by the deceased, including the widow and her children. As Ames, S.P.J. said:[5] "The custom by which a man's heir is his next male relative, whether brother, son, uncle or even

---

1 [1926] Ch. 676 at 684.
2 Re Adoption Application No. 41/61 (1963) Ch. 315 at 329 per Danckwerts L.J.
3 This is considered separately below.
4 (1949) 19 N.L.R. 38.
5 Ibid.

cousin, is widespread throughout Nigeria. When there are minor children it means that the father's heir becomes their new father. This is a real relationship and the new fathers regard the children as their own children." Whereas if the widow got married to a complete stranger "the children will acquire a step-father and not a father"[1] as they would have if the widow remarried within the family of the deceased. Having made this preliminary classification of the dispute into its proper juridical category, e.g. that it is an interparental suit, the Nigerian courts would then proceed to apply the usual principle of determining the issue according to the paramountcy of the welfare of the child.

Fostering: A word or two will now be said about a special type of fostering which is now assuming frequent occurrence in British courts. This must be distinguished from the more usual British type of fostering which forms part of the recent Houghton Committee Report.[2] The British type of fostering usually involves children who are "in need of care and protection". It takes the form of "boarding out" under the Children Act, 1948, sections 1 and 2 or the Social Work (Scotland) Act 1968 where a child is involved in the commission of an offence or is in need of care, protection and full education. And three parties are

---

1 Ibid. at 39.

2 See Report of the Departmental Committee on the Adoption of Children (Cmnd. 5107) 1972. See also, Christine Davies, "The Departmental Committee on the Adoption of Children and the Tug of War Cases" (1973) 36 M.L.R. 245, for useful comment on this Report with which we are not directly concerned.

usually involved in the fostering arrangement - the parent or guardian, the local authority and the foster parents. In such a triangular arrangement, the scene is readily set for the ideal "tug-of-war" situation, for,

"The authority may wish to terminate the arrangement with foster parents who are unwilling to return the child, or his natural parents or guardian may wish to resume care and control which the authority or foster parents (or both) are anxious to retain."[1] Our concern is with the special[2] institution of fostering which is associated largely with West African married students in Britain. Such fostering which is undertaken primarily for pecuniary ends has been said by Sir George Baker to be contrary to British ideas and social beliefs "that a child's formative years should be spent with its mother"[3] and it raises "grave social problems or social evil."[4] In Re O(A Minor) where a Ghanian couple sought unsuccessfully to repatriate their child who was with foster parents, the English court said that the child was "totally English by nurture". And in spite of the fact that "problems of race, nationality and language"[5] which the girl would grow up to face - undoubted

---

1 Christine Davies, "The Departmental Committee ... and the Tug of War Cases" (1973) 36 M.L.R. 245 at 248.

2 See "African Foster Children", in West Africa (magazine) Oct. 22, 1973 p. 1481, for a useful discussion of this problem. The article revealed that the researches of Dr. R. Holman of Glasgow University shows that 60% of children placed in private foster homes in the U.K. were from West Africa.

3 Re O (1973) 5 Rev. Ghana Law 6, at 7; (1973) 137 J.P.N. 85 at 86; The Times, Dec. 5, 1972.

4 Ibid.

5 Ibid.

social difficulties which might involve "lack of future employment and marriage opportunities and racial prejudice generally"[1] - the learned President still held that the child's best interests and welfare "in the long term and the short term"[2] required her remaining in Britain with foster parents. To send the child to Ghana would expose her, it was said, to "tribal prejudice in West Africa, where she might be the butt of other children because of her English accent and ignorance of her parents' language",[3] and this would leave both the judge and the girl with a "rankling sense of injustice".[4] The case of Re O.E.,[5] with minor factual differences, involves a similar problem as in Re O (A Minor). A Nigerian parent wanted to recover, from foster parents and take to Nigeria, a child. Contradictory expert evidence was tendered as to the short and long term effect of the child being uprooted. After weighing all the relevant considerations Latey J., in this "agonisingly difficult" case, decided in favour of the natural parents. But the Court of Appeal, in opposition to the general rule of deference to the trial court's decision in these cases, overruled the trial judge who had seen and heard all the parties and evidence. "She might develop a permanent

---

1 (1973) 5 Rev. Ghana Law 6, at 9; (1973) 137 J.P.N. 85 at 86.
2 Ibid.
3 Ibid.
4 Ibid.
5 (1973) 137 J.P.N. 85; The Times Feb. 15, 1973 p. 15.

emotional scar,"[1] if she were returned to Nigeria, said Davies L.J. Further, the child would be upset and "would be cut off from her 'parents', friends and school and left with strangers", added Cairns L.J. The consequences that the child would be unable to adapt to the "primitive" society and "strangers" in Nigeria weighed heavily on their Lordship's mind.

With due respect, one suspects that questions of cultural gap and prejudices were being unconsciously revealed in these opinions. The decisions seem to forget that, children, it has been said, "are the world's greatest conformists".[2] What is the evidence for the view that West African children with "English accents" are disadvantaged on their return home? Would it make a difference if the children returned home with a "Scottish accent"? When these West African children are a few years older; it is natural they will begin asking questions, and other children with whom they play will ask questions too. "Why don't I live with my father and mother, if I have one? Are they bad people? Are they in jail?" - these girls will ask themselves. And other children will ask them, "You must be ashamed of your father, or you would live with them the way we do. So your father was so bad that the police had to go and take you away from him? Isn't it awful? You poor thing!"[3]

---

[1] Ibid.

[2] The Observer ("Inside Education") 8 April, 1973 p. 43.

[3] cf. Sayre "Awarding Custody of Children", (1942) 9 U.Ch.L. Rev. 672, at 681-82.

Is this the sort of result that avoids the "rankling sense of injustice" in the "long term and the short term"? One would have thought that the decisions have the effect, to use a modified paraphrase of Cross J.,[1] of turning little African girls into little English girls and cutting them off from their natural mother and relatives. Predictably, reactions from West Africa to these English decisions were swift and critical, if not hostile. They range from the naive to the outright emotional outbursts. Diplomatic measures,[2] including an O.A.U.-sponsored initiative were seen as means of countering the opinions of the "British Solomons."[3] What is worth emphasising is that in such a complex and highly emotional field as custody law, great care should be taken in formulating rules that would best accord with a child's short and long term interests. Such decisions as above, involving parents and non-parents as well as cultural[4] factors could not be reached in Nigeria. There can be little doubt that for a long time to come the mention of an English court in the context of custody would be most distasteful in Nigeria. These special fostering cases may have to be approached with a larger spirit of comity towards other involved jurisdictions.

---

1 Re E (D)(An Infant) [1967] Ch. 287 at 298.

2 See e.g. West Africa (magazine) 15 Oct., 1973 p. 1493; Sunday Times (Lagos) March 25, 1973.

3 Sunday Times (Lagos) March 25, 1973 p. 11.

4 Acceptability into a particular culture weighs with Nigerian courts. See Diri v. Nyikwa (unreported) Suit No. K/M91/1965.

We may conclude this part of the discussion by saying that legal doctrine today in the field of custody has set its face firmly against the superior (common law) rights of a parent to the custody of a child as against strangers. After all, parental right was not a principle impervious to the onslaught of what Lord Guest described as the "change in the climate of social conditions"[1] which has had a universal impact. The unimpeachable parent, it has been said, "is something of a Victorian-type figure",[2] and although the wishes of the unimpeachable parent stand out as the most important secondary consideration, the more important legal principle that the welfare of the child is to be the first and paramount consideration has been very heavily emphasised in J. v. C. As Professor Alec Samuels says, "The importance of parental rights and wishes has been stressed, but the notion that there is any presumption in favour of the parents unless they can be shown to have forfeited their right by ill-treatment, has been firmly rejected, and even the unimpeachable parents have failed to recover custody."[3]

---

1 J. v. C. [1970] A.C. 668 at 697.

2 "Custody and the Welfare of the Child" (1970) 114 Sol.J. 365, at 366.

3 Ibid. at 366; see J. v. C. [1970] A.C. 668 at 714.

(iii) Custody as between strangers: This is another form which custody disputes frequently take. Here the disputes very often involve struggles between grandparents inter se, or between relatives and institutions concerning the form of religious upbringing the child is to have.

The main question in the reported cases has been whether the welfare rule contained in section 1 of the 1925 Act applies in a dispute where none of the parents is a claimant. In Re Collins[1] the Court of Appeal considered a claim for custody brought by paternal grandparents against maternal grandparents, both father and mother of the child being dead. For two years previous to the bringing of the claim the child had been educated as a Protestant by his maternal grandparents. The paternal grandparents now advanced the deceased father's Roman Catholic creed according to which the deceased mother had agreed the child should be brought up. Confronted with section 1 of the 1925 Act, the question was whether the common law right of the father, e.g. to dictate the religious education of the child, had been abrogated, or reduced to the status of other relevant consideration, or just suspended until the welfare of the child is neutral. Counsel argued that section 1 had not abrogated the rule in

---

[1] (1950) Ch. 498.

Hawksworth v. Hawksworth[1] according to which the father's right survived even after his death and that therefore section 1 only had application in cases of rival claims by living parents. The argument was rejected. "That would be a most surprising result, and I think the argument is ill-founded,"[2] Lord Evershed M.R. said, being of the view that disputes between non-parents (third parties) must be resolved in the same way as if it was a suit between living parents because "it is impossible to put/[a] limitation on the intention of the words used by Parliament."[3] In the courts' view, therefore, it became unnecessary to determine the weight to be attributed to the pre-marital arrangement between the spouses for the upbringing of the child because the welfare of the child clearly demanded that it be left where it was - with the Congregationalist maternal grandparents. Viscount Cave in the Northern Ireland case of Ward v. Laverty[4] decided some months before the Guardianship of Infants Act, 1925, furnishes another clear statement on the law relating to third party custody claims. It is that the welfare of the child is to predominate. And after J. v. C., there can be no doubt about the position at all. Every other factor must yield to the welfare of the child.

---

1 (1871) 6 Ch. App. 539.
2 (1950) Ch. 498 at 505.
3 Ibid. at 506.
4 [1925] A.C. 101.

(iv) Guardianship and Custody of Illegitimate Children: This is the last of the different types of custody suits we shall have to consider. We have not thought it appropriate to undertake a detailed and separate examination of the guardianship[1] and custody rules pertaining to illegitimate children primarily because the distinction between legitimate and illegitimate children is becoming increasingly anachronistic. And we may expect in the future a fusion of the rules pertaining to the two categories of children.

At common law no one except an illegitimate child's mother had, in normal circumstances, a right to its custody.[2] The putative father of the illegitimate child had no right to its custody at all.[3] This was the so-called "settled older law"[4] which held the mother's right absolute and near-inviolable. The view was carried into legislation down to the early part of this century. But things have altered radically for the illegitimate child and its custody, as the case of Duguid v. MacBrinn illustrates. In that case the mother of an illegitimate child brought an action for its custody and she contended that her right to the custody

---

1 For a discussion of guardianship as it relates to the illegitimate child in Scots law, see e.g. Brand v. Shaws (1888) 16 R. 315; Ward v. Walker 1920 S.C. 80. For the position under English law, see James "The Legal Guardianship of Infants" (1966) 82 L.Q.R. 336-339; O.M.Stone, "Parental Custody of Infants in English Law", in Parental Custody and Matrimonial Maintenance (1966) B.I.I.C.L. (Series 13) esp. at pp. 26-28; Bevan, The Law Relating to Children (1973)pp. 302-7.

2 See Sutherland v. Taylor (1887) 15 R. 224. This rule was applied in Diri v. Nyikwa, a decision of the High Court in Kano. (Unreported) Suit No. K/M91/1965. See also, Bromley, Family Law (4th ed.) p.271; Barnardo v. McHugh (1891)A.C. 388.

3 Macpherson v. Leishman (1886) 14 R. 780.

4 Duguid v. McBrinn 1954 S.C. 105 at 109 per Lord Mackay.

of her illegitimate child was in ordinary circumstances an absolute one. This was the contention that took up the deliberations of their Lordships in the Court of Session who pointed out the flaw in the mother's contention as revealed, for example, by the Illegitimate Children (Scotland) Act, 1930. Section 2(1) of that Act had enacted that

> "The Court may, upon application by the mother or by the father of any illegitimate child ... make such order as it may think fit regarding the custody of such child and the right of access thereto of either parent, having regard to the welfare of the child and to the conduct of the parents and to the wishes as well of the mother as of the father and may on the application of either parent recall or vary such order."

Although the Guardianship of Infants Acts 1886 and 1925 were generally held as "not applicable to illegitimate offspring",[1] the "trend of modern ideas", in particular the 1930 Act, had changed the position in so far as the "welfare" concept and the father's "rights" were concerned. As Lord Justice-Clerk Thomson said, "the result of modern legislation, both in the case of the legitimate and the illegitimate child, is to make its welfare the paramount consideration."[2]

In English law also this progressive development is illustrated by the Legitimacy Act 1959 which allows the natural father to apply for custody. The result of the

---

[1] Duguid v. McBrinn, 1954 S.C. 105 at 110 per Lord Mackay. The 1886 Act applies in Nigeria (apart from the West and Mid-West) as a statute of general application.

[2] Ibid. at 111. See also Syme v. Cunningham, 1973 S.L.T. (Notes) 40. It was held in Re G (An Infant) (1956) 2 All E.R. 876; (1956) 1 W.L.R. that the 1925 Guardianship of Infants Act applies to both legitimate and illegitimate children.

statutory changes in English law has been to undermine the superior legal claim of the mother to the custody of the illegitimate child as against the putative father. So that under the prevailing rule of the paramountcy of the child's welfare, "One did not start with either the mother or the natural father having a superior claim" to the custody of the illegitimate child.[1] In Nigeria's Western and Mid-Western states, the Infants Law[2] in force in those states applies to the custody and guardianship of all infants, whether legitimate or not.

Any distinction between legitimate and illegitimate children for purposes of guardianship and custody law is likely to work hardship on the child contrary to the general statutory trend to remove the disabilities of the illegitimate child. This welcome trend has a long history in both Scots and English law. The Bastards (Scotland) Act 1836[3] allowed a bastard to make a will, while the 1926 Legitimacy Act enabled a bastard to inherit from its mother, if she died intestate and without lawful issue.[4] The Law Reform (Miscellaneous Provisions)(Scotland) Act, 1940 enabled a bastard to recover damages or solatium in the event of the wrongful death of a parent.[5] And coming into more recent

---

1 James, note 1 supra p.311, at 337; see also, English Legitimacy Act, 1959, s.3.

2 Cap. 49, Laws of Western Nigeria (1959 ed.) s.2.

3 6 and 7 Will 4, cap. 22.

4 Section 9.

5 Section 2(2).

times, the Registration of Births, Deaths and Marriages (Scotland) Act 1965 provides for the issue of an abbreviated form of birth certificate which, while containing the name, surname, sex and other information about the child, omits completely any details of parentage.[1] And the Law Reform (Miscellaneous Provisions)(Scotland) Act 1968 allows the illegitimate child rights of succession to his father and mother. In English law also, the rights of intestate succession between the child and its parents are the same as if the child were a legitimate child.[2] Modern fiscal and social welfare legislation such as the Family Allowance[3] and National Insurance[4] Acts, 1965 confer benefits on the parents irrespective of the legitimacy of birth of the child. What is important, for the purposes of these enactments, is the de facto family situation, not the manner of the birth of a child. In addition the power that vests in the courts in England, Scotland and Nigeria to make a matrimonial order in respect of "children of the family" means that the courts can award the custody to the spouse of the natural parent of children - legitimate or illegitimate - if the spouse has accepted and treated the children as part of the family.[5]

---

1 S. 19.

2 See Family Law Reform Act, 1969, S. 14.

3 SS. 3 and 17(5); see also Bromley, Family Law (4th ed.)p.487.

4 S. 41.

5 See Matrimonial Proceedings (Children) Act, 1958, S.1. as extended (for England) by the Matrimonial Proceedings and Property Act, 1970, S. 27(1). See also Bevan, The Law Relating to Children, pp. 280-281.

(Mention may also be made of the position regarding the custody of illegitimate children in socialist countries, where state support is made available to the child, irrespective of its legitimacy, as part of the effort to remove the stigma of illegitimacy and also to ensure security for the child.[1])

In the light of the overwhelming trend to erase any distinctions between illegitimate and legitimate children, it is a surprise that the Guardianship Act, 1973 has failed to remove the distinction between the two classes of children. This is a retrograde step. And not surprisingly this has provoked general criticism[2] of the Act. One would hope that this unfortunate discrimination between legitimate and illegitimate children will be removed when the Law Commissions submit their review of the law relating to children. The welfare of the child should not depend on societal norms about niceties of birth.

Nigerian customary law, unlike Anglo-Scottish common law, dissociates the circumstances surrounding a child's birth from the issue of the child's social welfare. This statement may be too general for the dozens of different native laws and customs in Nigeria.[3] But it has been

---

1 See Alec Samuels, in Parental Custody and Matrimonial Maintenance (supra, note 3 p.292)

2 See e.g. E.M. Clive (1973) S.L.T. (News) pp. 84; 225. But cf. Bevan, op. cit. at 304-5.

3 See, generally, Kasumu and Salacuse, Nigerian Family Law, Chapter 11.

approved in major decisions, all supporting the view that under Nigerian customary law illegitimacy is not a disability. In the 1909 case of Savage v. Macfoy,[1] the deceased who died intestate came from Freetown, Sierra Leone, and settled in Lagos where he married the plaintiff according to Yoruba customary law. The marriage was declared void because the deceased was not "competent to contract marriage according to native custom",[2] in that he was not a "native". The plaintiff and her children had brought the action asking for a declaration that they were entitled to the real and personal estate of the deceased as against the defendants, the deceased's brothers and sisters. The deceased had acknowledged the paternity of the children . The court was faced with determining what law was to govern the administration of the estate. Chief Justice Osborne said:[3] "There has been divergence of testimony as to the details of this native law, but from all the evidence adduced one fact stands out prominent, this is that the principal interests to be considered are those of the deceased's children. In this respect, there appears to be no difference between children born in native wedlock, and the offspring of fortuitous connection provided that paternity has been acknowledged." Although it does not appear that the doctrine of acknowledgment of paternity is recognised

---

1 (1909) Ren. 505.
2 Ibid.
3 Ibid. at 508.

among the Muslims of parts of the Northern States of Nigeria, in another case which involved the fatal accidents claim of children of a leading Muslim in Western Nigeria, Chief Justice Ademola remarked as follows:

> "In Nigeria, a child is legitimate if born in wedlock according to the Marriage Act. There are also legitimate children born in marriage under native law and custom. Children not born in wedlock or who are not the issue of a marriage under native law and custom, but are issue born without marriage can also be regarded as legitimate for certain purposes - if paternity has been acknowledged by the putative father."[1]

Nigerian customary law, then, does not visit the "sins" and indiscretions of the parents on the children. What is of paramount consideration to the law, as Osborne C.J. makes clear, is the interest and welfare of the children. And this principle prevails in matters of guardianship and custody irrespective of any questions about legitimacy or illegitimacy.[2]

---

[1] Lawal and Ors. v. Younan and Ors. (1961) All N.L.R. 245, 250.

[2] See Akanle, op. cit., chapter 5, esp. pp. 447 et seq.

3 "Rule Scepticism"

(a) General:

In discussing Anglo-Scottish as well as Nigerian law of custody one enters into an area of "rule scepticism". This has remained a cardinal feature of this field of law even though it runs counter to the training of lawyers and judges and the professional techniques lawyers acquire in litigation planning and litigation advising. Courts have felt happier to state that there are no rules, and yet they have felt the appeal of general principles which enable them to decide what a child's welfare requires in any particular case. Three such general principles which have been prominent are discussed below. These are (a) the doctrine that children of tender years (and girls not of tender years?) should generally be awarded to the custody of the mother; (b) the principle that boys past the age of tender years who increasingly need the guidance of a father should, other things being equal, be awarded to the father's custody; and (c) the principle that wherever possible, young children - brothers and/or sisters - should not be separated in the award of custody.

A striking practice one comes across in many cases is that the courts, in arriving at their decision, have often proceeded along two basic philosophies: first, to reach a

decision according to "authority",[1] and secondly, to reach a decision according to "common sense".[2] Mr. Justice Cross (as he then was) in a case which involved the kidnapping of two American children to England, had no doubt that "the commonsense solution of the problem is surely that the children should return to the State of New York."[3] And in affirming the lower court upon appeal Lord Justice Willmer was of opinion that "in the absence of authority, and treating the matter as one of ordinary commonsense ... the proper order was to send these two American boys back to their own State of New York, where they belong ...."[4] Such an order "would be the ordinary common sense approach of anyone in the absence of authority."[5] The Court of Appeal then went on to discuss the "authorities" by virtue of which it arrived at the same conclusion that the children should be repatriated to America. In the much-cited case of Re Thain,[6] the Court of Appeal affirmed Eve J.'s statement that the emotional upset caused to a child who is removed from its familiar environment is "mercifully transient"[7] because that statement "appeals to the common sense of human nature".[8] But the

---

[1] The jurisdiction invoked in all custody cases, says Mr. Justice Buckley, is a "paternal jurisdiction" which, "apart from authority, the court ought to be very slow to leave to be exercised by any other tribunal. It seems to me that authority supports that view." Re Kernot (1964) 3 W.L.R. 1210, at 1214; also at 1215.

[2] e.g. In Re G(Infants) (1899) 1 Ch. 719 at 724.

[3] In Re H(Infants)(1966) 1 W.L.R. 381 at 388 C.A.

[4] Ibid. at 396. [5] Ibid. [6] (1926) Ch. 676.

[7] Ibid. at 684.

[8] Ibid. at 691 per Warrington L.J.

courts are at pains to emphasise that no "rules" are ever involved in such cases.[1] Perhaps looking for "rules" is chasing shadows. And this leads one to pose the question whether common sense and humanity are not right in assuming that young children should be with their mother, that older boys stay with their father, and that young children who need one another's companionship should not be severed.

(b) Examination of the "Rules"

(I) Scholarly view

Clive and Wilson have stated that although the health and physical welfare of very young children may sometimes require the award of their custody to the mother,[2] "tender age is not a conclusive factor".[3] And on the principle of awarding custody of sons to their fathers, the learned joint authors wrote: "It is sometimes suggested that for reasons of education and discipline it is better for older boys to be with their father, but there can be no general rule or principle on this matter."[4] When courts reject any rule of tender years by which a mother would gain custody of a child, writes Cretney, it only means that the court "is not bound, as a matter of law, to apply any presumption in the

---

1 e.g. Re B(an Infant)(1962) 1 W.L.R. 550 at 551 (per Lord Evershed M.R.); Symington v. Symington (1875) 2 R(H.L.) 41, at 45 per Lord O'Hagan; Oyedu v. Oyedu (1972) 2 E.C.S.L.R.41 at4

2 As in Martin v. Martin (1895) 3 S.L.T. 150; Reid v. Reid (1901) F 330; McLean v. McLean 1947 S.C. 79.

3 The Law of Husband and Wife in Scotland p. 584. See also Campbell v. Campbell 1920 S.C. 31; Brown v. Brown 1948 S.C. 5

4 Clive and Wilson op. cit. p. 588. See also In Re C(A)(An Infant)(1970) 1 W.L.R. 288.

mother's favour. It does not mean that the judge, applying his experience in infancy cases, cannot and should not have regard to the consensus of opinion about children's needs at various ages which may well provide a prima facie principle."[1] It would seem, then, that academic opinion inclines towards being sceptical of "rules" in this field just as some of the judicial pronouncements in some leading cases on this controversy have been. We shall have to examine what the judges have actually said.

(II) Judicial opinion.

(i) Tender years doctrine: While most courts are still slow in coming round to accepting a "rule" of tender years in custody awards, there is actually no case in which the courts would not acknowledge "the unique advantages attaching to maternal ministrations".[2] It was realisation of this unique role of mothers that led Lord Justice-Clerk Moncrief to assert that "no greater calamity could befall a child of tender years than that it should be taken from its mother. Nothing will make up, especially to a girl, for the want of a mother's care."[3] The famous statement of Sir John Romily, M.R. in Austin v. Austin[4] furnishes clearly the rationale behind the tender years doctrine:

---

1 S. Cretney, "Custody and Morals" (1969) New L.J. 822 at 823.

2 McLean v. Hardie 1927 S.L.T. 340 per L.P. Clyde, 1927 S.C. 344 at 348.

3 Ketchen v. Ketchen (1870) 8 M 952 at 954; see also Mackellar v. Mackellar (1898) 25 R 883 at 885. "In the case of a child of very tender age; it might be right to give the custody to the mother" per Lord McLaren.

4 (1865) 34 Beav. 257; 55 E.R. 634.

> "No thing, and no person, and no combination of them, can, in my opinion, with regard to a child of tender years, supply the place of a mother, and the welfare of the child is so intimately connected with its being under the care of the mother, that no extent of kindness on the part of any other person can supply that care. It is the notorious observation of mankind, that the loss of a mother is irrepairable to her children, and particularly so if young. If that be so, the circumstances must be very strong indeed, to induce this Court to take a child from the guardianship and custody of her mother. It is, in point of fact, only done where it is essential to the welfare of the child."[1]

A century has elapsed since Sir John Romily M.R.'s major pronouncement. Since then the law and practice in infancy matters has been developing and public opinion changing. And as we enter recent times we begin to encounter serious clashes of judicial opinions. One school (which we are calling the Denning School) holds that there is a prima facie rule of tender years; the other school (which we are calling the Evershed School) denies that this is so. We shall illustrate the controversy by focusing on a few cases. And we shall give our own appraisal after all three 'rules' have been discussed.

In Re S(An Infant)[2] Roxburgh J. stated that "the prima facie rule (which is now quite clearly settled) is that, other things being equal, children of this tender age [under 5] should be with their mother, and where a court gives the custody of a child of this tender age to the

---

[1] Ibid. at 263; 55 E.R. at 636-637.
[2] (1958) 1 W.L.R. 391.

father it is incumbent upon it to make sure that there are really are sufficient reasons to exclude the prima facie rule."[1] Lord Denning M.R. in the Court of Appeal case of Re L(Infants)[2] aligned himself with the "tender years" doctrine, stating that "as a general rule it is better for little girls to be brought up by their mother."[3] Lord Denning again reaffirmed this view in 1968.[4]

On the other hand we have the decision in Re B(An Infant). There, Pennycuick J. had reversed an order of magistrates and awarded custody of a 4 year old to its mother on the ground that other things being equal it is better for children of tender years to be with their mother. In the Court of Appeal, however, Lord Evershed M.R.[5] denied that in custody cases "there is any such thing as a rule," but he conceded that "as a matter of human sense a young child is better with its mother and needs a mother's care."[6] As far as Lord Justice Harman was concerned, "so long as a child is young enough to need the day to day care of its mother, it is better to leave the child with her unless she is an entirely unsuitable person. But that does not mean that one starts with the mother being 'one up'; the court must look at the facts of each case, the parents having equal rights /under statute/."[7] In the

---

[1] Ibid. at 397. [2] (1962) 1 W.L.R. 886. [3] Ibid. at 890.
[4] S. v. S. The Times, 14 March 1968; (1968) 132 J.P.N. 197.
[5] (1962) 1 W.L.R. 550 at 551. [6] Ibid.
[7] Ibid. Even Donovan L.J. who delivered a dissenting opinion said "there is no rule of law to that effect." But he agreed that prima facie, a young child of 4½ years "ought to remain with its mother... it is the natural law and one that should, if possible, prevail." Ibid. at 554.

more recent case of H. v. Hand C,[1] Salmon L.J. also rejected the tender years doctrine. As he said, "this is not a proposition of law /but/ from the point of view of common sense and ordinary humanity, all things being equal, the best place for any small child is with its mother."

Nigerian customary law does not equivocate on the doctrine of tender years. Where, following upon divorce, it is found that the child is too young to live apart from its mother, its custody will be awarded to the mother. This rule is recognised in several systems of customary law.[2] The case of Chollom v. Gatak[3] decided by the Birom Tribal Court in Plateau Province in 1960 illustrates the application of tender years rule in customary courts. The facts were as follows:

> Chollom, after his divorce from his wife Gatak, sought to have custody of his two infant daughters. The Fan Native Court awarded custody of the girls to Chollom but Gatak refused to give the children to their father. Gatak did not dispute paternity of the children, but she says she cannot live apart from her daughters. Chollom, for his part, contended that since one of the children can live apart from Gatak, that child should be given to him.

It was held by the court that although the two girls belong to Chollom, they should continue to live with their mother since they are not yet "grown up". "Grown up", in the view of the court, meant approximately the age of nine, when

---

1 (1969) 1 W.L.R. 208 at 209.

2 See Salacuse, Selected Survey of Family Law in Northern Nigeria.

3 Cited in Salacuse op. cit. p. 41.

the children no longer need their mother.

Different ages are fixed for tender years under different customary laws, usually ranging from three to ten years. The Igbirra Native [Local] Authority Declaration of Native Law and Custom lays down the tender years doctrine in section 33 in these terms: "All children must have a woman's care until they reach the age of seven." Although this is not specifically tied to a "mother's" care, elsewhere the Declaration provided that upon divorce the father shall be entitled to custody of the children "provided that any such children not at that time having reached the age of four years shall be ordered to remain in the custody of their mother."[1]

The Nigerian High Courts, on the other hand tend in general to follow the English and Scottish practice of denial of anything like a tender years "rule".[2] An intriguing problem might arise if an appeal goes to the High Court from a decision of a customary court based on tender years rule. Should the High Courts follow their own rules in spite of the fact that they are enjoined not to "deprive any person of the benefit of any native law or custom" which is "not repugnant to natural justice, equity and good conscience"?[3] The Nigerian courts have not yet

---

[1] S. 22(a).

[2] See e.g. Somorin v. Somorin, Suit no. HD/48/72, CCHCJ/11/72 approving Lord Evershed's "No rule" statement in Re B (An Infant) supra as "good sense and good law". But this is not an invariable approach. Sometimes the Nigerian High Courts invoke the tender years rule as basis of decision, see e.g. Osunde v. Osunde (1961) L.L.R. 29 at 31 per Coker J.

[3] See e.g. section 34(1) High Court Law, Northern States.

given any (satisfactory) answer to this question. In the one relevant case - Olayemi Kasebiye v. Adeyemi[1] - the High Court in Jos upheld the rule of paramountcy of the interest and welfare of the child. But in doing so the High Court varied a custody order made by the Native Court which clearly had jurisdiction over the case and had applied the proper native law and custom. The rule laid down by the Privy Council in McKee v. McKee[2] appears therefore to be visibly applied by the Jos High Court in the Kasibiye case. The case is an unsatisfactory one as it is unreported and the brief "note" of it leaves too many gaps which cannot be filled by conjecture, e.g. as to whether it involved application of tender years rule. However, the West African Court of Appeal in the Ghanaian /Gold Coast/ appeal of Ghamson v. Wobill[3] has held that the High Courts are to be guided on appeal by the rules laid down for the native or customary courts. Presumably this would include the "unrepugnant" rules laid down in customary courts decisions, as well as the enacted statutory rules for these lower courts.

(ii) Older boys to father: It may be of interest to observe that Jeremy Bentham in his Theory of Legislation proposed[4] that in cases of divorce, the custody of boys should remain

---

1 Noted in (1963) Vol. 1 Nig. Law Journal p. 125.
2 (1951) A.C. 352.
3 (1947) 12 W.A.C.A. 181.
4 Theory of Legislation 7th ed. p. 228, cited in Graveson ed. A Century of Family Law, p. 17.

with the father while the custody of girls goes to the mother. This mechanical rule goes beyond what we would support in that it leaves out of consideration issues of tender years and parental (un)fitness.

The Scottish courts appear to be more consistent than the English courts in holding that it would be in the best interests of older boys who need the advice and guidance of an adult of their own sex to be awarded to the custody of the father.[1] The Lord Chancellor in Symington v. Symington said:[2] "With regard to the boys,-I cannot for my part, perceive that an order which should take their custody from their father, and hand it over to their mother would be an order which would be conducive, so far as we can judge, to the future welfare of the children. It is a very different matter with regard to the girls."

The English decisions are more divided on this "rule". In W. v. W. and C.[3] Lord Denning M.R. approving the "rule" said:[4] "I feel it is right to be guided by the general principle that a boy of this age, some eight years of age, is, on the whole, other things being equal, better with his father." The same principle was also approved in

---

1 Symington v. Symington (1875) 2 R(H.L.) 41; Mackellar v. Mackellar (1898) 25 R. 883 at 885, per Lord McLaren; McLean v. McLean 1947 S.C. 79 at 90 per Lord Jamieson.

2 (1875) 2 R(H.L.) 41 at 44-45.

3 (1968) 1 W.L.R. 1310.

4 Ibid. at 1312. Sachs L.J. concurred saying, at 1313 "It is normally best for /a son/ to have his father to turn to at all possible times ... /and/ it is normally best for a son to be with his father".

Re O (Infants).[1] But in Re C(A)(An Infant) Harman L.J. expressed a contrary view saying:[2] "I do not at all agree with [the] opinion ... that a boy should, as a matter of 'principle', be with his father - just as much as I disagree with the other 'principle' which has altogether been abandoned, that a girl of under three should, as a matter of principle, be with her mother. Other things being equal, these things may be so, but there is no principle involved in either. They are merely considerations which may weigh with the judges, where the scales are nicely balanced." Lord Justice Edmund Davies, concurring, was also of opinion that "there is no such 'principle'."[3]

(iii) Siblings together: There are peculiar attachments and advantages deriving from sibling togetherness which adults may not be able to fathom. Younger ones often derive much care and understanding from older ones.[4] This is how the advantage of allowing brothers and sisters to be placed together in a custody award has been expressed:[5] "But there is an advantage ... and that is not an inconsiderable advantage, namely, that she will have the companionship of her little brother. To my mind that would be a very great advantage to a little girl. As a man of the

---

1 [1962] 1 W.L.R. 724.
2 [1970] 1 W.L.R. 288 at 291.
3 Ibid. at 292.
4 The rule of sibling togetherness was followed in the Nigerian case of Ilevbare v. Ilevbare (1958) W.R.N.L.R. 46 at 48; see also Ehigiator v. Ehigiator (1966) N.M.L.R. 372,376.
5 Re Besant (1879) 11 Ch.D. 508 at 512 per Jessel, M.R.

world, and speaking as a father, I am satisfied that solitary children are not so happy, and not so likely to make good men and women, as children brought up in the society of brothers and sisters in early life. Of course I shall not decide this case upon such a ground as that alone, but that is one of the elements I have to consider in forming my conclusion." One may disagree with aspects of this statement in the context of an only child, but it has much force in a situation where children are separated.

(C) Appraisal : The "rule" versus "no rule" arithmetical calculus

We will now attempt to answer the question of how credible is the "no rule" thesis of the Evershed school. We shall illustrate only with the "tender years" doctrine, concentrating principally on the two cases of Re B(An Infant)[1] and Re L(Infants)[2]. It would be recalled that in the former case Lord Evershed M.R. and Harman L.J. affirmed that there is nothing like a "rule" of tender years, while Donovan L.J. dissented forcefully. In the first place, the persuasive effect of the "no rule" majority holding was considerably reduced by Donovan L.J.'s dissent. Lord Evershed himself acknowledged this when, in almost counselling further appeal, he said that that dissent

---

[1] [1962] 1 W.L.R. 550 C.A. (For short, the Evershed Court).

[2] [1962] 1 W.L.R. 886 C.A. (For short, the Denning Court).

> "has ... this relevance. None of these orders is in any sense permanent. If the occasion should arise which would justify it, there would be nothing to prevent the mother hereafter from making another application." [1]

In the second place, as Ross Martyn has well said, the judicial hostility is towards "rules" or general principles, not to propositions of common sense.[2] Lord Evershed attested to this when he admitted that had he been trying the case at first instance, he certainly would never "have taken the child from the mother".[3] And Lord Justice Harman who has carried the "no rule" campaign into very recent times agreed with the Master of the Rolls, saying:[4] "If I had tried the case I should not have acted as the magistrates did; I should have left this child with its mother a little longer anyhow... I doubt whether I should have taken him from his mother's care and given him into the care of another woman at this stage." But of course their Lordships were sitting as an appellate court. Here then was the grotesque position of the Appeal Court abdicating its corrective role in a matter which intimately concerns the child's welfare. For Donovan L.J., this would not do. And although subscribing to the notion that the decision of the lower court should not be readily disturbed on appeal, Lord Justice Donovan in his dissent said: "In matters where credibility is an

---

1 Ibid. at 552.

2 "Principles and Practice in Infancy Cases" (1970) New L.J. 868 at 869.

3 (1962) 1 W.L.R. 550 at 552.

4 Ibid. at 553. The whole question of the review powers of appellate courts in custody cases has been fully examined by P.J. Pace, "Custody and Appellate Courts"(1973) 3 Family Law 27-32. See also H. Findlay, "Judicial Discretion in Custody and other Family Litigation", paper delivered at the 1st International Conference of the International Society of Family Law, Berlin, Germany (April 1975).

issue, of course that consideration is of great weight. I do not think it is of such weight when one is assessing a person's character and ability to look after a child. The encounter is too brief for any reliable conclusion..... In a case which concerns the welfare of an infant .... the appellate court should preserve its full freedom."[1]

Turning now to the Denning Court in Re L(Infants) it would be recalled that while Lord Denning M.R. approved the tender years rule, Harman L.J. (of the Evershed Court) rejected it. It is significant to note that the third member of the Court, Russell L.J., was silent on the controversy. But even when we look at the words of Harman L.J. who was merely continuing his earlier "no rule" crusade, it is arguable that even his Lordship was not against a general rule as such. This is what he said:[2]

> "I am satisfied that there is no such rule and that there never has been in a case of this sort where the wife does not bring before the court any adequate reason why she has broken her marriage vows."

Now, the earlier case of Re B(An Infant) where Harman L.J. was decisive in his "no rule" judgment differs significantly from the present case of Re L(Infants). In the former case, as Donovan L.J. points out, we find a woman who fell in love with another man "but broke off the association almost at once,"[3] whereas in the latter case the woman went off with

---

1 Ibid. at 555.
2 (1962) 1 W.L.R. 886 at 891. Emphasis added.
3 (1962) 1 W.L.R. 550 at 554.

another man in adultery, broke up her home, left the father and children - and all the time expecting that if she came back to collect the children the law would not say "nay".[1] Again, in the former case, there was no evidence to show that the mother lacked stability of character whereas in the latter case the mother was found to have neglected her maternal duties, displaying at every turn "a curious attitude".[2] There is thus a much weaker case for the application of the "tender years" rule in the less normal, latter case of Re L(Infants). Therefore, no one would doubt that "in a case of this sort" the tender years rule could not operate, and this is the essence of the qualifying words "as a general rule"[3] or "other things being equal".[4] It would be recalled that Lord Evershed M.R. and Harman L.J. weakened their case in Re B(An Infant) by the opinions they expressed concerning the decision in the lower court. It is therefore significant to observe that Russell L.J. who was "neutral" on the "rule" versus "no rule" controversy in Re L(Infants) nevertheless said that when an appeal judge "finds that the judge [below] does not on the face of it appear to have approached the matter in the correct manner, then it is the duty of the Court of Appeal to go behind his judgment and substitute what they consider to be the correct decision."[5]

---

1 (1962) 1 W.L.R. 886 at 890 per Lord Denning M.R.
2 Ibid. at 891 per Harman L.J.
3 Ibid. at 890 per Lord Denning M.R.
4 W. v. W. and C. (1968) 1 W.L.R. 1310 at 1312 per Lord Denning M.R.
5 (1962) 1 W.L.R. 886 at 892.

It cannot be said as Harman L.J. has asserted positively in one of his latest pronouncements that the tender years doctrine "has altogether been abandoned."[1] His Lordship's opinion is not borne out by the authorities. First, in Re F (An Infant),[2] Megarry J carefully listed 5 factors which are relevant to a consideration of the child's welfare in the case which was before him. The mother had an "advantage" in three of the five factors, and in particular, as far as concerns "a young child's need for its parents, the mother has a substantial advantage."[3] The father, on the other hand, had an "advantage" in the other two considerations. In particular, he had a "substantial advantage" on the question of "justice", and responsibility for the "break up" of the family.[4] But Megarry J. quickly added that this last point does not directly "relate to the welfare of the child."[5] This is how Megarry J. sums up his opinion:

> "I am not for one moment suggesting that this father is a bad father. He is not; he is, I think, a good father. Nor am I saying that this mother was a good wife; she was not. But I think that her failings as a wife have not made her so bad a mother as to displace the greater need that young children have for the mother rather than the father."[6]

---

1 In Re C(A)(An Infant) [1970] 1 W.L.R. 288 at 291 C.A.
2 [1969] 2 All E.R. 766.
3 Ibid. at 769.
4 Ibid.
5 Ibid.
6 Ibid. at 770. Emphasis added.

In the second place, the language in the more recent case of Jussa v. Jussa[1] is redolent of the tender years philosophy, especially with regard to the distinction drawn between the "day to day care and control" for which a tender years rule was most appropriate, and strict "legal custody" to which the application of the tender years doctrine "was not so obvious".[2]

(d) Jurisprudential Considerations

Besides its specific manifestations in the custody decisions, the "rule" versus "no rule" controversy can be placed against the background of broader jurisprudential considerations. Are courts justified in looking for the presence of "rules" before they apply particular doctrines which common sense and humanity adopt? "Rules", writes Professor Neil MacCormick, "are not the whole of the law, though they are a singularly important part of it."[3] And Professor Dworkin has lately been urging that it cannot be wholly satisfactory to explain law as being simply and solely a structure of rules.[4] To do so, he states, would be to ignore the essential part which "principles, policies and standards" play in the judicial process and in the operation of the law. Accordingly, Professor Dworkin has

---

1 [1972] 2 All E.R. 600. 2 Ibid. at 603 per Wrangham J.

3 N. MacCormick, Law as Institutional Fact. (Univ. of Edinburgh, Inaugural Lecture No. 52, May 23, 1973) p. 30, reprinted in (1974) 90 L.Q.R. 102 at 129.

4 R.M. Dworkin, "Is Law a System of Rules?" in Essays in Legal Philosophy, ed. R.S. Summers (Oxford 1968) pp. 25-60; also "Social Rules and Legal Theory" (1972) 81 Yale L.J. 855-890

advanced the thesis that "there are other kinds of standards which have been or may be advanced as the ultimate test of good law in general or proper judicial decisions in particular."[1] A judge may believe that the ultimate test of proper judicial decision is whether it represents "the application of the principles of fair play generally endorsed and publicised by the community."[2] In other words, the "ultimate test" of acceptability of a judicial decision may be, among other things, whether it accords with the policy and standards of common sense.

Judicial pronouncements in support of the foregoing thesis are plentiful in the Law Reports of custody cases, but especially in cases of "first impression". One is reminded of the classic statement of Lord Atkin in the famous "snail in the bottle" case of Donoghue v. Stevenson.[3] In allowing the appeal in that case in which there were no precedents to guide, Lord Atkin remarked:

> "It is a proposition which I venture to say no one in Scotland or England who was not a lawyer would for one moment doubt. It will be an advantage to make it clear that the law in this matter, as in most others, is in accordance with sound common sense."[4]

In custody cases, one would have thought that the sound common sense need for the application of such guidelines as "tender years" or "siblings togetherness" would be sufficient

---

1 R.M. Dworkin, "Does Law Have a Function? A Comment on the Two-Level Theory of Decision" (1965) 74 Yale L.J. 640 at 644.

2 Ibid.

3 [1936] A.C. 562; 1936 S.C.(H.L.) 31.

4 Ibid. at 599; at 57.

without probing further for the existence of "rules" as justification for the invocation of the common sense guidelines. Insistence on "rules" in cases affecting intimately the welfare and interests of children may sometimes outrage our sense of propriety. Take the case of the unfortunate and much publicised situation of the Thalidomide children. Should there be insistence on established "rule" before such children can claim compensation for the life-long damages they have sustained? Surely this would be revolting. As Professor MacCormick has observed:[1]

> "It would be the most arid sort of conceptualism to rest decisions [whether or not to award compensation to children for ante-natal injuries] upon one's answer to the question whether or not a foetus has "rights" under some existing "legal rules". Here, as elsewhere in law, considerations other than 'established rules' do, and ought to, govern the decision of the case."

With respect, therefore, we would submit that it would aid clarification of the law and policy in the field of custody law to have, subject to qualifications, such a rule as "tender years" which would operate for children of under five years of age. In Re B(An Infant) there was reference to a child being "past the baby stage".[2] And in Re Agboruja, Ames, S.P.J. referred to a child being "still on the mother's back."[3] So evidently whether or not a child is so tender as to need the day to day care of its mother is a question of fact. We have suggested the age of

---

1 Class notes of Jurisprudence (mimeograph materials, Spring, 1973, Univ. of Edinburgh).

2 [1962] 1 W.L.R. 550 at 553.

3 (1949) 19 N.L.R. 38 at 39.

five because a child under that age would almost invariably be in need of a mother's day to day care and attention. Above that age, judges usually have little difficulty in deciding that the child need not stay with its mother.[1] Thus in Re Besant[2] which involved the custody of an eight-year old girl, the judge said: " ... it is not pretended ... that she requires a mother's care for her physical education, that is to say, considering the age of the girl, she may live with anyone who takes proper care of her."[3]

As we indicated above, there will have to be a qualification to the "tender years" rule. The rule should not come into operation where the mother is clearly unfit to have custody. Sir John Romily M.R. acknowledged the need for such a qualification when, after laying down the "tender years" rule in Austin v. Austin, he went on to say:[4] "There are cases of unnatural mothers, and of immoral mothers, where the court is obliged to take away a child from the mother, finding that a bad mother is worse than no mother at all, but in those cases, it acts solely for the benefit of the child."

Fitness, as a test, can take many forms, such as gross immorality, abandonment of child etc. This would undoubtedly be viewed according to the prevailing norms in the society.

---

1 See e.g. Re O(Infants)(1962) 1 W.L.R. 724 at 727.

2 (1879) 11 Ch. D. 508.

3 Ibid. at 512.

4 (1865) 34 Beav 275 at 263; 55 E.R. 634 at 636-637: cf. Seddon v. Seddon & Doyle (1862) 2 Sw. & Tr. 640.

And in speaking about fitness, a question of time factor arises: the question whether or not a mother is fit to have custody of her young child must be determined by reference to the parent's fitness at the hearing of the suit only. Thus, in Kelly v. Marks,[1] a grandmother's attempt to retain custody of a child against its natural mother's desires was rejected by the Court of Session in spite of the deplorable acts of irresponsibility displayed in the past by the mother. In the opinion of Lord Dunpark,[2] since the mother's marriage there was no evidence that she would "revert to her former restless ways" and there was no evidence that she was "now unfit to have the care of [the] child".

(e) Conclusion

A certain measure of paradox seems to characterise the "no rule" controversy. As Bill Mortlock writes, "Theoretically ... there are no rules. Every case is to be decided on its own merits ... In practice, there are rules which operate to regulate matters of custody by which the parties are content to abide, and in the vast majority of cases they only arrive before the judge to obtain what amounts to his formal sanction."[3]

We have seen from a review of the case law that in recent times the tender years "rule" was reaffirmed in 1958

---

1 1974 S.L.T. 118.

2 Ibid. at 121. Emphasis supplied.

3 B. Mortlock, The Inside of Divorce (1972) p. 62.

and that in 1962 it was first disapproved but was later the same year reaffirmed. Yet again the rule was reaffirmed in 1968 and 1969, only to be disapproved once more in 1970 and approved in 1972.

It must be stressed, in the first place, that the cases examined are too few to enable one to form a definite opinion on the place of "rules" in this controversy. Secondly, it seems rational to suggest that the very fact that there have been so much fluctuations in the standing of "rules" in custody law indicate that the qualifications which would be needed if we are to avoid rigidity in this area of the law would be so extensive as to render whatever remains of the "rule" valueless; another way of putting this point is to say that the subject of "welfare" is one for which a vast amount of rules would be needed (say in place of the extensive qualifications to the rules) and this would be an impractical proposition. Furthermore, it may legitimately be asked whether a rule can co-exist with the "first and paramount" test at all. Finally, awarding custody of children of tender years to a mother does not tell us whether the term "mother" includes "mother substitute" (whoever this may be) since the latter would qualify in a true sense as the child's psychological parent.[1] All these seem almost insurmountable objections of rule sceptics. Perhaps all we can say is that while the

---

1 See Goldstein, Freud and Solnit, Beyond the Best Interests of the Child, p. 17.

controversy continues, we should try to adopt, in the words of Foster and Freed,[1] "an open-minded scepticism".

The important case of J. v. C. was a missed opportunity since not even an obiter dictum was directed at the controversy over the tender years rule. Therefore, both the schools of Lord Denning M.R. and Lord Evershed M.R. are debatable. It is arguable that the lower English courts are faced, in the two schools, with two inconsistent pronouncements. Given the traditional English approach to precedent, a court in the future may be free to choose between the two schools and may decide to return to (or continue with) the Denning school.[2] It is respectfully submitted that in view of these considerations the "common sense" principle of tender years in custody law will continue to enjoy a twilight existence until the time when the imprimatur of the House of Lords will, hopefully, attest its full jural quality.[3]

---

1 "Child Custody Law" (Part II)(1964) 39 N.Y.U.L. Rev. 615 at 627.

2 See, e.g. Young v. Bristol Aeroplane Co. (1944) K.B. 718.

3 One recalls also the classic struggle between the two schools of thought concerning the so-called "blood-test" cases. One school (led by Lord Denning) claimed that it is for the child's benefit and interest to undergo blood test so as to know who its father was. The other school (led by Sachs L.J.) believed it was always in the child's best interests to rely on the presumption of legitimacy and not undergo blood test. The conflict was resolved by the House of Lords which held that the court was not bound to act solely in the best interests of the child. See S. v. S. (1970) 3 All E.R. 107.

E The Factors or Criteria Applied in Awarding Custody

1 Introduction: It is still difficult to ascertain the emerging guidelines in custody cases, as individual circumstances carry so much different weights. The one dominating theme is the principle of the paramountcy of the welfare of the child. But welfare is a concept which is difficult to define. The concept admits of no dogma, and it functions in an area where precedent cannot rule. "The facts of particular cases are infinitely variable, the general social background is constantly changing, the state of medical and psychological knowledge is changing and, perhaps not least important, judges are changing."[1] In light of the large measure of value judgment involved in custody, the actual determination of the cases bears out nicely what some jurists have said, that law is what the courts say it is. By way of general statement, Professors Foster and Freed have very well summarised the factors which courts consider in determining the best interests and welfare of the child:

> "Among the factors considered by the courts are the social, spiritual, psychological, and economic conditions prevailing at the alternative environments. A child's physical and mental health is another factor which may dictate a custody award ... Other factors .... have been the character of other persons in the home, educational and religious opportunities therein, and the type of home and neighbourhood ... In addition, the courts may weigh assumed bonds of love and understanding between the child and the contesting parties,

---

[1] Clive and Wilson, The Law of Husband and Wife in Scotland p. 583. An empirical study of the changing attitudes of Canadian judges in custody cases is reported in (1971) 49 Can. B. Rev. 557.

> the length and intimacy of their association, and the wishes of the child. The ages of the child and the parties, the attachment of the child to his environment, and the amount of time available for his rearing, have also been deemed relevant. Other persuasive factors include a desire to keep siblings together rather than to split custody and a feeling on the part of the court in some cases that a given claim for custody is not bona fide but a manoeuvre in a power struggle between the adversaries. Finally there is a tendency to assume the local milieu is better for children than some foreign clime." [1]

It is obvious that the above statement represents general principles which are used as tests for arriving at a just decision in custody cases. The principles would need, however, to be further isolated and analysed according to the distinct parts embraced. Before doing that we would add that a defect in the multitude of vague tests that exist today is that of "the conflict between the tests themselves",[2] many of them often interlocking and overlapping. In the discussion that follows, we shall group the relevant criteria and qualifications under (1) custody and (2) access. And in the grouping of the relevant criteria discussed in the succeeding pages, we have taken as our text Lord Merrivale's statement that in custody cases "Many elements enter into the welfare of an infant. ... The matters of immediate consideration are the comfort, the health and the moral, intellectual and spiritual welfare of the child."[3]

---

[1] H.H. Foster and D.J. Freed, "Child Custody" (1964) 39 N.Y.U.L. Rev. 423 at 439-441.

[2] H. Kay and I. Philips, "Poverty and the Law of Child Custody" (1966) 54 Cal. L. Rev. 717 at 719.

[3] W. v. W. [1926] P 111 at 115. See generally, Bates, "Custody of Children: Towards a New Approach" (1975) Aust.L.J. 129; Sornarajah, "Parental Custody: The Recent Trends" (1973) 90 S.A.L.J. 131.

(2) Custody

(a) Health and physical welfare: The health and physical welfare of a child are obviously very important considerations in the award of custody since these more readily stand out to be observed directly by the judge and medical personnel. Anyone seeking custody must himself possess a health and character which is not tainted by illness, addiction to drugs and alcoholism, ungovernable temper and general inadequacy in dealing with the affairs of life[1] as well as being able to provide for the child's physical needs. This latter point is one of the reasons why children of very tender age are often awarded the custody of mothers[2] and also why a stranger (e.g. a step mother) may be rejected in favour of a fit mother's custody claim. For instance, a stranger who is claiming custody has the burden of proving that he would be more suitable to have the custody than the parent who normally has the care of the child's physical welfare.[3] But tender age as such, courts have said,[4] is not necessarily a decisive factor. Medical evidence as to a child's physical health has not been accorded decisive role by the courts in custody cases.[5]

---

1 See Clive and Wilson, op. cit. p. 584.

2 See Martin v. Martin (1895) 3 S.L.T. 150; McLean v. McLean 1947 S.C. 79.

3 The statement that "To a child of... tender age ... a step-mother however anxious to do her best for the child ... can not take the place of the mother" may have over-emphasised a step-mother's handicap, as against the natural mother, to look after a child. See Willoughby v. Willoughby (1951) P. 184 at 190.

4 See Campbell v. Campbell 1920 S.C. 31; M. v. M. 1926 S.C. 778; Brown v. Brown 1948 S.C. 5.

5 See M. v. M. 1926 S.C. 778. The medical officer in the case had certified "on soul and conscience" (Ibid. at 780 n.) that the child be left with the mother. But the court held otherwise.

The courts have not yet come round to accept that custody determinations along the lines of amorphous criteria of "welfare" and "best interests" are not peculiarly within the ability of judges. Lord Upjohn's opinion typifies the judicial attitude to medical evidence in custody. In J. v. C. Lord Upjohn said, "My Lords, such evidence may be valuable if accepted but it can only be an element to support the general knowledge and experience of the judge in infancy matters, and a judge, in exercising his discretion, should not hesitate to take risks, ... and go against such medical evidence if on a consideration of all the circumstances the judge considers that the paramount welfare of the infant on the balance of probabilities (for that must be the true test) points to a particular course as being the proper one."[1]

Taking risks with the child's physical welfare by relying on "general knowledge and experience" instead of on specialist medical opinion as the statement urges appears, with respect, to imply too much faith in the strictly judicial path in custody matters which, properly considered, require collaboration of knowledge and experience of many disciplines. Dr. Naomi Michaels has given one of the best statements concerning the reasoning behind the attitude towards medical evidence in infancy matters. " ... It must be admitted that at present there have been relatively few cases in which

---

[1] [1970] A.C. 668 at 726; see also Re W(An Infant)(1970) 3 All E.R. 990 at 1006, per Cross L.J.

the courts have been ready to accord decisive significance to medical evidence. It has been noted how the courts in both adoption and custody cases have sought to find ways of lessening the apparent severity of the evidence, and even where it has been admitted that the medical evidence was indeed compelling, the judges have on the whole shrunk from the conclusion that such evidence could in itself be sufficient foundation for the judgment of the court. In the case which has come nearest to holding that the medical evidence alone justified the court's decision, Pearson L.J. adverted to the danger of allowing the medical profession to usurp the functions of the judiciary in this connection.[1] And this must surely be a powerful factor in the minds of the judges. ... Perhaps the crux of the problem lies in the present relative incompleteness of medical research into the element of risk. So long as the medical profession remains unable to quantify convincingly the degree of probability of harm it could be said that the courts are justified in refusing to shed their traditional attitudes ..."[2]

---

[1] See Re C(L)(An Infant) [1965] 2 Q.B. 449 at 469-470.

[2] N. Michaels, "The Dangers of a Change of Parentage in Custody and Adoption Cases" (1967) 83 L.Q.R. 547 at 568 ; see also Finlay and Gold, "Paramount Interest of the Child in Law and Psychiatry" (1971) 45 Aust. L.J. 82.

(b) Happiness and psychological welfare: "Even fifty years ago", writes Professor Bromley, "the courts tended to give more weight to material, moral and religious considerations and less to the child's mental and emotional well-being than they would today."[1] There is no doubt that a child's happiness and psychological welfare assume prominence in situations where his physical welfare would be equally secured by an award to the one or the other party. The present criterion we are considering manifests itself in many different forms. Where a child is happy and well established in his particular environment and relationships he will not be disturbed or transferred by bandying him about as a kind of shuttlecock and battledore[2] between the contending parents because to do so would create a sense of insecurity and instability in the child.[3] It is now widely recognised that there is virtue in procuring stability, continuity and security for the child.[4] Equally, if there is evidence that the child will be unhappy in one custody as against the other, the courts will take this as an

---

1 Bromley, Family Law, 3rd ed. p. 326.

2 Re McGrath (Infants)(1893) 1 Ch. 143 at 151.

3 Macallister v. Macallister, 1962 S.C. 406 at 413; W. v. W. (1926) P 111, 116; Allen v. Allen (1948) 1 All E.R. 413 at 414; Re Collins (an Infant) (1950) Ch. 498 at 503; Re S(An Infant)[1958] 1 W.L.R. 391 at 392; Re B(An Infant) [1962] 1 W.L.R. 550 at 552; Wakeham v. Wakeham [1954] 1 W.L.R. 366 at 368; Ward v. Laverty [1925] A.C. 101 at 110.

4 See Goldstein, Freed and Solnit, Beyond the Best Interests of the Child.

important factor. The problem of generation gap and communication between "an old-looking 49"[1] and a six year old girl, was considered in denying custody to a grandmother. The child's happiness and psychological welfare might suffer if the grandmother were to prevail. There was a time when it was felt that no psychological damage could result to a child who is transferred from one custody to another. Thus, in Re Thain[2] Eve J could say that "one knows from experience how mercifully transient are the effects of parting and other sorrows, and how soon the novelty of fresh surroundings and new associations effaces the recollection of former days and kind friends." But that was in 1926. Things are changing. As Ross Martyn has said, "Matters which were once common sense in this area of the law now look like common error."[3] Today, the dangers to the child's happiness and psychological welfare are more acutely recognised as can be seen from the following statement of Lord MacDermott in J. v. C.:[4]

> "Some of the authorities convey the impression that the upset caused to a child by a change of custody is transient and a matter of small importance. For all I know that may have been true in cases containing dicta to that effect. But I think a growing experience has shown that it is not always so and that serious harm even to young children may, on occasion, be caused

---

1 Kelly v. Marks 1974 S.L.T. 118 at 121. The grandfather in that case was 63 years old.

2 [1926] Ch. 676 at 684, approved in Re O(Infants) [1962] 1 W.L.R. 724 at 727 per Lord Evershed M.R.

3 Ross Martyn, "Principles and Practice in Infancy Cases" (1970) New L.J. 868 at 869.

4 [1970] A.C. 668 at 715.

> by such a change. I do not suggest that the difficulties of this subject can be resolved by purely theoretical considerations, or that they need to be left entirely to expert opinion. But a child's future happiness and sense of security are always important factors and the effects of a change of custody will often be worthy of the close and anxious attention which they undoubtedly received in this case."

In pursuance of what was referred to above as "the close and anxious attention" which need to be paid to the psychological effect of change of custody, the child's own views and wishes,[1] if he is old enough to express these, are received by the court. The older the child is, the greater the weight accorded to his or her wishes,[2] although in one case where an eleven year old child expressed the "strongest aversion" against one of its parents, that parent nevertheless gained custody.[3] However, the courts frown at any attempt by one parent to influence the child in his view about the other parent.[4] The ultimate responsibility for the decision is the court's - not the child's.[5] The practice

---

1 See J.E. Hatherley, "The Role of the Child's Wishes in California Custody Proceedings" (1973) 6 Univ. Cal., Davies L. Rev. 332-353; see also Cole v. Cole (1944) 16 N.L.R. 9.

2 See e.g. Harvey v. Harvey (1860) 22 D. 1198; Gover v. Gover 1969 S.L.T. (Notes) 78; Johnson v. Johnson 1972 S.L.T. (Notes) 15

3 Re O'Hara (1900) 2 Ir. R. 232 at 240.

4 See e.g. B. v. B. (1924) P 176 at 177-178; and 186 C.A.; R. v. R. and I [1961] 1 W.L.R. 1334.

5 See Gover v. Gover 1969 S.L.T. (Notes) 78; Nicol v. Nicol 1953 S.L.T. (Notes) 67. (The wishes of the children aged 11 and 10 did not prevail); Nugent v. Vetzera (1886) L.R. 2 Eq. 704 at 715 where Page-Wood, V.C. said, "I have not asked to see the children. I could not be influenced by anything I might hear from them."

of privately interviewing the child was carried to unacceptable limits as shown in two recent Court of Appeal decisions, B. v. S. (formerly B)[1] and H. v. H.(Child : Judicial Intervention).[2] In both cases the trial judge had interviewed the child to ascertain its wishes, and then promised the child that nothing said to the judge would be told any other person. The trial judge, in the latter case, had transmitted the substance of the interview to the Court of Appeal in an envelope marked, "Confidential - Interview with Children - Not to be opened." The trial judge in his efforts to obtain the confidence and co-operation of the child, gave that solemn promise. But in doing so, he was placing shackles not only on the appellate court procedure but on the whole judicial process.[3] This was a particularly painful dilemma for the Appeal Court. As Megaw L.J. said, "If we look at it [the confidential document], as I see it, we, in this Court, would be participating in the breaking of the promise which was solemnly given by the judge."[4] Again, "It may be that to look at the document would in one sense ultimately be in the interests of the children themselves. It may be that it would not so develop. Speaking for myself, however, I am unable to see how it would be right or proper for this

---

1 (1973) 118 Sol. Jo. 219. 2 (1974) 1 W.L.R. 595.

3 "How can the legal advisers give advice on the question whether there should or should not be an appeal if, when the matter comes before the Court of Appeal, they may be faced with some fact unknown to them, communicated to the Court of Appeal by the judge as a fact affecting his judgment which did not appear in the reasons he gave?" (1974) 1 W.L.R. 595 at 600.

4 Ibid. at 598.

court to participate in or connive at the breaking of a solemn and unconditional promise given by a judge."[1] The Court of Appeal entertained no doubt that "it is wrong that a judge should give a promise to a child such as was given in B. v. S.(formerly B) and such as we now know was given in the present case."[2]

Still in connection with the child's happiness and psychological welfare is the practice that has developed of not splitting or separating the children where there are more than one. It is felt that such separation may be prejudicial especially if there is a much younger child who would benefit from associating with older ones.[3] As Jessel M.R. said,[4] "Solitary children are not so happy, and not so likely to make good men and women, as children brought up in the society of brothers and sisters in early life." Other factors such as the number of children involved, the de facto separation of the children in the past[5] do enter into a decision whether to separate them or not.

Another aspect of the need to secure the happiness and psychological welfare of the child concerns what Foster and Freed calls the preference for the "local milieu".[6] The observed precedents on this point are not consistent. The decisions sometimes appear to be influenced by political

---

1 Ibid. 2 Ibid.

3 see Christison v. Christison 1936 S.C. 381 at 385; Begbie v. Nichol 1949 S.C. 158 at 163-164.

4 Re Besant (1879) 11 Ch.D. 508 at 512.

5 Cf. Barr v. Barr 1950 S.L.T. (Notes) 15.

6 Foster and Freed, "Child Custody" (1964) 39 N.Y.U.L. Rev. 423 at 441.

or ideological bias and preferences - considerations which negate the idea of the paramountcy of the welfare of the child. Thus, in the two recent cases[1] involving struggles for custody of Nigerian and Ghanaian children, the English courts refused the repatriation of the African children through awarding their custody to their natural parents because of the "backward" and "primitive" conditions in these West African countries and awarded custody to the English foster parents despite factors of "the blood tie, race and colour." Whereas in Re H(Infants),[2] on an American father's application, the Court, without going into the merits of where and with whom the children should live, ordered the children to be returned to America. For Mr. Justice Cross (as he then was), "The sudden and unauthorised removal of children from one country to another is far too frequent nowadays."[3] Little wonder that the editors of the Family Law (Journal), in view of this ambivalence of attitude of English courts to the factor of "local milieu", stated that those courts do "not necessarily practise what [they] preach to foreign courts."[4]

---

1 Re O(A Minor)(1973) 5 Rev. Ghana Law 6; The Times Dec. 5 1972; Re O E, The Times, Feb. 15, 1973.

2 [1966] 1 W.L.R. 381 (C.A.).

3 Ibid. at 389.

4 (1971) 1 Family Law, p. 140.

(c) Religion and Spiritual welfare: Although it is commonly acknowledged that religious considerations are often closely intertwined with custody, it is beyond the province and ability of temporal courts to arbitrate between the respective merits of one religion and another as to which affords the greater benefit to the child or which gives the more profound spiritual guidance to its adherents. "It has been said many times that a temporal court is not able to decide in any case which religion affords the greater benefit to its adherents,"[1] Lord Evershed has said. And courts have shown a disinclination to so decide - which is just as well. The obvious and practical justification for this judicial aloofness, it has been said in a case arising outside the custody field, is that "Here we are outside the region of proof as it is understood in our mundane tribunals. This is ground on which the law does not presume to tread."[2] And again, "The faithful must embrace their faith, believing where they cannot prove: the court can act only on proof."[3] If the religious considerations in custody create difficulties in a "Christian" country like the United Kingdom, the problem would certainly be insurmountable in a multi-religious

---

1 In re Collins(An Infant)(1950) Ch. 498 at 502.
2 Gilmour v. Coats [1949] A.C. 426 at 453 per Lord Du Parcq.
3 Ibid. at 446 per Lord Simonds.

nation as Nigeria where Christianity, Islam and animism coexist and flourish side by side. A stronger case for judicial aloofness therefore exists in Nigeria. For if the Nigerian judges were to deviate from the path of scrupulous impartiality and were, instead, to dabble or delve into such controversial issues as the merits of religious faiths if and when these do arise in a custody case, they (the judges) would stand condemned for undermining Nigerian unity through the backdoor by embarking upon a judicial "jihad" or court-room "crusade".[1] And certainly the courts cannot answer whether the Maliki school of islamic law is better than the Hanafi or Shia schools, or whether Christianity is better than Islam, or whether Catholicism is preferable to Protestantism or to animism.

In one case[2] the High Court at Akure, Western Nigeria, denied a mother's claim to custody of two children and awarded custody to the father. Both spouses came from "reputable and Christian families". The mother had been in desertion of the child's father. In denying the mother's claim, Ogunkeye J. said, "I wonder how the respondent (appellant) who has failed to be influenced by her Christian religious background can bring up a child and give her religious training."[3] The Court of Appeal (Western State) reversed

---

[1] The "jihad" and "crusades" stand, respectively, for the Moslem and Christian holy wars of old.

[2] Afonja v. Afonja, Suit No CAW/115/69. (1972) Univ. of Ife L.R. 105.

[3] Ibid, at 108.

this finding. In the words of Kester, P., "'Desertion' in law does not necessarily involve 'religion' or 'religious background'."[1] But even if the trial judge had not tied up the question of desertion with religious considerations, it is our respectful view that the failure of a Nigerian parent to be influenced by her Christian, islamic or any other religious background, should not constitute a basis for denying such a parent custody of her child.

The question that has arisen in several cases in the United Kingdom is in which particular religious faith a young child who is the subject of proceedings before the court should be nurtured. The cases have involved Buddhist, Christian and islamic religions as well as atheists and the different denominations of Christianity. Some of the Scottish cases seem to show a preference for the religious parent or for some form of religious upbringing as against the non-religious parent or no religion at all. Mackay v. Mackay[2] involved a petition for the custody of a girl aged 7 years who had been with her father for four years prior to the action. The mother was a Roman Catholic and the father was a communist and atheist who "had no time for religion."[3] There was little to choose between the parents on the accommodation and material benefits offered to the child, but the mother had been primarily responsible for

---

1 Ibid.
2 1957 S.L.T. (Notes) 17.
3 Ibid.

the breakdown of the marriage. The court awarded custody to the father because his mother who lived with him was a practising Christian and the father had no objection to the religious instruction which was being given to the child. In the words of Lord President Clyde:[1]

> "Since the paramount consideration in custody cases is the welfare of the child, it would be almost impossible for a court in Scotland to award the custody to an atheist with the prospect of the child being brought up without the solace and guidance of any religious teaching at all, and had I considered that this result would take place in the present case I should have the greatest hesitation in awarding custody to the petitioner, however fitted he might be in other respects to have the child with him. For atheism and the child's welfare are almost necessarily mutually exclusive, according at least to our standards of civilised society ..."

In McClements v. McClements[2] the Second Division of the Court of Session awarded custody of the 9 year old son to the adulterous mother in preference to an atheist father who was allowed access rights only on condition that he made no attempt to influence the child's religious beliefs. At first sight it is difficult to see why the same decision should not have been reached as in Mackay. The father in McClements did not "prevent David [the son] receiving religious instruction at school", just as the paternal grandmother in Mackay was not inhibited from instructing the child in religious matters. The unsuccessful mother in Mackay seems to have been in a better (moral) position than

---

[1] Ibid. Lord Carmont expressed a similar opinion.

[2] 1958 S.C. 286.

the successful mother in McClements who not only committed adultery but had had an illegitimate child whom the son /David/ "believed to be his full brother", and the same mother had also once been "under the influence of drink". Whether the court was influenced by the child's own preference for the mother, it was clear that if the non-religious parent is not prepared to allow the child to have any religious instruction, his or her claim would be very weak indeed. Thomson, L. J.-C. observed as follows:[1]

> "In my view this child ought not to be denied the opportunity of being brought up in the generally accepted religious beliefs of the society in which he lives. When he comes to years of discretion he may wish to modify the ideas in which he has been brought up or he may wish entirely to depart from them. When he comes to maturity he can form his own judgment on such matters, but I do not think that in his formative years he ought to be deprived of the opportunity of a religious upbringing. Accordingly this case turns out to be in sharp contrast to the case of Mackay v. Mackay to which we were referred. There the father had no religious beliefs, but he was prepared to give the opportunity to his child of acquiring religious beliefs. In the present case the father is not prepared to do so."

Whether or not a substantial distinction exists between these two cases, it is clear that the opinions do hold dedication to religious beliefs very high in Scotland's national life. And whether or not this also indicates that Scotland has a more active religious conscience than England, say, we can not be sure about. The English courts have not yet expressed such opinions as we have had from

---

[1] 1958 S.C. 286 at 289-290.

the Scottish courts.

It would certainly be a surprise to thousands of Nigerian pagans to say that atheism and the child's welfare are "necessarily mutually exclusive." Welfare means different things according to the eyes of the beholder. In Re Agboruja[1] Mr. Justice Ames, in declaring the mother custodier of infant children who had all been moved from ancestral homeland in Warri to the modern city of Lagos hundreds of miles away, and ordering the payment of money for the children's maintenance, looked primarily to the children's moral and spiritual welfare when he observed:

> "They [i.e. the children] are not Christians or Mohammedans. I do not see how they can be brought up in Lagos in traditional tribal beliefs prevailing in Warri. The danger thus is that although this money will be available to feed and clothe the children they will grow up in a religious and moral vacuum."[2]

But even in Scotland, the pronouncements of Lord Clyde L.P. and Lord Thomson L.J.-C. in the two Scottish cases above fall like strange music on the ears of contemporary Scottish lawyers.

> "If the reasoning is that Scotland is a religious country, that when in Rome it is better to do as the Romans do, and that children in Scotland should therefore have a religious upbringing, then it can merely be criticised as drawing a slightly vague conclusion by crude means from a premise which is at least open to argument. But if the reasoning is that a child will derive spiritual benefit from a belief in God, and that a religious parent who is prepared to inculcate such a belief should therefore be preferred to an atheist

---

1 (1949) 19 N.L.R. 38.

2 Ibid. at 39.

> parent, then it is open to the far more serious objection that it proceeds on a set of unproved and unprovable assumptions and involves exactly the sort of discrimination between different beliefs which the courts have otherwise been so anxious to avoid."[1]

In the apt words of Lord Reid, "No temporal court of law can determine the truth of any religious belief: it is not competent to investigate any such matter and it ought not to attempt to do so."[2] Finally, it should be added that an applicant for custody whose concern is primarily to bring up the child in a particular denomination rather than with promoting the interest and welfare of the child in other matters is not likely to be favoured by the courts.[3]

(d) Wealth and Material Welfare: Cases are not uncommon in which the equities on both sides to a custody case are equal; in the sense that either party can equally provide stable physical and emotional environment for the child. But where the circumstances of one of the parties is such that he or she cannot adequately provide for the

---

[1] Clive and Wilson, op. cit. pp. 589-590.

[2] Gilmour v. Coats [1949] A.C. 426 at 455.

[3] See e.g. Codrington v. Codrington and Anderson (1864) 3 Sw. & Tr. 496 at 502-503; 164 E.R. 1367 at 1370; D'Alton v. D'Alton (1878) 4 P.D. 87 at 90. For further discussion of religious problems in custody cases, see Note "A Child's Religion" (1962) 106 Sol. J. 804.

child's food, clothing and entertainment, then wealth and material welfare of the child begin to assume significance. "The court cannot proceed on any artificial assumption that all are economically equal,"[1] it has been rightly said. The accommodation and general suitability of the surroundings which rival parties offer to the child are taken into a subsidiary account.[2] It is no use possessing the most balanced moral character if the child cannot be assured of a comfortable roof over its head. Of course the wealth and material welfare are not taken into account directly but are referred to "only for their bearing on other aspects of the child's welfare."[3] A parent seeking custody of a child who has not been staying with him for the previous few years or months must establish that he has made reasonable efforts to keep in touch with the child by writing and visiting him, or by sending him (Christmas, birthday and other) presents so far as these are practicable.[4] The incommunicado parent, writes Alec Samuels, "must give an explanation if he has failed to keep in touch."[5]

The courts do not weigh very finely on the balance

---

1 Clive and Wilson, op. cit. p. 586.

2 See e.g. Willoughby v. Willoughby (1951) P. 184 at 189.

3 Clive and Wilson, op. cit. p. 586.

4 See Akparanta v. Akparanta (1972) 2 E.C.S.L.R. 779 at 788 per Agbakoba J.

5 Alec Samuels, "Custody and Access Principles" (1963) 107 Sol. J. 49 at 51. See also Allen v. Allen (1948) 1 All E.R. 413 at 414; Willoughby v. Willoughby, supra note 2; Wakenham v. Wakeham (1954) 1 W.L.R. 366 at 368.

material welfare but they take, instead, a fairly broad view of the matter. Although some language in Ward v. Laverty[1] suggested a "means" test on the question of material welfare, in the words of Lord Justice Harman, welfare "does not mean that you add up shillings and pence, or situation or prospects."[2] In few cases are differences in material welfare regarded as of great significance.[3] There are hardly any cases in England, Scotland or Nigeria in which a custody award has been made solely on the basis of a difference in wealth if in all other respects the child's welfare could be well served in either home. But it may not be justifiable for the courts to ignore entirely extra material benefits which one party may be able to offer the child because such extras may lead to an enhanced or increased welfare for the child. And surely this cannot be a bad thing. But this is not to suggest that a kidnapper, a successful racketeer (be he a mafia lord or Nevada gambler) should necessarily prevail over, let us say, an upright woman earning a normal wage. In this sort of situation several criteria - justice, moral welfare etc. -

---

1 [1925] A.C. 101 at 109 per Viscount Cave.

2 Re "O"(An Infant) [1963] Ch. 23 at 29.

3 See Diri v. Nyikwa (Unreported)Suit No.K/M91/1965 (Kano High Court, where father's better material position was ignored). See also Nicol v. Nicol 1953 S.L.T. (Notes) 67 at 68 (where material welfare received significant weight); but contrast with Cochrane v. Keys 1968 S.L.T. (Notes) 64 (where material consideration did not favour the case of the more affluent party).

would come into conflict with wealth and material welfare. To sum up, wealth, it has been said, "may affect other aspects of welfare; in itself it may be relevant, but has not been regarded as important."[1]

Finally, two major statutory provisions having a bearing on issues of material welfare should be noted briefly. These are the Matrimonial Causes Act, 1950, section 23(1), read with section 4(1) of the Matrimonial Proceedings (Children) Act, 1958.[2] The 1958 Act provides that where the court makes an order under section 23(1) of the 1950 Act, the court shall also have jurisdiction to make such other provision as appear just with respect to the custody of any child referred to in section 23(1) of the 1950 Act. This latter provision itself comes into effect where the husband has been guilty of wilful neglect to provide reasonable maintenance for the wife or infant child. These United Kingdom provisions which have now been consolidated in the 1973 (English) Matrimonial Causes Act were relied upon in giving custody offour children to their mother in the Nigerian case of Ehigiator v. Ehigiator[3] by virtue of the now repealed State Courts (federal Jurisdiction) Act,[4] section 4 of which had provided for the exercise of jurisdiction by the Nigerian High Courts in matrimonial matters

---

1 Clive and Wilson, op. cit. p. 586.

2 Now consolidated in the Matrimonial Causes Act, 1973 (cap 18) Part II. (See e.g. sections 23(1) and 27(1)).

3 (1966) N.M.L.R. 372.

4 Cap 177 Laws of the Federation of Nigeria and Lagos (1958 ed.)

in conformity with the law and practice for the time being in force in England.

(e) Education and Moral Welfare: According to Clive and Wilson,[1] the criteria of education and moral welfare of the child were pre-eminently a 19th century phenomenon during which period they constituted one of the very few considerations which would justify a court in interfering with a father's right to custody.[2] For example, in the notorious custody case of Wellesley v. Wellesley,[3] a father was denied custody of his minor children whom he sought to recover from his deceased wife's sister upon the following facts, among others. Mr. Wellesley, while living with one Mrs. Bligh in Paris, to which city he had fled to escape his creditors in England, had sent letters to his son with such moral advice as these: "Study hard, but as soon as you have completed your tasks, go out, in all weathers, and play hell and Tommy etc., chase cats, dogs, and women, old and young, but spare my game."[4] The House of Lords had no hesitation in denying his application for custody because he was a poor moral exemplar. Lord Neaves

---

1 The Law of Husband and Wife in Scotland p. 586.

2 See e.g. Lang v. Lang (1869) 7 M 445.

3 (1828) 4 E.R. 1078 (H.L.).

4 Ibid. at 1079. In one other letter to his son's tutor, Mr. Wellesley wrote that "there are certain things which ought to be let alone, a man and his children ought to be allowed to go to the devil their own way if he pleases it." 1080.

in Lang v. Lang[1] spelled out the law on this matter from the Scots point of view when he said, "It is not that he has committed faults, but that he teaches, or is likely to teach evil to them, and to corrupt their morals, that can alone entitle us to interfere." Begho J. (as he then was) in the Mid-Western Nigerian case of Lafun v. Lafun[2] curtailed drastically access rights to a mother because "owing to the moral depravity of /the mother/ it will not be to the best interests of this child ... for the /mother/ to have frequent access to him in his formative years when he could easily be influenced."

It is obvious then that a person seeking custody of a child must be able to meet not only the child's physical and material needs, but must also provide a proper moral example as well as healthy home surroundings. This explains the strictness of the old rule as contained in the words of Sir Cresswell Cresswell: "It will probably have a salutary effect on the interests of public morality, that it should be known that a woman, if found guilty of adultery, will forfeit, as far as this court is concerned, all right to the custody of or access to her children."[3] That statement indicates that in matters of sexual (im)morality, the moral welfare test weighed more heavily against the wife. "Although the courts were prepared to overlook the occasional seduction

---

1 (1869) 7M 445 at 447. See also Muir v. Mulligan(1868) 6M 1125 where it was alleged that a boy of two had "already been taught to drink ardent spirits and to smoke tobacco." Quaere whether this appertains more to health and physical welfare.

2 (1967)N.M.L.R. 401 at 403. Mr. Justice Begho had said at p.402 "she appears to me a depraved woman who takes delight in immoral acts and feels that she cannot help the situation without any real effort to raise herself from this depth of depravity."

3 Seddon v. Seddon and Doyle(1862) 2 Sw. & Tr. 640 at 642.

of a maidservant by a man of upright character they were reluctant to grant an adulterous wife access to her children."[1] The courts were thus content to employ a double standard in such matters. But things have changed. "There is no shortage of twentieth century cases in which custody has been awarded to an adulterous spouse, whether wife or husband."[2] The usual factors relevant to education and moral welfare centre on the so-called "unimpeachable" or "bad" parent theories. Before proceeding to discuss these theories, it will be pertinent to observe that in questions of education and morals, just as with religion, welfare is not easy to assign a meaning because it is difficult to see how any court can assess the merits of different moral codes or different moral philosophies. Also, in matters of education and morals, just as in the matter of happiness and psychological welfare, the courts take into consideration the possibility of whether a parent, if given custody, would attempt to poison the mind of the child against the non-custodier parent.[3]

We now turn to the question of how far, today, considerations of morality (and justice) may be deemed as impinging

---

1 Clive and Wilson, op. cit. p. 587. See also Symington v. Symington (1875) 2 R(H.L.) 41; A.B. v. C.D. (1847) 10D 229; Contrast McIver v. McIver (1859) 21 D 1103.

2 Clive and Wilson op. cit. p. 587. See also McCurdie v. McCurdie (1918) 2 S.L.T. 250; Stewart v. Stewart 1914, 2 S.L.T. 310; Nicol v. Nicol 1953 S.L.T. (Notes) 67; Zamorski v. Zarmoska 1960 S.L.T. (Notes) 26.

3 M. v. M. 1926 S.C. 778 e.g. at 786 per Lord Anderson.

upon the true welfare of the child. First, we will examine the theory of unimpeachable parent. This theory can operate between parents inter se, as well as between parents and strangers. It is not in doubt today that the morals of the parties enter into the criterion of the child's education and moral welfare. Megarry J., in Re F(An Infant)[1] said that the commission of adultery by both spouses "lessens the disparity between the father and the mother in the scale of moral guilt." Therefore, where the parent is morally unimpeachable, his or her claim would stand very high among the secondary factors having a bearing on the child's moral welfare. In Re L(Infants),[2] Lord Denning after stating the facts of the case, began his judgment as follows:

> "The father is a man against whom no word can be spoken as to his conduct towards his wife or towards the children. His wife has left him and has gone to another man." His Lordship continued: "If the mother in this case were to be entitled to the children, it would follow that every guilty mother (who was otherwise a good mother) would always be entitled to them: for no stronger case for the father could be found. He has a good home for the children. He is ready to forgive his wife and have her back. All that he wishes for is her return. It is a matter of simple justice between them that he should have the care and control. Whilst the welfare of the child is the first and paramount consideration, the claims of justice cannot be overlooked." [3]

---

[1] [1969] 2 All E.R. 766 at 769.

[2] [1962] 1 W.L.R. 886 C.A.

[3] Ibid. at 889-890. Emphasis added. A similar decision was reached in Cole v. Cole (1944) 16 N.L.R. 9.

We may pause to observe with regard to Lord Denning's statement, that the introduction of considerations of justice between parents in custody proceedings is difficult to reconcile with section 1 of the Guardianship of Infants Act, 1925, which, having made the infant's welfare the paramount consideration, goes on to direct that the court "shall not take into consideration whether from any other point of view the claim of the father ... is superior to that of the mother" or vice versa. One wonders whether this injunction does not preclude the court from putting matrimonial innocence or guilt as such into the "welfare" balance at all.[1] We may also note that a survey of the reported cases reveals that only in extremely rare occasions do courts make explicit reference to "justice" as a possible basis of custody decision.[2]

Lord Justice Harman in Re L(Infants) was equally firm in his denunciation of the moral conduct of the impeachable parent. "It is not the law," he stated, "and it never has been, that no consideration shall be given to the spouse who has been deserted, whose home has been blasted, whose matrimonial felicity has been ended through no fault of his. If a wife chooses to leave her husband, for no ground which she chooses to put forward, but because she has a fancy or

---

[1] See J.C. Hall, "Family Law - Custody of Children", (1962) Camb. L.J. 169, 171.

[2] See e.g. Re H(Infants) [1966] 1 W.L.R. 381 at 393 per Cross J.; J. v. C. [1970] A.C. 668 at 724 per Lord Upjohn.

passion for another man, as this woman has, she must be prepared to take the consequences."[1]

These opinions, it is true, relate to disputes between mother and father; but Lord Guest in J. v. C. has made it plain that in custody disputes between unimpeachable parents and strangers, the parents may still have an advantage over the strangers, though this is not overwhelming. Unimpeachability in such a case is relevant "only as one of the factors as bearing on the child's welfare."[2]

We shall now examine the theory of the bad mother or bad parent.[3] This theory often manifests itself in considerations such as adultery, general unfitness, moral depravity. We have seen that adultery by a mother was once taken as evidence of a mother's unfitness to have custody. But single acts of adultery which fall far short of outright promiscuity or other misconduct are today usually not enough to invite the drastic sanction of disqualification for custody on moral grounds. The modern view of adultery as it relates to the child's moral welfare, therefore, is simply that once adulteress does not mean always adulteress. Isolated lapses do not make a woman "a bad mother, or a bad housekeeper, or anything which made it undesirable for her to look after the child."[4] Where the parent is still living

---

1 [1962] 1 W.L.R. 886 at 890-891.

2 [1970] A.C. 668 at 697.

3 See Alec Samuels, "Custody and Access Principles" (1963) 107 Sol. J. 49 at 51-52.

4 Allen v. Allen [1948] 1 All E.R. 413 at 414 per Wrottesley L.J.; See Willoughby v. Willoughby [1951] P 184 at 192. Where a mother told a lie to the court in order to obtain custody, a Nigerian judge thought this showed "maternal devotion". Diri v. Nyikwa (unreported) suit No. K/M91/1965. High Court, Kano per Williams J.

in adultery with the paramour, courts are often anxious to protect the child from contact with the "corroding side" of the parent's life.[1] As far as unfitness as a parent is concerned this is an area where other departments of law feature prominently: social welfare legislation, Children and Young Persons Acts are all relevant besides strict Custody-Guardianship legislation. Broadly, unfitness such as would warrant deprivation of custody would embrace such matters as committing crimes, dishonesty, neglecting and battering a baby and other acts of cruelty to children, immorality, immoderate drinking, drug addiction and other manifestations of irresponsibility. In this area it is not possible to draw a strict line between the effect of these different forms of unfitness on the child's moral welfare as distinct from their effect on other aspects of the child's welfare. Similarly, depravity as a facet of immorality would embrace such issues as arose in Re Besant[2] - unbridled taste for reading, publishing or distributing obscene or immoral books or literature such as most modest people would shun. A child, traditionally, would not be left in the custody of a parent indulging in such acts considered repugnant and abhorrent to the feelings of the generality of people in either Scotland, England or Nigeria.

---

[1] See e.g. Re G(Infants) [1899] 1 Ch. 719 at 723 per Kekewich J.
[2] (1879) 11 Ch. D. 299.

But of course opinion would differ greatly today as to what constitutes obscenity, depravity and immorality. And it differs from place to place, and from time to time. Therefore, this criterion more properly belongs to the last century than this latter half of the present century. And in particular the whole question of interspousal morality or immorality as having a bearing on the welfare of the child may need to be more carefully demarcated. For as Alec Samuels has stated: "The father may be beyond reproach, a pillar of society, and yet be a remote, insensitive, authoritarian and unaffectionate parent; the mother may be guilty of moral lapse, indifferent to social reputation, and yet be a close, sensitive, kindly and affectionate parent. A bad spouse is not necessarily a bad parent. Moral probity is reasonably easily established by evidence. Loving parenthood is not so easily established by evidence. Unimpeachability should be taken to describe fitness for custody as a parent, not any other characteristic."[1]

(f) Family unity and total, long-term, societal welfare:

Interparental conflicts over custody inevitably disturb and confuse a young child, and courts would seize any

---

[1] Alec Samuels, "Custody and the Welfare of the Child", (1970) 114 Sol. J. 365 at 366.

opportunity whereby such confusion or disturbance could be minimised or avoided. Naturally in a normal case the best method of achieving this goal is to ensure for the child a two-parent family relationship. It is one of the main duties of parents to maintain a joint home for the child. This is why the spouse who breaks up the matrimonial home is held in such great disfavour. "In this case, whilst no doubt the mother is a good mother in one sense of the word in that she looks after the children well, giving them love and, as far as she can, security, one must remember that to be a good mother involves not only looking after the children, but making and keeping a home for them with their father, bringing up the two children in the love and security of the home with both parents. In so far as she herself by her conduct broke up that home, she is not a good mother."[1]

Courts do not readily accept that a one-parental custody situation is the best solution for the child's plight. Hence they endeavour to see a reconciliation reached by the two parties in the interest and welfare of the child.

Professor Sayre[2] has advanced the thesis that the best interests and welfare of the child can only be adequately realised by considering the interests of all the parties involved. Hence he criticised the courts for de-emphasising

---

1 Re L(Infants) [1962] 1 W.L.R. 886 at 889-890 per Lord Denning M.R

2 P. Sayre, "Awarding Custody of Children" (1942) 9 U. Chi. L. Rev. 672 at 676-685.

the interests of the parents. And this is where the Nigerian customary law practice in the matter of child custody offers another clear contrast to English and Scots law. For under customary law welfare is emphasised not so much from the point of view of the particular infant but in the interests of the larger family of which the child is a part. But one must emphasise that even in Anglo-Scots law a major premise - sometimes explicit and sometimes hidden - whenever the child's welfare is emphasised as paramount be it in statutes or cases, is that ultimately it is in society's own best interests and welfare. This is the force in the assertion that "Each time the cycle of grossly inadequate parent-child relationships is broken, society stands to gain a person capable of becoming an adequate parent for children of the future."[1]

Judicial opinions as to the hope of reconciliation between the parties are heard like a refrain in custody cases. The ratio decidendi for some decisions seems to be that a child's immediate well-being may even be sacrificed if its removal from one parent may induce that parent to return to join the other parent to continue the matrimonial union since it is felt that the child's long-term welfare will best be served if reconciliation can be achieved. The courts have, in other words, sometimes placed a broad

---

[1] Goldstein, Freud and Solnit, Beyond the Best Interests of the Child (1973) p. 7.

interpretation on the "welfare" concept.[1] An example of judicial expression of hope of reconciliation is in Re L(Infants) where Lord Denning M.R. said:[2]

> "..... if they [i.e. the children] are to be given up to the mother now I can see no chance of reconciliation, whereas if they remain with their father, there may be some hope, even if it is only a faint hope, that she will return for the sake of the children themselves: and if only that would happen, their welfare would be ensured in the best way of all."

Before the House of Lords in a Scottish case it was observed that the total separation of a father from his children would "destroy the possibility of that reunion of husband and wife which, notwithstanding all that has occurred, may yet, I trust, - and perhaps through their intercourse with the children, to whom they are bound by a common affection, - be happily accomplished."[3] In Re T(Infants)[4] Russel L.J., sanguine on the efficacy of reconciliation, urged the parties to make "a go of things"[5] which had clearly fallen apart. The Court of Appeal in Northern Ireland has given an equally clear statement of the necessity for reconciliation. Babington L.J. in affirming the opinion of the Lord Chief Justice in Re E.A.W. and M.W.(Infants)[6] observed that "From

---

1 See J.C. Hall, "Family Law - Custody of Children" (1962) Camb L.J. 169 at 170.

2 [1962] 1 W.L.R. 886 at 890; This opinion of Lord Denning was not followed in Re F(an Infant)(1969) 2 All E.R. 766 at 770 because "Here there is no such possibility" of reconciliation, Megarry J.

3 Symington v. Symington (1875) 2 R. 41 at 46 per Lord O'Hagan.

4 (1968) Ch. 704.

5 Ibid. at 719. (The wife had kidnapped the child from Canada to England and she was "adamant" of never returning to the matrimonial home. Russell L.J. said: "many things that seem impossible turn out to be possible with mutual adjustment". He then urged the parties to make a "go of things""and by so doing do the best for their children". Ibid. at 718-719)

6 (1949) N.I.L.R. 1 at 10.

/the children's/ point of view the best solution to this dispute would be that the parents should come together again, and it is more probable that this reunion will take place if the children remain in the custody of their father."

The Morton Commission also attached great importance to the necessity for reconciliation. In supporting the idea that a divorce court should fully investigate the circumstances pertaining to the children's interests and future welfare before a decree nisi is made absolute, the Commission said:[1]

> "if parents were thus made to realise at the outset their obligations to their children we would hope that they would sometimes decide to abandon the idea of divorce for the sake of their children."

This is all seen as a way of making more effective the statutory rule pertaining to the welfare of the child. But it is debatable[2] whether the child's welfare has such a decisive influence in reconciling the parents as the different quotations above intended. As Cretney has stated, "At first sight it might seem unfortunate to appear to be using the effective guardianship of the children as a bribe to a couple to paper over their differences. On the other hand, it might be said that the welfare of the children would be so much better served by a reconciliation than by any other course."[3] So it is just as easy to approbate as

---

[1] (1956) Cmnd. 9678 Para. 377.

[2] See Cretney, Principles of Family Law (1974) pp. 273-274.

[3] S. Cretney, "Custody and Morals" (1969) New L.J. 822 at 823.

it is to reprobate this practice of urging reconciliation. It is respectfully submitted that custody awards should neither be used as a punishment nor as a pressure placed on one spouse or the other. Some families just cannot and should not stay together longer than is absolutely necessary. This is in the interests of society as a whole. The complex socio-legal field of custody is not an area "in which success can be measured only in terms of the number of families who were reconciled."[1]

The Nigerian High Courts have also addressed themselves to reconciliation of the spouses as a viable means of promoting the welfare of the child and the total welfare of society. In Oyedu v. Oyedu,[2] Mr. Justice Aniagolu urged the parties to settle their differences for the sake of the children's welfare and he added:[3] "In venturing this suggestion about a settlement, I am mindful of the provisions of section 30 of the High Court Law under which the court is enjoined to promote reconciliation among the parties in a civil suit and to encourage and facilitate amicable settlements of dispute in those suits." Since the Matrimonial Causes

---

1 H. Kay and I. Philip, "Poverty and the Law of Child Custody", (1966) 54 Cal. L. Rev. 717 at 739.

2 (1972) II E.C.S.L.R. 41.

3 Ibid. at 46. In another case a wife's application for custody and maintenance was allowed because "the prospects of the couple's reconciliation are now grim." Jegede v. Jegede, C.C.H.C.J./12/72 at 122 per Odesanya J.

Decree,[1] 1970 came into force regarding monogamous marriages, extensive provisions on reconciliation are now contained in sections 11-14 of that Decree. But in Nigeria the device of reconciliation as promoting enhanced societal welfare in matters of custody has some limitations, because in urging reconcilation one may encounter a possible conflict with the Constitution. The Matrimonial Causes Decree which enjoins the High Courts to attempt to reconcile[2] the parties to a "matrimonial cause"[3] may run foul of the Constitutional injunction that "Every person shall be entitled ... freely [to] associate with other persons".[4]

It is true that the Federal Military Government has now placed "a very high premium on reconciliation",[5] but the question is whether that premium is not too high. The question is not answered by the parenthetical provision that reconciliation is not to be attempted where "the proceedings are of such a nature that it would not be

---

1 No 18 of 1970.

2 Most commentators regard this provision as an innovation. See e.g. Ijaodola (1971) 5 Nig.L.J. 144 at 154; Aguda, Select Law Lectures and Papers p. 101.

3 "matrimonial cause" is defined in section 114(1) of the Decree to include "the custody or guardianship of infant children of the marriage."

4 Nigerian Constitution (1963) S. 26(1).

5 Ilegbune, "A Critique of the Nigerian Law of Divorce under the Matrimonial Causes Decree 1970" (1970) 14 J.A.L. 178 at 193.

appropriate to do so."[1] It must not be assumed that the fundamental constitutional provision in section 26(1) has only a market place (that is, a political or trades union) dimension. It implies freedom of association in matters of family life as well. Therefore, since parents have a guaranteed right to live apart, the question of the bond created between them by the existence of children should not be used to violate the parents' constitutionally protected fundamental rights by inducing them to live together after the marriage's irretrievable breakdown has been clearly demonstrated.[2]

3 Criteria applied in granting access

It is generally agreed that as a matter of human sense it is in the child's best interest to know and be accessible to both parents,[3] just as it is in the child's interest that a parent's natural right of access to the child should be preserved.[4] Access, Lord Justice Wilmer said, is a "basicc

---

1 S. 11(1) Matrimonial Causes Decree, 1970.

2 That point would be reached when, in the usual Nigerian fashion, "serious attempts by the parties, their parents, their friends, well wishers and relatives have completely failed." As reconciliation attempts by judges are unlikely to be fruitful after this point, Dr. Aguda considers the provision of section 11(1) of the 1970 Decree as a "mere paper work with no practical utility." See Note 2 supra p375, at 10

3 Re G(an Infant) [1956] 1 W.L.R. 911 at 917.

4 Cf. Huddart v. Huddart 1961 S.C. 393.

right of any parent."[1] The case would be exceptional before the court would refuse access rights to the non-custodier parent. If one parent is deprived of custody, his or her access rights do not "fly off and fasten" to the fit, custodier parent or person. The law does not countenance such a "drastic result".[2]

The fundamental nature of this right constituted one of the few inroads which the wife made into the near-absolute common law rights of the father.[3] One small but interesting aspect of the need to preserve a parent's natural desire to have access to the child is the statement occasionally heard that such access promotes not only the child's, but also e.g. the father's, moral welfare. In Lang v. Lang[4] Lord Neaves said that "Children are oftentimes the means of keeping a father from vice, and such is doubtless a part of the purpose of providence in constituting our family relations. If we take a man's children from him, we leave him a solitary being, and deprive him of the most powerful inducement to amendment of life." And Lord George Paton L. J.-C. observed that "the presence and society of children may often have a salutary influence in correcting such faults and failings on the part of a father as those which the respondent appears to have."[5]

---

1 S. v. S. (1962) 1 W.L.R. 445 at 448. But this basic right was refused to the Ghanaian father of an illegitimate child with an English mother. Re G(An Infant) 1956 1 W.L.R. 911 C.A.

2 Browne v. Browne 1969 S.L.T. (Notes) 15 at 16 per Lord Fraser.

3 Symington v. Symington (1875) 2 R(H.L.) 41; MacKellar v. MacKellar (1898) 25 R. 883.

4 (1869) 7 M 445 at 447.

5 Ibid. at 448.

These statements were directed more at custody, but the underlying principles are the same for access. While such statements would seem to alarm a Scottish or English lawyer,[1] they would accord perfectly with the Nigerian notion of welfare which, as we saw earlier, is geared towards the larger welfare of the child and of the family in the latter's cohesion and perpetuity. It surely would not be in the interest of a child to have a parent who is in "vice" and who is "solitary."

Because of the basic right to see the child, the likelihood that if a parent is given custody he or she would take the child out of the jurisdiction is a factor carefully considered by the courts. In one Scottish case a divorced mother was allowed to take the child with her to Australia even though this amounted to denial of access rights to the father.[2] And in the Nigerian case of Zetlin v. Akpan[3] an American couple was allowed to take a Nigerian illegitimate child to the U.S.A. with an eye upon its education but on condition that the child be not taken to the southern states of the United States of America. In the more extreme cases which involve the kidnapping of the child out of the jurisdiction by one spouse without the consent of the other party, the courts have (in recent years) used strong denunciatory language commensurate to the evil in illegally

---

1 cf. Clive and Wilson, op. cit. p. 582 n. 46.

2 Huddart v. Huddart 1961 S.C. 393. Cf. Nash v. Nash [1973] 2 All E.R. 704; and P(LM) v. P(GE) [1970] 3 All E.R. 659. See also Re O(Infants) [1962] 1 W.L.R. 724.

3 (Unreported) Suit No. M/14/69 of April 14, 1969 (Lagos High Court).

denying access to the law-abiding, stay-at-home, parent. As Cross J. said in Re E(D)(An Infant)[1]

> "In the western world there are thousands upon thousands of children of broken homes in respect of whom courts of different countries have made custody and access orders ... In modern conditions it is often easy and tempting for a parent who has been deprived of custody by the court of country A to remove the child suddenly to country B and set up home there. The courts in all countries ought, as I see it, to be careful not to do anything to encourage this tendency. The substitution of self-help for due process of law in this field can only harm the interests of wards generally."

By kidnapping a child out of the jurisdiction, the child is denied visiting and access rights by the other parent, and the exercise of these may well have promoted the child's interest and welfare. The child loses contact and identification with the other parent. The child's need for "continuity of relationships, surroundings and environmental influence"[2] is jeopardised by its unauthorised removal, and this may be upsetting to the child's emotional welfare.

Since the child's welfare is now the first and paramount consideration all former ideas of rights and innocence or guilt of the mother as affecting questions of access are now rendered otiose. As Alec Samuels neatly states, "That the parent was a bad wife and mother, neglected the children, showed interest in other men, deserted the husband leaving the children unattended with him, and generally placed her own interests before those of the child, would be

---

[1] (1967) Ch. 287 at 289.

[2] Goldstein, Freud and Solnit, Beyond the Best Interests of the Child p. 31.

very relevant in custody proceedings, but it is not sufficient ground for depriving the mother of access."[1]

The judicial attitude to the proper criteria which should dictate access questions is best summed up in the words of Lord Justice Atkin. He said:

> " ... but certainly if access were never to be allowed to children on the part of either father or mother, if the father or mother was not always and on all occasions perfectly discreet and wise, there are a great many parents who never could have the opportunity of seeing their children again, and to my mind the love and affection of a mother outweigh many foolish or indiscreet acts on the part of the parent in question."[2]

In other words, access will normally be granted to a party who does not have custody or care and control.

Nevertheless, access may be refused or granted subject to restrictions in a variety of situations: e.g., if the parent seeking access is likely to "have an undesirable influence on the child";[3] or if the parent in question is a person with a criminal record or is disposed to be cruel to children or something of that sort; or it may be refused in order to "protect the security of an on-going relationship - that between the child and the custodial parent."[4] And occasionally one may still come across judicial view that a child ought not to be brought into contact with any person with whom the parent is committing

---

1 "Custody and Access Principles" (1963) 107 Sol. J. 49 at 52.

2 B. v. B. [1924] P 176 at 191 C.A.

3 Clive and Wilson, op. cit. p. 590; cf. McClements v. McClements 1958 S.C. 286.

4 Goldstein, Freund and Solnit, Beyond the Best Interests of the Child, p. 38.

adultery[1] in order to avoid, in the words of Kekewich J., the "corroding side"[2] of the parent's life. Thus in Lafun v. Lafun[3] an adulterous mother was denied "frequent access" to her child during the latter's formative years when he could be influenced, owing to the moral depravity of the mother. Such a situation as this is likely to be encountered more frequently in jurisdictions where divorce law is still based fundamentally upon the doctrine of the matrimonial offence.

Finally, where an older child has expressed a desire not to visit or be visited by the non-custodier parent, such wishes would be given very heavy and often decisive weight.[4] It would not be in the child's nor in anybody else's welfare and interest that the child be compelled to comply with the court's decree regarding access. Thus, in B. v. B. (B(An Infant) Intervening)[5] a father who was divorced for cruelty but was otherwise "genuinely devoted" to his son and whose character as custodier was untarnished in any way, applied for restoration of access rights which he had lost a few years previously. Because the boy was

---

1 B. v. B. (1924) P 176 at 182; Re L (Infants) [1962] 1 W.L.R. 886 at 888.

2 Re G(Infants) [1899] 1 Ch. 719 at 723.

3 (1967) N.M.L.R. 401 at 403 per Begho J.

4 See Gover v. Gover 1969 S.L.T.(Notes) 78 (where two girls aged 13 and 14 made "genuine" and "reasonable" resolve not to see their father again); also Mozeley Stark v. Mozeley Stark (1910) 79 L.J.P.D. 98.

5 (1971) 1 W.L.R. 1486 C.A.

adamant he did not want to see his father, the Court of Appeal refused the application. In the words of Davies L.J., "on the evidence the boy is not, in his frame of mind, a suitable person to have access to his father; for that is, in effect, what it comes to."[1] For his part, Edmund Davies L.J., considering the "dreadful" and "Draconian" order the court was about to make on a "good parent" whose "character as a parent is absolutely untarnished"[2] and was deeply devoted to his son, mused:

> "Sometimes justice comes with the passing of the years. The day may well dawn when there will be a complete change in this boy's attitude towards his father."[3]

And so the general "rule" that the court will only deprive a parent of access if he is not a fit and proper person was subordinated to the principle that the court will do what best serves the child's welfare.

In concluding this discussion, however, it should be added that since the law does not set an age over which the wishes of the child is to be respected and below which it is not to be consulted or respected, great care should be taken by judges before abdicating their responsibility in the name of deference to the child's wishes as to access and custody.

---

[1] Ibid. at 1492.
[2] Ibid. at 1494.
[3] Ibid. at 1495.

F Public Law Dimensions

1 A Rule of Public Policy

(a) General consideration: It is not our aim here, even if it were possible, to attempt a detailed exposition of the concept of public policy. Much fuller accounts of the concept are furnished in the leading works on conflicts of laws.[1] "Lying at the threshold of the international private law", it has been said, public policy is "an enigmatic monster which shows no desire of being analysed, and which defies the concerted attacks of professors, daring thesis writers and treaty makers."[2] Our aim is more modest: we are to see whether there are justifications for allowing public policy to pre-empt all private international law considerations in guardianship and custody. But first two preliminary points should be noted. It is generally agreed that public policy performs two main functions in the conflict of laws. First, it has a negative role of preventing or excluding the application of foreign law which is otherwise applicable. An extension of this role is the

---

[1] In addition to standard textbooks, the following works are very useful: Kahn-Freund, "Reflections on Public Policy in the English Conflict of Laws"(1954) 39 Grotius Society 39-83; Goodrich, "Foreign Facts and Local Fancies", 25 Va.L.Rev. 26; also the following relevant articles, Beach 27 Yale L.J. 656; Grybowski, 4 Am.J.Comp.L.365; Katzenbach, 65 Yale L.J. 1087; Lorenzen, 33 Yale L.J. 736; Nygh, 13 I.C.L.Q. 39; Winfield, 42 Harv.L.Rev. 72; Paulsen and Sovern, 56 Col.L.Rev. 969; and also Lloyd, Public Policy (1953)

[2] Nussbaum,"Public Policy and the Political Crisis in the Conflict of Laws" (1940) 49 Yale L.J. 1038, at 1037.

exclusion also of the results, within the forum, of the application of such foreign law. In other words, in their discretion judges may flexibly interpret the doctrine of public policy so as to be result-oriented even where the implicated foreign law has no contact with the forum. Secondly, it has a positive function of making compulsorily applicable domestic law on a particular topic. It would appear that these two functions are combined in the field of guardianship.

It has been urged that a distinction should be drawn between public policy in a purely domestic realm and public policy in an international situation. This is how the Scottish jurist, Anton, presents the distinction:

> "In general the domain of public policy is narrower in the legal systems of the United Kingdom than is the domain of ordre public in continental systems. The plea that the application of a foreign rule would be inconsistent with public policy cannot be based merely upon its inconsistency with the substantive law of Scotland, nor even, it is thought, upon its inconsistency with the internal rules of public policy in Scots law. The foreign rule must be inconsistent with the Scottish court's view of public policy in international matters."[1]

This distinction, it is submitted, ought to be borne in mind in approaching problems of guardianship in private international law.

English, Nigerian and Scottish courts approach foreign law in a spirit of restraint and tolerance, so that internal or domestic law solutions of legal problems sometimes are made to yield to solutions built upon foreign norms and

---

[1] Anton, Private International Law, p. 88.

standards. This "departure from our natural law complex [which is] an exception from a psychologically determined parochialism which otherwise, in all value relationships, does not seem to have loosened its grip on us"[1] goes to the very foundation of the system of private international law. Private international law, as we have seen, is based on considerations of justice and convenience, on the necessities of international intercourse between individuals and even on "an enlightened conception of public policy itself."[2] The courts in the three jurisdictions we are considering recognise that substantive rules of foreign systems of law differ from country to country and these courts further appreciate that such differences are no justification for non-application of foreign laws where these are otherwise relevant. But it must not be assumed from what we have said that a state must apply foreign law under all circumstances whatever without limitations and, as Lauterpacht says,[3] "without a safety valve, without a residuum of contingencies in which, because of the very nature of its structure and the fundamental legal, moral and political conceptions which underlie it, it should be able to decline to apply foreign law." This then is the justification for

---

[1] A. Neekam, Experiences in African Customary Law p.1.

[2] Case Concerning the Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands v. Sweden) (1958) I.C.J. Reports 54 at 94 per Sir H. Lauterpacht [Hereinafter ICJ Reports]

[3] Ibid. at 95.

invocation of public policy to exclude, for example, foreign penal or revenue laws, or for refusing to give effect to foreign law which is contrary to the fundamental policies of forum law. It is obvious that not to allow such residuum of discretion via public policy would in fact be antithetical to the system of private international law. In the robust language of Nussbaum, "Practising liberalism becomes preposterous where it is exercised towards a foreign law which is plainly directed against the interests of the forum."[1]

(b) Place of Public Policy in private international law

(i) Juristic and judicial views: Public policy has been an inevitable part and parcel of the doctrine and practice of private international law from its very inception. The two "are inseparable, not only as a matter of history but also of necessity; they have grown together in mutual interaction and compromise."[2] Because of the prominence of public policy in all systems of private international law, it has even been suggested[3] that the concept has become a general principle of law recognised by civilised nations within the meaning of Article 38 of the Statute of

---

1 Nussbaum, supra note 2, p. 383, at 1049

2 (1958) ICJ Reports 54 at 94 per H. Lauterpacht.

3 Ibid. at 92 per H. Lauterpacht. However, this suggestion has been doubted, rightly, by Dr. K. Lipstein who proceeded not on the ground that public policy is not a general principle of law but on the ground that such general principle does not fit readily into the jurisprudence of the World Court. See K. Lipstein, "The Hague Conventions on Private International Law, Public Law and Public Policy" (1959) 8 I.C.L.Q. 506 at 522. Paulsen and Sovern write: "The principal vice of public policy concepts is that they provide a substitute for analysis. The concepts stand in the way of careful thought, of discriminating distinctions, and of true policy development in the conflict of laws." See supra, p383 note 1 at 1016.

the International Court of Justice. The very universality of the concept and the intractable nature of its content has aroused the hostility of writers. As Professor Ehrenzweig has said, "Public policy functions as the x of the law, the unknown quantity."[1] Dr. Cheshire's view is that "public policy covers a multitude of sins varying in their degree of turpitude."[2] And Dicey and Morris in a qualified approval write that "The reservation of public policy in conflict of laws cases is a necessary one but no attempt to define the limits of that reservation has ever succeeded."[3] This antipathy to public policy is not confined to juristic writers.[4] Burrough J.'s classic statement that public policy is "a very unruly horse, when once you get astride it, you never know where it will carry you "[5] is still invoked today, though with less reverence. If public policy is held with such disfavour, why then, it may be asked, does it wield such predominant influence in guardianship? This we shall now consider briefly.

(ii) Public policy in Guardianship-custody law: The crucial provision in section 1 of the Guardianship of Infants Act 1925 (and its equivalent in other enactments) which lays

---

1 A. Ehrenzweig, Treatise on the Conflict of Laws p. 344. Earlier on, at p.3, Ehrenzweig referred derisively to public policy as the "cure all".

2 Cheshire & North, Private International Law, 8th ed. p. 143.

3 Dicey-Morris, The Conflict of Laws, p. 74.

4 Strong, denunciatory language is used by Goodrich in "Foreign Facts and Local Fancies", supra, note 1. p383

5 Richards v. Mellish (1824) 2 Bing. 229 at 252.

down the rule that in all cases concerning the custody, upbringing or guardianship of children the welfare of such children shall be the first and paramount consideration has earned the following verdict from Dr. Morris: "The section ... should ... be regarded as a rule of public policy applicable notwithstanding any rule of the conflict of laws."[1] Professor Anton is in agreement. "This section", he writes, "while not itself a rule of the conflict of laws, must be regarded as stating a general principle of public policy controlling where necessary the application of the rules of private international law otherwise applicable."[2]

Controversy is stirred, in our view, when public policy is substituted wholly for private international law considerations in guardianship, and the generally acknowledged reciprocal interaction and compromise between the two disappear. Since "public policy is generally the result of strong feelings, commonly held, rather than of cold argument",[3] should there not be some qualification to its application - such as requirement that the guardian and/or ward be significantly connected with the forum before public policy is invoked? If a foreign ("Western") country has an identical law on guardianship as Scotland or England, what public policy is outraged as to lead to supplanting normal

---

1 J.H.C. Morris, The Conflict of Laws p. 180.
2 Anton, Private International Law pp. 371-372.
3 Attorney General v. Times Newspapers Ltd. (1974) A.C. 273 per Lord Reid at 300.

private international law considerations where a custody case involves the foreign legal system? It is not being denied that public policy has close affinity to matters pertaining to the child's welfare. But should the gloss on "welfare" mean nothing but public policy? With section 1 of the Guardianship of Infants Act 1925 firmly in mind, Judge Lauterpacht in four sentences formulated the relevance of public policy to guardianship in these words:[1]

> "Apart from criminal law it is difficult to conceive of a more appropriate and more natural object of ordre public /public policy/, as generally understood, than the protection by the state of infants, especially when they are helpless, ill, an actual or potential danger to themselves or to society, a legitimate object of its compassion and assistance, and an occasion for public resentment whenever the state fails to measure up to its responsibilities in this respect. There are, in that wide and highly controversial province of ordre public /public policy/, matters which are the objects of uncertainty and occasional exaggerations of national prejudice reluctant to apply foreign law. But there is a hard core within that field which is not open to reasonable challenge. The protection of children, in the sense indicated above, is an obvious particle of that hard core."

But surely the need for "protection" arises when there is danger. And it is not in every case of guardianship that danger to the child is established. In most cases there would be no indication that the foreign law was "plainly directed against the interests of the forum", as Nussbaum would say.[2] It would be nearer the truth perhaps to assert that "there is an element of foreign politics in the conflicts

---

[1] (1958) ICJ Reports p. 54 at 90.

[2] Nussbaum, supra note 2 p383 at 1049.

use of public policy."[1] How else can one explain the return of American children of an English mother to America, and not the return of fully Nigerian or Ghanaian children to West Africa?[2] It would seem that while judges would be prepared to acknowledge that public policy is still an "unruly horse", yet the "foreign politics in the conflicts use of public policy" could enable even liberal-minded Lord Reid to say that "in a chapter of law so intimately associated with public policy [as guardianship] we must not be too pedestrian."[3]

(iii) Conclusion: Dr. Cheshire has urged that public policy "should be narrower and more limited in private international law than in internal law."[4] This, in our respectful view, is the attitude which courts should bring to bear on guardianship where, at the moment, internal public policy has been used to usurp the role of private international law even in proper cases. As Sir Percy Spender has remarked, "Public policy in every country is in a constant state of flux. It is always evolving. It is impossible to ascertain any absolute criterion. It cannot be determined within a formula."[5] This is the kind of

---

1 Ibid. at 1048.
2 See discussion at pp. 303-307 supra.
3 Attorney General v. Times Newspapers Ltd. [1974] A.C. 273 at 300.
4 Cheshire and North, Private International Law, 8th ed. p. 143.
5 (1958) I.C.J. Reports 54 at 122.

regime in which judicial discretion flourishes and may be abused. There is no express reservation in section 1 of the 1925 Guardianship Act that in all guardianship cases, public policy is to prevail with its consequential application of internal (English, Scots, Nigerian) domestic law. "Welfare" by its very nature invites comparison and admits of external values. It may be that in the majority of cases a public policy gloss on the "welfare" provision is all that is required. But there would remain a minority of cases in which it would not be justifiable to classify "welfare" rule as exclusively a rule of public policy not susceptible to normal operation of rules of conflict of laws. As regards conflicts of guardianship laws between Scotland and England, or between the different Nigerian states, this further consideration should be noted. Guardianship law in these countries is designed to promote the welfare of children and citizens of the same country (British or Nigerian children). Thus, for example, refusal in the one part of the United Kingdom to apply the guardianship law of the other on grounds of public policy smacks of what Judge Beach called "an intollerable affectation of superior virtue."[1] Within the context of an interstate or interlocal conflict of laws such as exists between Scotland and England or between the different states in a federation, Professor Goodrich commented: "A mutual tolerance for each other's

---

[1] J.K. Beach, "Uniform Interstate Enforcement of Vested Rights" (1918) 27 Yale L.J. 655 at 662.

little idiosyncracies does not seem a great deal to ask from members of a family of states which have so much in common."[1] Such mutual tolerance would, the learned author submitted, facilitate the banishment of public policy argument from conflict of laws.

In both the United Kingdom and Nigeria there is the instrumentality of an ultimate court of appeal (House of Lords and Supreme Court, respectively) which could see that laws do not diverge beyond acceptable limits so as to harm the children of one and the same nation. And this should reduce local fancies for public policy. Dr. Agbede has summed up nicely the public policy controversy as far as Nigeria is concerned. He said that " ... uniform protection of the parties' expectation is desired in Nigeria not only as a matter of justice but also as a necessary corollary to the constitutional obligation on the part of the several states not to discriminate against the citizens of other sister states.[2] Surely, no court is obliged to give effect to the laws of a sister state which, in its view, is unconstitutional. But to refuse to enforce a valid rule of another state on grounds of public policy may come perilously near to overriding the constitution."[3]

---

[1] Goodrich, "Foreign Facts and Local Fancies", 25 Virg. L. Rev. 26 at 35.

[2] See Nigerian Constitution (1963) S. 28.

[3] Agbede, Conflict of Laws in Nigeria (Unpublished) Ph.D. Thesis, University of London, 1970 p. 707. The learned author's views do not apply to issues governed by customary law.

Even in a true international conflicts law of guardianship, it has been suggested that at least among English speaking countries (or the common law, commonwealth countries) who share "similarity in law and point of view"[1] and often have similar if not identical laws on guardianship, the wide scope of operation of public policy should be curtailed or even abolished. To invoke public policy against foreign law of guardianship which the forum state itself has enacted is hypocritical. Some three hundred years ago the Court of King's Bench said that "discretion ... is only a softer word for arbitrary."[2] This is what, in the final analysis, would continue to cause anxiety in guardianship-custody unless public policy doctrine allows the normal operation of rules of conflict of laws in a proper case.

2 The Welfare Principle and Public Responsibility Towards Children in Modern Law[3]

The protection and advancement of the welfare and interests of the child has become the fundamental policy

---

1 Goodrich, op. cit. at p. 35.

2 R. v. Walcott, (1694) 4 Mod. 395, cited in (1968) 118 New L.J. 697 at 698. ("Wardship and Parental Rights").

3 See P. Diwan, "The Welfare Principle and Public Responsibility towards Children in Modern law," in Lawyer (Journal of the Indian Law Institute - Madras State Unit)(1969) Vol. 1, No. 8 p. 147. I am grateful to my colleague Mr. R.S. Bhalla of the Dept. of Public Law for drawing my attention to Dr. Diwan's article.

of modern law in both the United Kingdom and Nigeria. Indeed, the concept of "welfare and best interests" is one of the few principles in law which cut across different ideologies pursued in the West, the East or the Third World. Our concern here is to examine the responsibilities which are shouldered by the state and its principal functionaries, the courts and other administrative authorities, in the direction of advancing the welfare and interest of the child. Guardianship may be seen today as an institution in which the guardian or custodier acts as an organ (agent) of the state, and acts under the active and vigilant supervision of the state which has the right and duty to step in at any time and supplant the guardian wholly or in part, in the interest and welfare of the child and society.

The major preoccupation of the courts in custody and guardianship as we have seen, is with the welfare of the child. In order to advance this principle beyond hollow dogma the courts now discharge their responsibilities along two main lines which are worthy of note. First, it is now widely acknowledged that some judicial principles, especially the rules of evidence[1] necessary for the administration of justice, may now be sacrificed by the courts in the interest of the children. As state agents for the discharge of the

---

[1] This is discussed further in chapter 6.

parens patriae duties the courts can exercise their powers at any stage of guardianship proceedings "with total disregard of any artificial formalities of the law."[1] A clear statement of the judicial function in this connection was given in Re K(Infants)[2] where Lord Devlin said:

> "In the jurisdiction parens patriae there are unquestionably some principles of judicial inquiry which are not observed." [3]

This is because it is becoming more and more evident that guardianship, custody and access proceedings appertain more of the nature of an administrative proceedings than judicial hearings in the strict, conventional sense. It is being realised that such proceedings should not assume the form of adversary litigation between the two parties but should rather assume the form of a non-contentious, or, in the phrase of Professor Ehrenzweig, an "extralitigious"[4] proceedings. In pursuance of this policy may be mentioned the Scottish provision in section 11 of the Matrimonial Proceedings (Children) Act 1958 (a United Kingdom Act which has been amended and consolidated for England by the Matrimonial Causes Act, 1973) under which may be appointed Court welfare officers charged with the duty of investigating and reporting to the court in cases concerning the welfare, care

---

1 (1958) I.C.J. Reports 54 at 90 per Sir H. Lauterpacht

2 [1965] A.C. 201.

3 Ibid. at 239.

4 See Ehrenzweig, "The Interstate Child and Uniform Legislation: A Plea for Extralitigious Proceedings" (1965) 64 Mich. L. Rev. 1

and upbringing of children. Such independent reports, it is believed, would lessen the court's reliance upon the contentious evidence produced by the parties themselves mainly to advance, not the child's welfare, but the parties' own interests. By relying on the reports of the court's own investigating officers who are trained, independent and had had opportunity of investigating the matter in the natural and real home surroundings of the parties and of sometimes talking privately with the children and possibly with the children's teachers, doctor and clergymen, the court would be acting truly as parens patriae, and would be in a position to reach a decision dictated primarily by the child's welfare. As Cretney says,[1] "Fairly extensive use is made of this power" in England. And it is "almost universally thought that reports do provide useful assistance in reaching a decision" in a custody case.[2] Of course the court remains essentially a judicial body although the procedure followed is essentially administrative. The court's reluctance actively to encourage reliance upon the findings of psychiatrists and child psychologists probably constitutes the greatest drawback to an otherwise welcome change of judicial direction.

---

[1] Cretney, Principles of Family Law (1974) p. 265. The author indicated (p. 265 n. 95) that in England in 1966, some 2,493 cases made use of such reports.

[2] Cretney, op. cit. p. 265.

In the second place, it is now widely recognised that custody proceedings involve not two but three and possibly four parties - the parents, the child and the State. Hence in matrimonial proceedings issues affecting the children are no longer regarded as merely ancillary or auxiliary. One of the first enactments that recognised this position was the Matrimonial Proceedings (Children) Act, 1958 - a United Kingdom Act. But today the relevant English law is the Matrimonial Causes Act, 1973.[1] These statutes provide that a decree nisi for divorce is not to be made absolute until the court is satisfied (after seeing the report of the court welfare officer) that arrangements proposed for the care and welfare[2] of the children involved are satisfactory or are the best that could be devised under the circumstances. The courts now have extensive powers to entrust the care of the children to a third party, such as probation officers[3] or to local authority.[4] And once the court assumes jurisdiction, it is empowered to pronounce any orders in relation to custody, maintenance and education of the children even if the main proceedings have been dismissed on the merits.[5]

---

1 See generally, Cretney, op. cit. at pp. 271-274.

2 The Matrimonial Causes Act, S.41(6) defines "welfare" to include custody, education and financial provision in respect of the child.

3 See s.6 of the 1958 Act, and S.41(2) of the 1973 Act [i.e. M.C.A.]

4 See S.43(1) of the 1973 Act [i.e. M.C.A.]

5 See S.42(1) Matrimonial Causes Act, 1973.

Turning to the State's own responsibilities towards the children's welfare, we find that legislative interest in the subject of child protection and welfare is no less conspicuous than the judicial manifestations of interest which we have already touched upon. We indicated in chapter one that guardianship and custody, with their dominant theme of the child's welfare, occupy a mid-stream area of the law. This view is nowhere illustrated better than in the different examples of State responsibility towards children which we are now about to consider.[1] The laws of most countries now recognise the special responsibility which the state has for children. The State, as father of all, has intervened through legislation to protect the child and to advance the all-important community values of welfare or well-being. Child welfare and juvenile delinquency are recognised as major social problems of concern to the State not only in the interest of the children but also essentially in the interest of the community. The State desires that young people become useful members of society instead of being a burden on the State. In a way, these legislative measures do impinge upon the parent-child relationship, but on the whole both the State's and parental responsibility may be seen as essentially congruent, combining to accord maximum protection for the child. We may illustrate the State's responsibilities in this regard first in general terms and then by looking at specific legislation.

---

1. Child battering offers one recent manifestation of the State's growing concern for the child's well-being, as the Maria Colwell and similar cases have shown. See generally M.D.A. Freeman, "Child Law at the Crossroads". (1974) 27 Cur. L Prob. 165.

In the United Kingdom, and increasingly in Nigeria[1] as well, the State on the one hand imposes an obligation on the parents to give at least compulsory primary education to their children,[2] and on the other hand it provides facilities of buildings, equipment, school fees and other grants-in-aid in respect of free primary education. Again, the law imposes upon parents an obligation to see that their children have medical tests and checkups, but at the same time the State endeavours to provide the necessary medical, hospital, and other child clinic and health facilities for such tests. Properly interpreted, therefore, the "welfare" concept leaves no room for geographical or ideological chauvinism. As Dr. Diwan has stated: "This is one of the fields where we find that distinction between 'purely socialist states' and 'purely capitalist states' is fast disappearing."[3]

The many Children and Young Persons Acts[4] in Scotland, Nigeria[5] and England furnish one of the best examples of

---

1 The Nigerian Federal Military Government is to launch a nation-wide Universal Primary Education Scheme as part of its 3rd National Development Plan in 1976. Efforts towards that momentous event are already well under way.

2 e.g. Education (Scotland) Act, 1962, cap. 47 S.31; Elementary Education Act 1876.

3 P. Diwan, op. cit. note (note 3 p393), at 152.

4 These will be referred to by abbreviations only. Thus, the English Children and Young Persons Act, 1933 will be C.Y.P.(E). We have cited from the 1933 English Act not the later Children and Young Persons Acts of the 1960's.

5 The various States in Nigeria have their own Children and Young Persons Acts in addition to a federal enactment on the subject. It will be tedious to cite from the individual statutes and we have refrained from doing so. The relevant enactments are cap 20(Western State), cap 32 (Lagos State), cap 19 (Eastern States) and C.Y.P. Law, 1958, Northern States.

legislation designed to curb particular abuses or dangers to the welfare of children. For example, the Children and Young Persons (Scotland) Act 1937[1] contains provisions aimed at prohibiting the employment of children under the age of 12 years. And the Employment of Children Act 1973 empowers local education authorities in England and education authorities in Scotland (a) to demand from a child's parent or guardian or custodier particulars of a child's employment or proposed employment and (b) to prohibit or regulate such employment, even though lawful, if it appears to the education authorities to be "unsuitable for the child, by reference to his age or state of health or otherwise prejudicial to his education."[2] The Federal Nigerian Children and Young Persons (Harmful Publications) Act, 1961 prohibits the importation, distribution and sale of any book or magazine or other material which portray "(a) the commission of crimes; or (b) acts of violence or cruelty; or (c) incidents of a repulsive or horrible nature; in such a way that the work as a whole would tend to corrupt a child or young person into whose hands it might fall."[3] The Children Act 1938, as amended by the Social Work (Scotland) Act 1968 contains salutary provisions to guard against unsuitable foster parents, child minders or nurseries.[4]

---

1 cap. 37 1 Edw. 8 and 1 Geo. 6, Part III.

2 Section 2(2) and (3); see generally, Bevan, The Law Relating to Children, cap. 13.

3 No. 52 of 1961, section 2.

4 See also Nurseries and Child Minders Regulation Act, 1948.

The criminal laws in England, Scotland[1] and Nigeria are replete with provisions to prevent such crimes as the sexual exploitation of children. Because the State imposes duties and rights on parents in respect of their children's custody and guardianship, it is made an offence in Nigeria to interfere without justification with the parental right to custody. Thus, one may mention the offences of kidnapping and abduction of children. Under the Criminal Code "any person who unlawfully takes an unmarried girl under the age of 16 years out of the custody or protection of her father or mother or other person having lawful care or charge of her, and against the will of such father or mother or other person, is guilty of misdemeanour, and is liable to imprisonment for two years."[2]

Section 12 of the Children and Young Persons (Scotland) Act, 1937 imposes a penalty upon parents or other persons having custody, charge or care of a child who is assaulted, neglected, ill-treated or exposed to other acts of cruelty.[3] In both the United Kingdom and Nigeria there are statutory provisions designed to protect a child from the ill-effects of criminal proceedings. Thus the law requires that

---

[1] e.g. Criminal Law Amendment Acts 1885 [ss. 2, 4-7] and 1922 [s.4].

[2] S. 303 Criminal Code (Western State); s. 362 Criminal Code (Federal); see also, sections 271-273 Penal Code (Northern States).

[3] See also C.Y.P. Act (E) 1933, section 1(1).

children are to be kept separated from adults in police stations and in courts;[1] that children be spared moments of embarrassment by clearing the court while the child is giving evidence in certain cases such as those involving immorality[2] or indecency; and that children be protected from damaging publicity.[3] In this last connection the court has discretionary power to prohibit the publication of identifying particulars of children and young persons involved in proceedings, either through the media of radio, television or newspaper publications.[4] It is interesting to observe in this connection the contrast between the English and Scottish procedures of reporting cases of custody. The Scottish practice is to use the actual names of the parties or the child's own name, whilst the English resort to abbreviations. We shall have occasion again briefly to refer to this point.

In any court where children and young persons are involved the Court "shall have regard to the welfare of the child or young person."[5] Hence children are generally subjected to special types of punishment, such as being placed in custody in remand homes instead of imprisonment.

---

1 e.g. C.Y.P.(S) 1937 as amended by Social Work (Scotland) Act 1968, S. 39; C.Y.P.(E) 1933, S. 31.

2 e.g. C.Y.P.(S) 1937 S.45; C.Y.P.(E) 1933, S.37.

3 e.g. C.Y.P.(S) 1937, S.46; C.Y.P.(E) 1933, S.39.

4 See C.Y.P.(S) 1937, S.54, as amended by Social Work(Scotland) Act, 1968 Schedule 2 para. 13.

5 C Y.P.(S) 1937, S.49; C.Y.P.(E) 1933, S.44.

It should be mentioned that the preceding specific instances of legislative provisions do not exhaust cases of the State's concern for the welfare of the child. There are numerous other legislative provisions directed against smoking[1] and drinking,[2] gambling,[3] possession of firearms[4] and begging[5] by children. It is interesting to observe the contrast between the United Kingdom and Nigeria in the matter of begging by children. An English or Scots man (lawyer or lay) would be struck by the high incidence of youth begging which has become almost institutionalised especially in parts of the Northern Nigerian States, in spite of its prohibition e.g. by section 405 of the Penal Code.[6] And of course smoking and drinking by youth are common place today in the U.K. and Nigeria, thus rendering the provisions on these things a dead letter.

Furthermore, there are statutory provisions in the U.K. to safeguard children from the dangers of open fires and for general safety at children's play and entertainment grounds.[7] In addition there are some dozen miscellaneous

---

1 C.Y.P.(S) 1937, S. 18; C.Y.P.(E) 1933, S. 7.

2 Ibid. section 16; and S. 5. See also Liquor Licensing Act 1959 (Nigeria) S. 36. In Nigeria's Northern States, drinking is prohibited to the general Moslem population, adult or young person.

3 See Betting, Gaming and Lotteries Act, 1963, Ss. 21, 22 /U.K./; Gaming Act 1968, ss. 7, 17.

4 Firearms Act, 1968, sections 22-24.

5 e.g. C.Y.P.(E) 1933, S. 4.

6 In Nigeria these children, referred to locally as "Almajirin" are almost invariably Quranic students of religious teachers or "Malamis", and the practice, it is alleged, has the sanction of the Moslem Holy Writ.

7 C.Y.P.(S) 1937 ss. 22 & 23; C.Y.P.(E) 1933 ss 11 & 12.

laws aimed at publication of harmful materials to children (e.g. horror comics)[1] while other enactments are directed at Tattooers,[2] pawnbrokers,[3] money lenders,[4] hypnotists[5] and scrap merchants[6] - to all of whom children could very easily fall prey with consequential detriment to the latter's well-being. It may be observed that climatic, sociological and youth culture differences between the United Kingdom and Nigeria have meant that Nigeria has not pursued legislation in as far ranging a field as the preceding account indicates for the United Kingdom. It does not appear that Nigerian law views the infliction of tribal marks as detrimental to the welfare of the child.

Mention must be made, finally, of the Children Act 1948 which provides that a local authority may take under its care any child who is in need of parental care, either temporarily or permanently. Even in the lifetime of the natural parents, the local authority may in certain situations assume parental responsibility over a child with a view to "further his best interests, and to accord him opportunity for the proper development of his character and ability."[7]

---

1 Children and Young Persons Harmful Publications Act 1955. The Nigerian equivalent was mentioned above.

2 Tattooing of Minors Act 1969.

3 C.Y.P.(S) 1937, S.19; C.Y.P.(E) 1933, S.8; Pawn Brokers Act 1872 - a statute of general application in force in Nigeria?

4 e.g. Money Lenders Act 1900, S.5.

5 Hypnotism Act 1952, S.3.

6 C.Y.P.(S) 1937, S. 20; C.Y.P.(E) 1933, S.9.

7 S.12 Children Act, 1948.

This modern trend towards increasing public responsibility for the welfare of the child has prompted the late Dr. Wolfgang Friedmann to ask whether "This growth of an 'administrative' family law, arising from a vast and complex network of modern social welfare obligations /does not/ indicate an undermining of the whole concept of the family."[1] That acute questioner returns the answer[2] himself by stating that rather than undermining the family, the new developments seek to strengthen the family by providing "a fuller and happier family life,"[3] although in the process, he concedes, the burgeoning and growing public family law would inevitably modify a great deal of traditional private law of the family.

In our respectful view, there would need to be a careful watching of the exercise of state powers and responsibilities towards children. As Lord Denning once wrote with regards to the growing powers of the Executive arm of government, "Properly exercised the new powers of the executive lead to the Welfare state: but abused they lead to the totalitarian State."[4] And as Dr. Paras Diwan has rightly observed,[5] "What the modern family law emphasises

---

1 W. Friedmann, Law in a Changing Society (2nd ed. 1972) p. 287.
2 W. Friedmann, op. cit. at 287-888.
3 Ibid. at 287.
4 A. Denning, Freedom Under the Law (1949) p. 126.
5 P. Diwan, supra, note 3 p 393, at 153

is that the family is not constituted of the father alone and certainly not of the father as the dominating ruling pater familias master of everything in the family and commanding everyone in the family, but of the children, mother and father all living together in love and freedom." Because the children, being the tenderest and weakest, would be the losers in a conflict situation involving the family members, the law has rightly focused on the children's interest and welfare as the paramount consideration needing protection. Viewed in this perspective, the principle and end of all laws concerning children should be to serve the welfare of the children and to protect their best interests. Whether the question involves guardianship, custody, parental care and control, employment of children or juvenile delinquency, the aim of the law is firmly set to give paramount - and it has been suggested even "sole"[1] - consideration to the welfare of children. Viewed in a still broader perspective, it is unrealistic to draw any distinction as to whether measures designed for the safety, health, happiness, morals, religion of a child are primarily in the child's or in society's interests. This is the point emphasised by Judge Lauterpacht when he said:[2]

---

[1] Alec Samuels (1970) 114 Sol. J. 365 at 366; also Diwan, op. cit. note 3. p393, Supra

[2] (1958) I.C.J. Reports 54 at 85.

"For it is clear that the distinction between the protection of the child and the protection of society is artificial. Both the laws relating to guardianship and those relating to protective upbringing are laws intended primarily for the protection of children and their interests. At the same time, the protection of children - through guardianship or protective upbringing - is pre-eminently in the interests of society. They are part of it - the most vulnerable and most in need of protection. All social laws are, in the last resort, laws for the protection of individuals; all laws for the protection of individuals are, in a true sense, social laws."

3 Global or International Implications of "welfare" concept

A discussion of the concept of the paramountcy of the welfare of the child would not be complete without mention of international conventions and treaties which devote specific Articles to reaffirmation of the welfare concept. We had earlier referred[1] to the provisions of the United Nations Declarations on Elimination of Discrimination against Women[2] and on the Rights of the Child[3] of 1967 and 1959 respectively, which emphasise the paramountcy of the "interests of the child". Two other international conventions may also now be mentioned to underline a problem

---

1 See chapter one, at p.31

2 This Declaration was adopted by the General Assembly on 7 November 1967 (Article 6(2)). For the text, see Brownlie, Basic Documents on Human Rights (1971) at 183-187; see also Yearbook of the United Nations (1967) p. 520.

3 Adopted by the General Assembly on 20 Nov. 1959 (Principle 7). See Brownlie, op. cit., pp. 188-190.

(discussed presently) which may arise when these Conventions and treaties fall to be judicially interpreted.

The U.N. Statement of Principles Relating to Discrimination in Respect of Right to Freedom of Thought, Conscience and Religion[1] provided in Article 2 that parents or guardians shall have priority of right to decide upon the religion in which their children should be brought up, "the best interests of the child being the guiding principle." The American Convention on Human Rights, in Article 17(4) states that "In the case of dissolution [of marriage], provision shall be made for the necessary protection of any children solely on the basis of their own best interests."

How would a national or an international court interpret some of these provisions in the Conventions? Suppose an international convention on the recognition of foreign custody orders provides that in the interests of children guardians properly and validly appointed in the child's domicile shall be recognised in other states; and then a state, party to such a convention, proceeds to enact that where the interests of an infant so requires, the state may take measures according to its own law for the protection of the person and property of the infant and subsequently exercises this power to remove the foreign-appointed guardian. What is an international tribunal to do when it is alleged

---

[1] See United Nations Review (Feb. 1960) Vol. 6, p. 29.

that the Convention has been violated?

An interesting case arose before the International Court of Justice in 1958 in the Case Concerning the Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands v. Sweden).[1] Although the 1902 Convention on which the case centred has now been superseded by the 1961 Convention,[2] the case contains some major pronouncements concerning aspects of guardianship law which, in the words of Dr. Lipstein, "will form part of the body of rules of interpretation applicable to treaties establishing uniform rules of the conflict of laws."[3] Because of this, the 1958 World Court decision cannot be ignored. The undisputed facts of the case, as found by the Court, were as follows. The guardianship in question involved one Marie Elizabeth Boll, a girl of Dutch nationality born in May 1945 in Sweden of a Dutch father and a Swedish mother. The mother had died in December 1953, and the father thereupon became her guardian by operation of Article 378 of the Civil Code of the Netherlands. In March 1958 the Swedish courts registered, i.e. recognised, the guardianship of the

---

[1] I.C.J. Reports, 1958 p. 54.

[2] Hague Convention on the Jurisdiction of the Authorities and the Law Applicable in the Matter of the Protection of Minors, 5 October, 1961.

[3] K. Lipstein, "The Hague Conventions on Private International Law, Public Law and Public Policy" (1959) 8 I.C.L.Q. 506 at 507.

father. The Dutch guardianship of the father was followed by the appointment of deputy guardians in June 1954 in accordance with Article 401 of the Dutch Civil Code and later by the replacement[1] of the father as guardian by another Dutch subject. The Swedish administrative authorities by a series of complicated measures involving several appeals entertained by the Swedish administrative courts over the period between May 1954 and February 1956, ordered the protective upbringing of the child in Sweden by virtue of Article 22(a) of the Swedish law of June 6, 1924 on the protection of children and young persons on the ground that her mental health required it. At the same time the Swedish courts which had earlier recognised the existence and validity of the Dutch guardianship as regards both the care of the person and of the property of the infant, subsequently withdrew their recognition of the Dutch guardians in regard to the custody of the child.

The Netherlands government alleged that the measure taken and maintained by the Swedish authorities in respect of the child namely, the "skyddsuppfostram" or protective upbringing (education) instituted and maintained by a series of decrees were actions contrary to the provisions of the

---

[1] This measure seems to have been influenced by the fact that soon after the death of his wife Mr. Boll was accused in Sweden of having committed an infamous crime against his little daughter, then aged eight years. Such depravity, it was felt, might seriously and permanently endanger the child's physical and mental health.

Guardianship convention of 1902 governing the guardianship of infants - which provisions are based on the principle that the national law of the infant is applicable and the national authorities are competent. The Swedish courts had held that measures sanctioned by the Convention and the Swedish law were complementary and not mutually exclusive, on the reasoning that the Hague Convention, which requires the recognition of a guardianship established according to the national law of the child, dealt with the private law aspects of guardianship, while the Swedish law of protective upbringing was a measure of a public law character the application of which was outside the scope of the rules of conflict of laws contained in the 1902 Convention on guardianship. The International Court of Justice was therefore faced with the problem of examining the duty of a State to apply in its own courts certain rules of municipal conflict of laws on guardianship which were embodied in a treaty, namely, the Guardianship Convention of 1902, of which the Netherlands and Sweden (defendant) were parties. To examine, in other words, whether the measures taken by Sweden were compatible with the 1902 Convention on guardianship.

Although in practical effects, as the Court found, the Swedish protective upbringing "temporarily impedes the exercise of custody to which the guardian is entitled

by virtue of guardianship under Dutch law"[1] (since the infant was prevented from being handed over to the guardian for the exercise of her functions), the World Court nevertheless, in a majority opinion, endorsed the findings of the Swedish courts. Presumably with an eye on the emerging concept of the child's welfare it was held that "The Court could not readily subscribe to any construction which would make the 1902 Convention an obstacle on this point to social progress."[2] On the highly controversial argument whether the Swedish measures were justified on grounds of public policy, the majority opinion doubted whether the Convention included an implied reservation of public policy in favour of the forum - especially having regard to the terms of Article 7 of the 1902 Convention which in explicit terms already permitted the local authorities of the place of the infant's residence to take measures "in cases of urgency". But the Court did "not consider it necessary to pronounce upon this contention."[3]

Considerable amount of time and space was devoted to a discussion of the question of classification or characterisation in conflict of laws. Does the Swedish Welfare Act

---

1 (1958) I.C.J. Reports 54 at 64.

2 Ibid. at 71. See also at p. 77 where Judge Badawi stated that no distinction should be drawn between the private interests of the child and the larger interests of society "especially bearing in mind the evolution that has taken place in ideas concerning children and young persons".

3 Ibid. at 70.

of 1924 fall within "guardianship" as understood by the treaty, that is, does "guardianship" within the meaning of the Convention include "protective upbringing"? Dr. K. Lipstein has discussed these issues in detail elsewhere;[1] our concern here is to indicate how the concept of the child's welfare and interests can be and have been used to sidetrack an international undertaking by a State. The individual concurring opinions as well as the dissenting opinions show the permutations that are facilitated when operating the "welfare and interest" concept under a regime of international conventions. There was little doubt, as Judge Winiarski said, that the proceedings of the Swedish judicial and administrative authorities indicated that "The interest of the infant is the ratio legis, the purpose and the aim of the legislative or treaty provision".[2] But what did individual members of the World Court say? Judge Pender who concurred, having examined the social and legal situation prior to the 1902 Convention and the mischief which the Convention sought to remedy, characterised the Convention as dealing strictly with conflict of laws of guardianship and nothing more. It had, he said, a different scope of operation from the Swedish law of protective upbringing. Since there was no mala fides on the part of Sweden, he

---

[1] K. Lipstein (1959) 8 I.C.L.Q. 506.
[2] (1958) I.C.J. Reports 54 at 137.

concluded that there is no inconsistency or incompatibility between the two laws.[1] Judge Wellington Koo, for his part, relied heavily on medical and psychiatric examinations and opinions relating to the child's health and he therefore based his opinion on the need to take urgent measures as sufficient justification for the Swedish action. As he said, "the measure in question was in fact ordered and applied on the ground of urgency, and as such it clearly falls within the meaning and scope of measures required for the protection of the person of a foreign infant"[2] as provided for by Article 7 of the 1902 Convention. The protective measure was therefore clearly compatible with the Convention, he held. The recognition of an implied reservation of public policy constituted the reason for the concurring opinions of Judges Badawi, Spiropoulos, Moreno Quintana and Sir Hersch Lauterpacht who also relied on public policy as a general principle of public international law.[3]

Turning briefly again to the facts of the case itself, since the Dutch guardian acceptable to the father of Elizabeth Boll and appointed in accordance with the Convention was replaced in respect of the exercise of the

---

[1] Ibid. at 120.
[2] Ibid. at 112.
[3] see e.g. at pp 74, 92.

right of custody by the infant's Swedish maternal grandfather who acts on behalf of the Swedish Children Bureau, it is natural that the Dutch authorities and guardian would rightly view the custody rights exercised by the Swedish grandfather - albeit in the interest of the child - as tantamount to rival guardianship. Arguments that the Convention and the Swedish law lie on different planes and pursue different objectives would not persuade the ordinary parent or guardian. This consideration formed the basis for the dissenting opinions as well as a main submission of Judge Lauterpacht in his separate concurring opinion. Judge Kojevnikov in his dissent relied wholly on the maxim pacta sunt servanda. In his view, having regard to the fact that the rights and obligations of the parties under the 1902 Convention are abundantly clear, and having regard to the character and the facts of the case as well as the legitimate interests of the child concerned - a Dutch national - the Court ought to have held that the measures taken by the Swedish administrative authorities in respect of Elizabeth Boll, which measures impede the exercise of the right of guardianship based on the treaty, were not in conformity with the obligations binding upon Sweden vis a vis the Netherlands by virtue of the Guardianship Convention of 1902. Judge Cordova also rejected as illegitimate the invocation of Swedish public policy and of Swedish public law in face of the terms of, in particular, Article 7 of the Convention which permitted the local

authorities of the place of residence to take their own measures only when the institution of guardianship is pending (which was not the case here) and "in all cases of emergency". Judge Cordova was clear in his dissenting opinion about the danger of evading responsibility assumed under a treaty by resorting to public policy which in this case forms an integral part of the concept of the child's welfare, saying, "I have always known the time-honoured and basic principle of pacta sunt servanda, which makes it impossible for the States to be released by their own unilateral decision from their obligations according to a treaty which they have signed."[1] Even Judges Spender[2] and Lauterpacht who concurred in the majority judgment were careful to emphasise the danger of relying on public policy to undermine pacta sunt servanda. In the opinion of Judge Lauterpacht, the reasoning behind the Swedish contentions which emphasised subtle issues of classification of the two laws involved, raised important questions of interpretation and observance of treaties in general.

> "If a State enacts and applies legislation which, in effect, renders the treaty wholly or partly inoperative, can such legislation be deemed not to constitute a violation of the treaty for the reason that the legislation in question covers a subject-matter different from that covered by the treaty, that it is concerned with a different institution, and that it pursues a different purpose? I have considerable difficulty in

---

[1] Ibid. at 141.

[2] In the words of Sir Percy Spender, "The maxim pacta sunt servanda is of special significance in considering this contention of Sweden. One should be constantly alert lest anything that might be said - or, indeed, fail to be said - should give any currency to a view that nations, under 'public policy,' may fashion their own yardstick to determine their obligations under international treaties or conventions." Ibid. at 121. See also Greco-Bulgarian Communities P.C.I.J. Series B, No. 17, p. 32.

> answering that question in the affirmative. The difficulty is increased by the fact that the conflict between the treaty and the legislation in question may be concealed, or made to be concealed, by what is no more than a doctrinal orlegislative difference of classification. An identical provision which in the law of one country forms part of a law for the protection of children may, in another State, be included within the provisions relating to guardianship. That, as will be shown, is no mere theoretical possibility. It is in fact a conspicuous feature of the present case." [1]

As to the Swedish contention, supported by the Court, that the 1902 Convention and the Swedish Child Welfare Act of 1924 cover different spheres in the matter of guardianship and child welfare, Judge Lauterpacht would not be convinced:

> "It is admitted that guardianship under the Convention covers the right to decide on the residence and education of the minor - a right claimed and exercised by a Swedish authority and, on its behalf, by the Swedish maternal grandfather acting in pursuance of the Law on Protective Upbringing. If that is so, then the Convention does cover, in one of its essential aspects, the same powers and functions which are now exercised by Swedish authorities in pursuance of the Law on Protective Upbringing. The substance is the same although the purpose of the Convention and of the Law may be different. It may be said that what matters is not the substance of these functions but their object. It is not easy to follow that distinction. When a State concludes a treaty, it is entitled to expect that that treaty will not be mutilated or destroyed by legislative or other measures which pursue a different object but which, in effect, render impossible the operation of the treaty or of part thereof." [2]

---

[1] Ibid. at pp. 80-81.

[2] Ibid. at 81.

Sweden relied heavily on the "public law" character of her Law on Protective Upbringing. The contention here being that "public law", like matters of evidence and procedure, penal and revenue laws in conflict of laws are matters which must yield to local law. But Judges Lauterpacht,[1] Spender[2] (both concurring) and Winiarski[3] (dissenting) exposed the fallacy of this argument. This is how Sir H. Lauterpacht delivered his telling rejection of the contention.

> " ... it is difficult to accept the suggestion that guardianship, instituted in the private interest of the child, is devoid of a substantial public element of social purpose. The rights of the parties, especially in an international dispute, ought not to be determined by reference to the controversial mysteries of the distinction between private and public law. The fact that the purpose of the Convention of 1902 is to establish rules for avoiding conflicts of laws in the sphere of guardianship does not mean that that sphere is confined to laws described as guardianship; it covers all laws, however described or classified, which fulfil an essential function of guardianship. It is part of the firmly established jurisprudence of this Court that with regard to national laws bearing upon treaty obligations what matters is not the letter of the law but its actual effect." [4]

That statement certainly accords to the jurisprudence of the Permanent Court of International Justice as well. In the case concerning the Treatment of Polish Nationals in Danzig[5] the Permanent Court of International Justice expressed the following view which Judge Winiarski[6] in the 1958 Guardianship

---

[1] Ibid. at 86.

[2] Ibid. at 128.

[3] Ibid. at 138.

[4] Ibid. at 86. Emphasis in the original.

[5] Series A/B, No. 44, p. 24.

[6] (1958) I.C.J. Reports 54 at 138. As Judge Winiarski said, "The Constitution is a classic example of public law."

case warmly endorsed:

> "A State cannot adduce as against another State its Constitution with a view to evading obligations incumbent upon it under international law or treaties in force."

In conclusion, therefore, it must be stated that what the 1958 Case Concerning the Interpretation of the Guardianship Convention of 1902 illustrates - a point which several Judges carefully emphasised - is that the criterion of welfare of the child or the best interests of the infant has itself in effect become an over-flexible formula for ignoring pacta sunt servanda. And this has remained a potentially dangerous side effect of the welfare or best interest of the child provision in international treaties and conventions.

G Other Considerations

In discussing the law of guardianship and custody and in particular section 1 of the 1925 Guardianship of Infants Act (and equivalent enactments) one should not be overwhelmed by the hypnotic power of the phrase "first and paramount consideration" which the law enjoins should be paid to the child's welfare.[1] As Lord Denning M.R. has said, "Whilst [the child's welfare] is the paramount consideration, it is

---

1. Frank Bates has pointed out rightly that "it would be quite impossible to ascertain what the best interests of children might be without evaluating other matters which touch on their welfare". (1975) 49 Aust.L.J. 129.

not the sole consideration."[1] What, it may be asked, are the other considerations (apart from the "first and paramount" one) which are relevant to custody? Of course it should be appreciated that the "other considerations" are infinitely various. To borrow a modified paraphrase of a language used in connection with the acquisition or loss of domicile, we would say that there is no act, no circumstance in a child's family life, however trivial it may be in itself, which ought to be left out of account in determining what other considerations are relevant, besides strict welfare, to questions of a child's custody, education, upbringing, administration of a child's property or the application of the income of any property belonging to a child.[2] For this purpose, it is useless to ransack strict legal sphere, or psychology, psychiatry or psychoanalysis for an answer. It will be convenient here to focus on a few major considerations, bearing in mind that such things as the "Society

---

1 Re L(Infants) [1962] 1 W.L.R. 886 at 889; see also Wakeham v. Wakeham (1954) 1 W.L.R. 366 at 370; Akparanta v. Akparanta (1972) 2 E.C.S.L.R. 779 at 789; Jegede v. Jegede (Selected Judgments, High Court of Lagos State) C.C.H.C.J./12/72, p.121 at 123.

2 Adapted from Drevon v. Drevon (1864) 34 L.J.Ch. 129 at 133 per Kindersley V.-C.: "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 in trying the question whether there was an intention to change the domicile."

of other children of the same age",[1] arrangements made for looking after the child while a parent-custodier is at work (e.g. nanny or nurses)[2] the age and sex of the child,[3] the desire to avoid leaving a child among those other children who are only half brothers and half sisters,[4] the intention of the parties,[5] the father's "better position" and his role as "head of the family",[6] the claims of the innocent party in a matrimonial suit[7] - all these have qualified at one time or another as "other considerations".

But it should be noted that not all of these factors are irrelevant to strict welfare consideration. The fact that some of these "other considerations" may equally qualify as pertaining to "welfare" shows how the two concepts are inextricably bound up together and indicates further that it would be unwise to maintain a sharp demarcation between the "first and paramount" and the "other" considerations.

The case of Re Thain[8] provides one of the clearer statements about the more significant amongst the "other considerations". In the words of Eve, J. "in as much as the rule laid down for my guidance does not state that the

---

1 e.g. Christison v. Christison, 1936 S.L.T. 275 at 277 per L.J.-C. Aitchison.

2 Ibid.

3 e.g. Re C(A)(An Infant) [1970] 1 W.L.R. 288 at 293 per Edmund Davies L.J.

4 Willoughby v. Willoughby (1951) P. 184 at 190-191.

5 e.g. Re O(Infants) [1962] 1 W.L.R. 724 at 727; Re Collins (An Infant) (1950) Ch. 498 at 505.

6 McLean v. McLean 1947 S.C. 79 at 88,89 per Lord Mackay.

7 See Jegede v. Jegede C.C.H.C.J./12/72, p. 121 at 123; Somorin v. Somorin (1972) C.C.H.C.J. 11/72 p. 101 at 102.

8 (1926) Ch. 676 C.A.

welfare of the infant is to be the sole consideration but the paramount consideration, it necessarily contemplates the existence of other conditions, and amongst these the wishes of an unimpeachable parent undoubtedly stand first."[1] The wishes of unimpeachable parents were also emphasised in Re O(Infants) and Re L(Infants).[2] From the angle of those cases involving an act of "kidnapping" a child against the wishes of the other parent, Cross J. said that although the child's welfare is the chief consideration, "it is far from being the only consideration."[3] His Lordship said a judge has to weigh various factors in such cases and he summed up the other considerations in these words:[4]

> "On one side there is the public policy aspect, the question of comity and the question of forum conveniens. Again, on the same side, there is the question of the injustice which may be done to the wronged parent if the court delays matters and allows the kidnapped child to take root in this country. On the other side, the court has to be satisfied, before it sends the child back, that the child will come to no harm."

---

1 Ibid. at 684. This opinion was followed in (a) Oyedu v. Oyedu (1972) 2 E.C.S.L.R. 41 at 44 where Agbakoba J. said that Re Thain "is authority for saying that among other considerations, the wishes of an unimpeachable parent stand first"; and (b) Cole v. Cole (1944) 16 N.L.R. 9 where Butler Lloyd J. went so far as to place the wishes of the parent higher in importance than the child's welfare. "The welfare of the child is a matter for consideration but is secondary to the wishes of an innocent parent". See also the strong words of Lord Upjohn who in J. v. C. [1970] A.C. 668 at 724 placed the question of parental wishes on a higher level than Lord Guest (P.697) and Lord MacDermott(PP. 713-714) were prepared to concede.

2 Both cases are noted above at notes 1 (p. 420) & 5 (p. 421).

3 Re H(Infants) [1966] 1 W.L.R. 381 at 393.

4 Ibid. at 393.

It is never easy "to maintain a correct balance between these conflicting considerations"[1]. Mr. Justice Megarry has stated that there are situations in which "the other considerations may be sufficiently strong to determine the matter"[2] of child custody; such would be where the welfare of the child would be equally served whoever has the custody. It may be convenient now to discuss briefly two of the other considerations mentioned by Cross J. in the statement above, viz. comity and justice.

Comity between the courts of different countries is often taken into a subsidiary account, presumably at least because it aids a proper functioning of the system of private international law. Buckley J. in Re G(J.D.M.)(An Infant) said[3] that although in custody cases the paramount consideration is the welfare of the child, where a foreign custody order is involved, however, that order becomes "one of the circumstances to be taken into consideration in deciding what it is right to do about the ward." And Lord Avonside in the Scottish case of Battaglia v. Battaglia[4] expressed the view that in certain situations the existence of a foreign custody order may "tip the scales". In some of the older cases, comity was accorded a much more prominent consideration.[5]

---

1 Re E (D)(An Infant) (1967) Ch. 761 at 768 C.A. per Wilmer L.J.
2 Re F(An Infant)/1969/ 2 All E.R. 766 at 768.
3 (1969) 1 W.L.R. 1001 at 1004; see also Ehigiator v. Ehigiator (1966) N.M.L.R. 372 at 376.
4 1967 S.L.T. 49 at 51.
5 e.g. Nugent v. Velzera (1866) L.R. 2 Eq. 704.

But it is not in all cases that due consideration is paid to comity.[1] And sometimes the status of comity among "other considerations" is not specifically pronounced upon. Thus in Re T(An Infant)[2] it was argued for the Swiss father in a kidnapping case, that the matter should be referred to the court in Switzerland in the interests of comity of nations and forum conveniens. Graham J., however, did not finally decide that issue but merely said:[3] "the court is not at present in a position to come to any satisfactory conclusion as to the relative weight which should be given to the interests of the infant and to the questions of comity and forum conveniens... It may be that after further investigation it will turn out that ... the matter should be referred to the court in Switzerland. It may, on the other hand, become clear that the interests of the boy are such that it would do real harm to send him back to Switzerland and that, therefore, his interests should properly in that event override any question of comity. .... In my judgment the right course is to adjourn the present proceedings so that the Official Solicitor may arrange for the boy to be interviewed and a report to be made to the court and to both parties."

---

[1] See e.g. J. v. C. [1970] A.C. 668 at 700-701 per Lord Guest; 714 per Lord MacDermott.

[2] (1969) 1 W.L.R. 1608.

[3] Ibid. at 1612.

In J. v. C. Lord Upjohn[1] spoke of the need to do "justice to the position of the natural parents" of a child in custody cases. But as we mentioned earlier an examination of actual cases indicates that "justice" is a word which is very rarely used in pronouncements on the "other considerations", although the notion of justice evidently underlies many decisions or case discussions. In many custody cases, where the equities on both sides as far as concerns strict welfare are equal, the innocent party normally prevails. This explains statements one often comes across about the guilty or innocent party or about the parent who has provoked the crisis. In Douglas v. Douglas,[2] Lord Thomson L.J.-C. said:

> "So far as the welfare of the children is concerned the situation appears to be very evenly balanced. Both parents seem suitable custodiers and the accommodation available on both sides seems not dissimilar. Nevertheless, we have to decide between them. ... The element [sic] which persuade me to give the custody to the father [is] that the ultimate responsibility for the breakup of the matrimonial home lies with the wife." [3]

And the Court of Appeal has held that, in the light of the conduct of the parents in a custody dispute, it "was a matter of simple justice between them"[4] that the father,

---

1 [1970] A.C. 668 at 724.

2 1950 S.L.T. 302.

3 Ibid. at 304 . See also at p. 304 per Lord Patrick and Lord Keith; see also McLean v. McLean 1947 S.C. 79 at 88 where Lord Mackay made reference to the father "who adheres to the law."

4 Re L(Infants)(1962) 1 W.L.R. 866 at 890 per Lord Denning M.R. See also Akparanta v. Akparanta (1972) 2 E.C.S.L.R. 779 at 789.

who was throughout blameless, should have the care and control, the two girls remaining wards of court.

And finally, we would include the hidden or unconscious premises and biases of the judges among the "other considerations." Some custody decisions would inevitably be coloured by the judge's own philosophy of life, his attitude to social and cultural issues of the day, his scale of moral, economic and political values, in short, his own entire way of life. These are all amongst considerations which on the one hand might constitute implied limitations on the concept of the "welfare" of the child in its truest and fullest sense, though on the other hand it may be difficult, in the ultimate analysis, to disentangle them from the overall welfare of the child.

The "other considerations" have implications for choice of law, and we shall turn to these again in chapter Six.

H Appraisal

The concept of the welfare of the child is easier to illustrate than it is to define. It embraces not one but an infinite number of ideas. It involves value-judgment which in itself one never succeeds in defining beyond indicating some of the major components. Both in the conflicts and non-conflicts field the content of "welfare"

is in essence the same. As the discussion in this chapter has shown, "welfare" is such a complex concept that any definition of its frame of reference is bound, inevitably, to be arbitrary. It is against the foregoing background that we now present this appraisal.

1 Pre-divorce Inter-parental friction : welfare

The children of most broken homes generally would have lived for some time in a household with an atmosphere in which the mother and father are constantly at loggerheads. It is not impossible to have such children even participating in the quarrels between their parents - except, of course, where the children are still babes in arms. It is at this stage that the law ought to have intervened for the child's welfare, rather than waiting for the ensuing custody proceedings. It is rare to find a child whose welfare has not suffered as a result of the pre-divorce interparental quarrels.[1] As Cross J. (as he then was) has said:[2] "One can, perhaps, imagine some brisk young extrovert whose whole demeanour testified beyond peradventure that the family dissensions had not taken a feather off him; but he would be a rare bird." In other words, a child whose custody

---

[1] "It is desirable in the interests of ... children," writes Hannen, P., "that they should not be troubled with their parents' dissensions, nor be made the depositories of their parents' grievances, the one against the other." D'Alton v. D'Alton (1878) 4 P.D. 87 at 90.

[2] Re S(Infant) [1967] 1 W.L.R. 396 at 407.

is the subject of legal controversy has already been deprived of his "welfare" or "best interests". This has led Goldstein, Freud and Solnit to say that "It is clearly beyond the court's power to undo the disturbances that have been caused in /the child's/ development.[1] It is accordingly a major failing in the United Kingdom and Nigerian enactments that there is no effective means whereby the child's happiness can be considered by a court except and until the parents' quarrel ends up in court or until the parent who has allowed the child to remain in the custody of a third party decides to wrench the child back. What the court actually sees in custody cases is only part of the total welfare of the child. As Dr. Mary Ainsworth has said, "Not all (emotional) damage is gross enough to be obvious at a crude level of observation."[2]

2 Travel arrangements and post-custody determinations : Welfare

Many private international law cases of custody and guardianship involve situations where one party desires a favourable decision from the court which would enable him to take the child out of the jurisdiction to his domicile, residence or country. It is evident that during custody

---

[1] Goldstein, Freud and Solnit, Beyond the Best Interests of the Child, footnote at pp. 62-63.

[2] M. Ainsworth, Child Care and the Growth of Love p. 194, cited in B. Mortlock, The Inside of Divorce (1972) p. 71.

proceedings the collective wisdom of all disciplines (besides the strictly judicial) ought to be brought to bear on the problem so as to effectuate the best acceptable solution. After the custody decree has been pronounced, however, new functionaries again will be turned to, especially in the "kidnapping" cases. The Immigration Departments stand out for particular mention. These have a role in ensuring that decrees empowering removal of a child out of the jurisdiction are given the desired effect. It is obvious that unless necessary money to cover transportation and repatriation costs is available, such custody decrees, in the absence of an international legal aid scheme, would be a mere dead letter. Thus, in the Victoria (Australia) case of Taylor v. Taylor[1] after Lush J. had ruled that "a consideration of the true welfare of these children requires their immediate return to England", the Australian Department of Immigration, to give effect to the decree, agreed to meet the cost of repatriating the mother and children to England. In the United Kingdom, the Scottish case of Kelly v. Marks[2] has shown that the Scottish courts would look into the question of the nature of the travel arrangements which would be made in respect of a child

---

1 (Unreported)(1970), noted in (1970) 44 Aust. L.J. 559. See also R.S. Geddes, "Should Something be Done About Kidnapping?" (1972) 21 I.C.L.Q. 774 at 780.

2 1974 S.L.T. 118 at 124.

who is the subject of a custody decree.

Furthermore, a shortcoming in the administration of custody law is a failure to realise that it is not necessarily the most logically coherent, the most scientifically supported or the most emotionally forceful judgment which results in the best custody placement for the child and the securing of its best interests. This is because there is a serious absence of feedback so that we do not know which principles or guidelines adopted by the courts make for the best actual results.

3 Welfare and Best Interests of Child : Beyond Any Discipline's Competence

In national as well as international legislation, the goal in custody and guardianship matters has been declared to be the securing of the "best interests" or "welfare" of the child. In a recent work, three authors trained in law and psychiatry have advanced the theory, based on psychoanalysis, that in custody or child welfare cases the court should emphasise the aspect of what they term the "psychological parent" and the "wanted child"relationship.[1] And with that relationship in mind the courts should seek to accomplish, not the "best interests of the child" but the

---

[1] J. Goldstein, A. Freud and A.J. Solnit, Beyond the Best Interests of the Child (1973). The terms in the text above are described by the authors at p. 17.

"least detrimental alternative." The latter has this meaning:

> "The least detrimental alternative, then, is that specific placement and procedure for placement which maximises, in accordance with the child's sense of time and on the basis of short term predictions given the limitation of knowledge, his or her opportunity for being wanted and for maintaining on a continuous basis a relationship with at least one adult who is or will become his psychological parent.[1] ... It should reduce the likelihood of /legislatures, courts and child care agencies/ becoming enmeshed in the hope and magic associated with 'best', which often mistakenly leads them into believing that they have greater power for doing 'good' than 'bad'." [2]

The authors then extolled the virtues of the new formula as avoiding the pitfalls of the "best interests" formula which (a) did not "convey to the decision maker that the child in question is already a victim of his environmental circumstances", and which (b) has "come to mean something less than what is in the child's best interests; and thirdly that "best interests" has been a convenient formula for decisions "fashioned primarily to meet the needs and wishes of competing adult claimants" rather than the best interests of the specific child.[3]

But the authors failed to recommend the participation of psychiatrists and child psychologists in the custody adjudicatory process, thus failing to take sufficient "account of the limited capacity of a legal system staffed

---

[1] Ibid. at 53.
[2] Ibid. at 63.
[3] Ibid. at 54.

by fallible humans."[1] Although the authors recommended independent legal representation for the child, to leave custody matters exclusively in the hands of judicial organs as the authors preferred does not result in that "wonderful calculus of estates"[2] of the common law. As Dembitz has observed: "The psychological calculus in child custody determinations compels the question of whether judges are the ablest individuals to fathom these equations."[3] And we respectfully agree with the editors of the New Law Journal that "the qualifications and insights required in custody cases are not the qualifications and insights that are specific to judges and lawyers, because the business of judges and lawyers is specifically with justice, whereas questions of child welfare involve interpreting correctly the emotional and general environmental needs of a particular child and deciding on the means whereby those needs may best be met."[4]

Furthermore, the authors' "least detrimental alternative" formula is far from satisfactory. It merely substitutes one slippery formula for another. It is no more than the

---

1 P. Strauss and J. Strauss, Book Review (1974) 74 Col.L.Rev. 996 at 997.

2 One sometimes comes across judges employing property language to describe the legal situation in custody cases. For example, in Re E(D)(An Infant)(1967) Ch. 287 at 300 Cross J. observed: "As I have said, the question of who is to bring up the ward after her father's death ought to have been brought before the court in /the U.S.A./ If that court decides, as well it may, that it is best for the ward to live with the Zs, then they will have established a good title to her custody to which at present they have no totle at all."

3 N. Dembitz, Book Review (1974) 83 Yale L.J. 1304 at 1311.

4 New Law Journal 13 May 1971 p. 399.

"best interests" or "welfare" formula differently worded and in due time the new formula will come to display the worst features of the old.[1] The suggested formula requires psychiatric judgment about "psychological parents", "child's sense of time" and other psychoanalytic terms, which judgment is beyond the capacity of most judges; and finally, the new test "slights the moral claims of biological parents."[2]

Nevertheless, the unknown realm involved in the concept of the "child's welfare" means that there is no limit to the disciplines which have a legitimate claim to harp on the theme of "welfare" in its many shades. And the fact that "laws are made by adults for the protection of adult rights"[3] makes it easier to welcome any proposals designed to improving and refining "a legal doctrine in transition"[4] - such as is the "welfare" or "best interests" doctrine. For "without continual insistence on the rights of children, the adult community and adult-staffed legislatures and courts may not be able to bring themselves to recognition of the rights of another class."[5]

---

1 As Judge Frank once said,"Give a bad dogma a good name and its bite may become as bad as its bark." Kulukundis Shipping Co. v. Amtorg Trading Co. (1942) 126 F 2d 978 at 984, cited in Ehrenzweig, Conflict of Laws p. 156.

2 W.E. Read, Book Review (1973-74) 13 Journal of Family Law 601, 607.

3 Beyond the Best Interests of the Child p. 106.

4 Ibid. at 55.

5 N. Dembitz, Book Review (1974) 83 Yale L.J. 1304 at 1313.

4 Conclusion

The child's welfare, like human behaviour, cannot be computerised. Custody involves the lives of human beings and these cannot be regulated by formula. And so, even given the best information and analysis - psychiatric, psychological, juristic, social scientific etc. - there is bound to be some element of error in the judicial determination of the crucial factors in this most flexible and amorphous of all socio-legal concepts. Judges who, in the existing state of the law, are entrusted with the administration of custody and guardianship law in Nigeria and the United Kingdom recognise these limitations and they see nothing amiss in either the "welfare" concept or in its exposition. Mr. Justice Megarry best expressed the judicial attitude when he said: [1]

> "I do not think that one can express this matter in any arithmetical or quantitative way, saying that the welfare of the infant must, in relation to the other matters, be given twice the weight, or five times the weight, or any other figure. A 'points system' is, in my judgment, neither possible nor desirable. What the court has to deal with is the lives of human beings, and these cannot be regulated by formula. In my judgement I must take account of all relevant matters; but in considering their effect and weight I must regard the welfare of the infant as being first and paramount. If it is objected that this formulation does little to define or explain the process, I would reply that it is precisely a process such as this which calls for the quality of judgment which inheres in the Bench; and this is a quality which in its nature is not susceptible of detailed analysis. There is a limit to the extent to which the court can fairly be expected to expound the process which leads to a conclusion, not least in the weighing of imponderables. In matters of discretion

---

[1] Re F(an Infant) [1969] 2 All E.R. 766 at 768.

> it may at times be impossible to do much more than ensure that the judicial mind is brought to bear, with a proper emphasis, on all that is relevant, to the exclusion of all that is irrelevant."

It is in the matter of existence of "rules" that customary law offers a distinctive contrast to Anglo-Scots law. Although Nigerian customary law still gives the father preference over the mother in matters of custody and upbringing, the severity of that position is tempered by the dominant place accorded the "tender years" doctrine. Anglo-Scots law, on the other hand, having felt so much revulsion about the father's absolute common law rights has over-reacted by tending to deny the existence of any "rules" whatever. And in so doing has come perilously close to jettisoning a common sense approach. This is regrettable. If public confidence and respect for the law is to be fostered, it will be important that the law reach results appealing to common sense and humanity, as well as being reasonably certain.

Finally, it may be expected that the international community may soon be called upon to do something about kidnapping and other custody problems. Although the sanctity of treaties should not be mechanically adhered to, nations should not flout pacta sunt servanda by reducing treaty provisions to waste-paper value through questionable resort to "welfare" as understood in the purely domestic legal domain.

CHAPTER FOUR

ADMINISTRATIVE AND OTHER SPECIAL PROBLEMS OF CHILD CUSTODY

In this brief concluding chapter of this General Part of our work we shall be focusing on some administrative problems which may be encountered in custody law. We shall also be discussing the question of whether extra-litigious proceedings should take the place of the present adversary proceedings and what emphasis should be given to expert reports and opinions. Finally, some specific issues which are inextricably bound up with any general discussion of child custody law will be examined. Most of these issues have important bearings on both domestic and private international law problems of custody.

A. General Administrative problems

There may be no apparent unity of theme between the conceivable problems of administration that could arise in custody cases. Administrative problems more readily arise where the a tual or potential disobedient action of one party to custody dispute leads to the taking of necessary precautionary measures.

The main administrative problems raised in enforcing an order for custody may be conveniently discussed in three contexts:-

(1) where the child's whereabouts are unknown, the problems of tracing the child;

(2) whether or not the child's whereabouts are known, the problems of preventing his removal outside the particular law district or jurisdiction; and

(3) where the child is in the de facto custody of a person in

a known place, the problem of seeing that the child is delivered to the legal custodian. We shall discuss these in turn, bearing in mind that practice in one jurisdiction covered by our study may be more developed than what obtains in the other law districts.

1. Tracing the child. In any jurisdiction the facilities for concealment of a child who is the subject of custody controversy are manifold. The party in de facto possession of the child at the time litigation arises may deliberately be concealing the child (by himself or through a third party) from the court and from the other party.[1]

In practice in Scotland - and the position in England and Nigeria may not be different - the task of tracing the child falls primarily on the solicitor instructed by the (foreign) claimant to the custody dispute. If the address of the illegal custodian is not known, the court may, upon application, order that notice of the petition be served on him at his last known address. If the address of the illegal custodian is known, the court may, on application, order that party to appear before the court to inform the court where the child is.[2] Failure to appear will be contempt of court. In

---

1. See, e.g. Robb v. Robb, 1953 S.L.T. 44 where the court found that the respondent (father) was deliberately concealing the child's whereabouts in England from the petitioner (mother). The mother's letters were not answered, the child's address was not disclosed, and every information was withheld from the mother.
2. See Edgar v. Fisher's Trustees (1893) 21 R. 59; Ross v. Ross (1885) 12 R. 1351.

Scottish practice this may entail simple admonition, or sequestration of the whole or part of the contemner's estate, or imposition of fine or imprisonment. Sometimes the Court may grant a warrant to search for and deliver up the child to the lawful custodian. And in such a case under Scots law the duty of implementing the warrant devolves upon messengers-at-arms. But apart from messengers-at-arms, recourse may be had to three principal means in the matter of tracing of the child. These will now receive our brief comments.

(a) Assistance by police in tracing a child. In one case involving tracing the Court of Session "granted warrant to officers of the law to take the child into their custody wherever it could be found".[1] Although it may be tempting to include the police in the phrase "officers of the law", we would stress that the phrase more properly refers only to messengers-at-arms. In the context of tracing a child or enforcement of custody orders, therefore, the police are not likely to be directly involved in searching for the child, or giving their assistance in the matter of enforcing decrees of the Court of Session. In England the position seems to be that the Tipstaff has the duty of tracing wards of court and invokes the aid of the police in certain circumstances. It is not known how Nigerian courts would approach the problem of tracing, as it does not seem yet to have arisen.

---

1. Low, Petitioner 1920, S.C. 351.

(b) Assistance by Government Departments in tracing a child. In England there is a procedure whereby government departments may disclose addresses so as to assist in tracing a missing ward of court. Under a Practice Direction issued by the High Court on 28 November, 1972, requests may be made for the address of the ward or of the person with whom he is alleged to be, through the Registrar of the High Court, to the Passport Office, the Ministry of Health and Social Security, or to the Ministry of Defence. It would seem to be unobjectionable if these type of facilities are resorted to in Scotland and Nigeria to trace the addresses of missing children involved in custody proceedings.

(c) Press publicity as a means of tracing a child. In England, publicity about wardship and custody proceedings in the press and other media is regarded as the most effective means of tracing a missing child, but leave to publish particulars of the case must be obtained from the judge. In Scotland, there are certain restrictions on the publication of evidence in divorce and other consistorial proceedings,[1] and, in the reporting of custody cases the Court may order that there should be no publication of the child's identity.[2] But apart from these there are no restrictions on the reports of custody cases.[3] As with so many of the administrative problems reviewed

---

1. See Judicial Proceedings (Regulation of Reports) Act, 1926.
2. See Clive and Watt, Scots Law for Journalists, paras 418-20, 428
3. See Babington v. Babington 1955 S.C. 115.

so far, it is not known what attitude the Nigerian courts would adopt to press publicity as a means of tracing a missing child. Certain problems associated with publicity are not likely to be easily resolved; for example, should there be restrictions at all on publicity in custody cases? And are there situations where publicity in the mass media would make it more difficult to trace the child in that the illegal custodian might then decide to disappear with the child?[1]

2. Removal of child from jurisdiction

The problem here is that of forestalling the removal of a child out of the jurisdiction to frustrate the expectations of one of the parties and in contravention of a court order. The Morton Report[2] in 1956 adverted to this briefly when it said:

> "In England, there is already machinery in existence designed as far as possible to prevent children being taken abroad in contravention of an order of the court."

The "machinery" referred to seems to be what is termed the "stop list" procedure introduced in England in 1952. This procedure is that where a child is the subject of wardship proceedings or of an injunction prohibiting the child's removal from England, a request may be made to the Home Office that action be taken to prevent the child's removal. The Home Office then circulates particulars of the case to the immigration

---

1. Cf. Low, Petitioner 1920, S.C. 351.
2. (1956) Cmnd 9678, para 424.

services at the air and sea ports. Thereafter, when an immigration officer identifies a ward on the point of departure, he will draw the matter to the attention of a police officer. The police would first try to persuade the ward or escort that the child should not leave the country. If persuasion fails, the co-operation of the carrying (air or shipping) company is then sought and it would be pointed out to the captain of the ship or aircraft that if the child is removed by them the company might be held in contempt of court. In the last resort, the police use such force as is necessary to prevent embarkation. Solicitors are asked to let the Home Office know when precautions are no longer needed, and all cases are reviewed by the Home Office after six months.

But the "stop list" procedure poses many problems. First, the legal basis upon which the immigration service and police act seems obscure. Could these officers act for instance, without the actual production to the child's escort and the carrying company of a certified copy of the interdict or injunction? Second, there are no controls at points of entry, say, from England to Scotland or into other law districts in the British isles, so that this creates a big loophole. Third, identification of children is not easy, especially having regard to the increase in the number of passengers at the ports. Fourth, there is a conflict between the primary need for speedy clearance of passengers (as this affects the reputation and economic interests of a country) and the duty of identifying

the children in question and their escorts. Efficient operation of the "stop list" procedure may therefore lead to the over-stretching of the resources of the state.

3. Securing delivery of the child.

The third and final major problem of administration to be considered concerns the situation where the child's whereabouts are known but where the respondent or other de facto custodian refuses to deliver the child before or after the award of custody. Clearly if the failure to surrender the child comes after the custody award, it would be contempt of court. In Scotland the custody decree will normally grant warrant to messengers-at-arms and other officers of the law to search for and take delivery of the child and to hand him over to the lawful custodian, and the decree would recommend further that the courts, magistrates and officers of the law in the foreign jurisdiction where the child is should give their aid in the execution of the court's decree.[1] The messenger may also in practice get the help of the local authority social work department to persuade the de facto custodian to give up the child.

In all the different problem-situations it is important to keep the child's welfare constantly in view. Before the offending parent or custodian is rushed off to his prison punishment, it would be important to bear in mind the child's

---

1. See, e.g. Campbell,v. Campbell, 1920 S.C. 31.

welfare. While wrongdoing should not be rewarded, the child's welfare should not be sacrificed in upholding the rule of (adult) law. The relevant guardianship legislation and cases do not, at present, provide for how these delicate administrative problems are to be tackled in the context of custody conflict of laws.

Finally, we may also mention that in order to secure compliance with an order requiring the appearance of a child who is being held in another state or in a foreign country the court (or the State) should be able to set aside some amount out of which would be defrayed the cost of transportation of the child and the escort. Realisation by the illegal custodian that he would receive financial aid for his interstate or international travel may induce him to appear with the child before the court.

There should also be machinery for interstate or international co-operation and assistance whereby the courts in one State can request the courts in another State to conduct ancillary hearings or to undertake social studies in respect of the custody of a child involved in proceedings pending in the court of that other State.[1] Information thus received would be forwarded to the requesting State. The costs of such requested services may be assessed against the parties or (preferably) be borne by the State.

---

1. Cf. Uniform Child Custody Jurisdiction Act, 1968, Sections 19 and 20. (United States)

B. **Adversary or Extra-litigious Proceedings?**

It seems that ideally custody matters arising either in conflict of laws or in purely internal law setting should be entrusted to a special body or panel comprising of experts who are able to make a full-scale investigation and produce a report for the judge. This report would form the basis of the judge's final disposition of the case. As Foster and Freed write: "An award of custody is too vital a matter to be committed to the vagaries of adversary procedure in its more bellicose form."[1] It is this same philosophy that motivated the late Professor Ehrenzweig[2] to suggest that the concept of jurisdiction which has been developed in the context of adversary proceedings has hampered, particularly in the conflict of laws, the recognition that what is needed is a separate category of extra-litigious proceedings in which the state, through its judicial and administrative organs, acts truly as parens patriae. Professor Ehrenzweig argues that[3] the "substitution of extralitigious proceedings for the adversary process, which tends to 'fan the flames' of discord instead of soothing them, opens the way for the solution of the interstate problem so predominant in child custody cases." For a successful operation of any proposed extralitigious proceedings, courts would need to place more reliance on the opinions and

---

1. H. Foster and D. Freed, "Child Custody" (Part II)(1964) 39 N.Y.U.L. Rev. 615 at 627.
2. A. Ehrenzweig, "The Interstate Child and Uniform Legislation: A Plea for Extralitigious Proceedings" (1965) 64 Mich. L. Rev. 1 at 9.
3. Ibid at 5.

reports of experts trained in social work, psychology, psychiatry and other behavioural sciences than is currently the case - at least in United Kingdom judicial practice which still reveals mistrust of social scientific and psychiatric findings in matters of custody. Reliance upon such expert opinion would divert principal focus in custody cases to problem-solving rather than contest-supervision. The American approach is tending towards freer utilisation of such reports and opinions. The Uniform Child Custody Jurisdiction Act has expressly sanctioned the undertaking of "social studies made with respect to the custody of a child involved in proceedings."[1]

There will undoubtedly remain controversy as to the value of such expert opinions. Some may say that the judge, while receiving such materials, has ultimate responsibility for the decision, and he may decide against expert findings. Yet others may maintain that the investigations and reports of persons with specialised training throw more light on the actual conditions of the child and its family than whatever the best-intentioned judge may be able to do.[2] In our view, a wise course has been advocated by Foster and Freed who wrote that "The court should think in terms of planning for the child's future and should seek guidance from the parties, counsel, its own experts, and experts provided by the parties. The reports and testimony of such experts would not be used to usurp judicial responsibility, but rather to aid decision."[3]

---

1. See e.g. sections 19, 20.
2. Foster and Freed, supra at 615.
3. Ibid at 627.

C. Guardianship and other ancillary relief

Our concern here is to discuss briefly the relationship to custody-guardianship of such ancillary matrimonial relief as maintenance (or aliment) and financial provisions. As a matter of practical consideration, custody determinations may not always be severable from these other ancillary reliefs because both are frequently juxtaposed. At times, statutes provide that an award of maintenance has to be ancillary to an order for custody. For example, the Nigerian Matrimonial Causes Decree, 1970, provides[1] that the High Courts, in exercising their powers, e.g. in respect of custody, guardianship, welfare, advancement or education of children of a monogamous marriage, shall have the power to "order that payment of maintenance in respect of a child be made to such persons or public officer or other authority as the court specifies". This is a logical result of the provision that custody of a child may be awarded to any person other than a party to the marriage.[2] Similarly, the provision in section 57(1) that a decree nisi shall not become absolute unless the court by order has declared that it is satisfied that proper arrangements in all the circumstances have been made for the welfare and advancement and education of those children may have relevance in this connection.

---

1. No. 18 of 1970, section 73(1)(g).
2. Ibid, section 71(3).

In England also, custody and maintenance proceedings may arise together as where, under the Family Law Reform Act 1969[1], the High Court orders either parent of the child to pay the child's maintenance to the other parent or to any other person who is given care and control by the Court. The English Guardianship of Minors Acts 1971 and 1973 enables the High Court, where it awards custody of a legitimate child to one parent or to a third party, to order that the parent excluded from custody pay maintenance for the child.[2] Similar provisions exist in the English Matrimonial Causes Act 1973,[3] enabling the court to make custody and maintenance orders principally in favour of the wife and child whose maintenance has been wilfully neglected by the husband. And in Scots law the Court of Session has power at common law to award aliment in custody petitions.[4] There are also statutory provisions in the Guardianship Acts[5] similar to the English provisions noted above. The Children Bill currently before Parliament contains, for Scotland, an important provision that "where custody of a child has been awarded to a person other than a parent of the child any local authority may make to that person payments for or towards the maintenance of the child."[6]

---

1. Section 1.
2. Guardianship of Minors Act, 1971, Section 9(2) as amended.
3. Section 27.
4. See Clive and Wilson, The Law of Husband and Wife in Scotland pp.221-222.
5. See, e.g. Guardianship of Infants Act, 1925, section 3(2).
6. Children Bill, Clause 4.

The important thing to note is that although custody and these other ancillary reliefs may often attract different jurisdictional criteria, there may be advantages at times in disposing of both types of actions together in the same proceedings. (And query whether the same jurisdictional grounds[1] as are invoked in custody cases unadulterated by maintenance and aliment proceedings could not be invoked in custody cases mixed with other ancillary reliefs).

D. Custody orders concerning minors over sixteen years

The question of wardship and custody orders concerning minors over sixteen years of age has peculiar relevance to English and Scots law. We refer to it because it is a fruitful source of conflicting jurisdictions between the two law districts - a theme taken up more fully in a subsequent chapter of this work. The conflict springs from differences between the internal substantive laws of Scotland and England on the question of parental authority. The problem is not encountered in Nigeria, first because wardship proceedings are virtually unknown, and secondly because the age of majority in Nigeria is still 21 so that theoretically custody orders can be made for children under twenty one years. In actual practice, however, since Nigerian law[2] recognises the concepts of "children" (that is, those up to the age of 14) and "young persons" (that is those between 14 and 17 years), it is most unlikely that custody

---

1. This is the subject of Chapter 5.
2. See, e.g. Children and Young Persons Act, cap 32, Laws of the Federation and Lagos, 1958 ed.

orders will be made in respect of infants who could be regarded as above the age of a "young person". Interstate conflicts problems concerning children below majority would be rare in Nigeria.

Turning to the problem of wardship, the English law is that wardship proceedings can be brought concerning a child under majority, whilst in Scotland (which has no wardship proceedings) custody decrees are not, in practice, made in respect of minors of sixteen years of age. Under English law, parental consent is required to the marriage of a child of sixteen or seventeen (or judicial consent must be given where the child is a ward of court). In Scots law, on the other hand, a minor has legal capacity to contract marriage at 16 years and no parental consent is required. But conflicts of law problems have been raised for the Scottish courts which have had to classify the lack of parental consent to marriage as to whether it relates to matters of capacity or formality, and which legal system ought properly to do the classification.[1] Scots law has generally done the classification without reference to classification under foreign law and this approach has been generally criticised.[2]

---

1. See e.g. Bliersbach v. MacEwen 1959 S.C. 43; Hoy v. Hoy 1968 S.C. 179.
2. See e.g. Anton, Private International Law p. 282; Clive and Wilson, Law of Husband and Wife in Scotland pp. 150-151; D.M. Walker, in "Case and Comment" (1959) Jur. Rev. 81.

These differences in internal substantive laws of Scotland and England have meant that young couples who wish to evade the impediment of parental consent in their home countries can come to Scotland to solemnise their marriage. A number of conflicts of law cases have arisen in this regard, and these have involved the parents of English or foreign children who desired to prevent a proposed marriage.[1] The case of Hoy v. Hoy (supra) illustrates nicely the nature of the conflicts of law problem in this connection. In that case, a girl of 16, domiciled and resident in England was made a ward of court in England by the mother who obtained an order restraining her from marrying a domiciled Scotsman with whom she was living. At the time when the order was made the girl was temporarily in Scotland, living with the intended husband. The mother applied to the Court of Session for an interdict (injunction) restraining the couple from marrying in Scotland. The Court of Session refused to grant the interdict. The Outer House reasoned that comity does not arise where "a domiciled Scotsman, living in Scotland", seeks to marry "in Scotland a girl who has capacity to marry by the law of Scotland."[2] In the words of the Lord Ordinary "the writ of the Chancery Court does not run in Scotland".[3] The decision was upheld by the First Division in spite of the fact that Scottish courts have traditionally held that

---

1. The procedure for instituting such actions is described fully in Clive and Wilson, op. cit. cap. 6, esp 150-152.
2. Hoy v. Hoy 1968 S.C. 179 at 183 per Lord Robertson.
3. Ibid at 182.

the courts of the domicile are pre-eminent in matters of custody and guardianship. The reason for the holding was elaborated by Lord President Clyde who said:[1] "This order was pronounced by the Court of Chancery in London while both parties ... were outwith the jurisdiction of the English Courts, being in Scotland. The English order is clearly one which the Court of Chancery had no jurisdiction to pronounce against either respondent." The full implications of this decision is not germane to our present discussion.

It may well be that a solution to this type of problem involving custody orders in respect of children above sixteen years would lie in the type of suggestion made by the majority of the Hodson Committee[2] that when an application is made to have a child who is domiciled in Scotland made a ward of court in England, the child should be entitled to plead in bar of the Chancery proceedings, that he is domiciled in Scotland, even though temporarily resident in England. It is to be hoped that the Law Commission in their current undertaking on the overhauling of this aspect of the law relating to children will come up with recommendations that clarify this area of Anglo-Scottish conflicts law of custody.

---

1. Ibid. at 184.

2. Report of the Committee on Conflicts of Jurisdiction Affecting Children (Cmnd. 842) 1959, para 55.

E. Criminal sanctions under the United Kingdom Guardianship Legislation

It is our intention in this section briefly to draw attention to the more important criminal law provisions in the various United Kingdom enactments on Guardianship of Minors. We have felt the need to do this because the occasional reader, in his anxiety to acquaint himself with the more important changes made in the various Acts in the civil law field may overlook the criminal law aspects of the enactments - few as these may be. The discussion may also be of interest to those whose main interests are in criminal law rather than in family law.

We shall first comment on the English Guardianship of Minors Act, 1971.[1] Under section 13(2) of the Act, any person who is under an obligation to make payments in pursuance of any court order for the payment of money under the provisions of the Act - e.g. for the child's maintenance - shall give notice of any change of his address to any person (if any) as may be specified in the court order. Failure to do so without reasonable excuse exposes the person on summary conviction to a fine not exceeding £10.[2] The penalty under the equivalent provision in the Western Nigeria Infants Law of 1959 is £25.[3] Such provisions are to guarantee that the child who is separated from the parent or person liable for its maintenance retains

---

1. Cap. 3, 1971.
2. The penalty on summary conviction for a similar offence under the earlier U.K. Guardianship of Infants Act, 1925, S. 8(1), is £2.
3. Cap. 49, Section 23(2).

a reasonable chance of being maintained. For once the parents have been separated or divorced, the child's chances of receiving maintenance from the person who bears that obligation are diminished if that person can change his or her address at will. Next must be mentioned the Guardinaship Act, 1973. The Act provides[1] that each parent or guardian of a child who is for the time being in the care of a local authority by virtue of a court order shall give notice to the local authority of any change of address of that parent or guardian. Any person who without reasonable excuse fails to comply with this provision shall be liable on summary conviction to a fine not exceeding £10.

It will be seen that while the provision in the 1971 Act is tied to the guardian's obligation to make some payments which he may be evading by non-notification of changes in his address, the provisions in the 1973 Act are not tied to any specific prior obligation. It seems curious that the same (token) penalty should attach in both types of situations.

However, mention must be made of the provisions in the Children Bill (1975) now before Parliament. These provisions arise in the context of unauthorised removal (or kidnapping) of a child from the custody of one party in the United Kingdom. The relevant provisions are contained in Clauses 37 (for England) and 45 (for Scotland). For example, by

---

1. Cap. 29, Sections 4(6) (England) and 12(3) (Scotland).

by clause 4_5(1) where any person has applied for custody of a child, it shall be an offence, except with the authority of a court or of some other lawful authority, to remove the child from the custody of the applicant against the will of the applicant if

(a) the child has been in the care and possession of that person for a period or periods before the making of the application which amount to at least three years; and

(b) the application is pending in any court.

Any person who contravenes this provision "commits an offence and shall be liable on summary conviction to imprisonment for a term not exceeding three months or a fine not exceeding £100 or both."[1]

This more drastic measure is designed to combat or discourage the reprehensible practice of child kidnapping. It may be hoped that this penalty which attaches to the offender should he be apprehended would discourage the potential kidnapper. Such unlawful removal of a child when an application is pending in any court would constitute contempt of court and is accordingly visited by a severe penalty.

In conclusion mention may also be made of the Practice Directions issued by the High Court in England to prevent illegal removal of children abroad. The courts (and now

---

1. Clauses 37(2) and 4_5(2).

the legislature) have forseen the dangers or the damage caused by kidnapping and have endeavoured to forestall this by preventive measures. Violation of these Practice Direction measures would inevitably attract penal sanctions.

F. Split custody orders

The practice is on the increase that where the court fails to award outright custody to one party it may make a split custody order.[1] The practice is one that one may expect to encounter in guardianship cases involving children born of interracial (or international) marriages. "Split" custody orders embrace at least two different ideas. It has been defined as "an order in which the responsibility for children is divided between spouses, either by a joint order for custody with care and control to one spouse, or, what must be the more normal form of split order, an order for custody to one spouse solely, with care and control to the other."[2] This distinction between "legal custody" and "care and control" was originally thought[3] not to have any statutory foundation, although the terms "legal custody" and "actual custody" were used in the Guardianship of Infants Act,[4] 1925. However, the Children Bill (1975) has specifically introduced and defined these concepts. The Bill defines[5]

---

1. See e.g. Re W (An Infant) (1964) Ch. 203 C.A.
2. Jussa v. Jussa (1972) 2 All E.R. 600 at 603, per Wrangham J.
3. See P.J. Pace, "Guardianship of Minors" (1971) April 15, New L.J. 315 at 316. B. Harris, "Split Custody Orders and Maintenance" (1972) April 6, New L.J. 300.
4. Cap. 45, 1925, section 7(5).
5. Clause 74(2) (Scotland).

"actual custody" as meaning care and possession, while "legal custody" is assigned the meaning of "custody".

The main issue is whether there should be resort to the device of splitting of custody awards. Is such a device advantageous to the child's interests and welfare? The contending positions in the metter of split custody orders are, on the one hand, the risk of subjecting the child to double or multiple jeopardy, and on the other hand, the need to ensure the child's welfare in every case.

There seems to be a sharp contrast between the English practice in this matter and what obtains in other parts of the Commonwealth such as Australia where split orders are frowned upon because of the "need to eliminate as far as possible the inevitable friction between parents where they have divergent views on the child's upbringing."[1] The practice of split custody awards is continuing (vigorously) in England. The main argument for opting for split orders is that a fuller realisation of the child's welfare might be achieved only through splitting which, it is argued, ensures the sustenance of a beneficial link between the child and its parents. Where custody arises as part of a matrimonial action it was at one time thought that if a guilty wife deserts her husband and takes the children with her only a split order would ensure that the innocent father

---

1. See Travnicek v. Travnicek (1966) A.L.R. 964 at 967 per Barber, J. cited in P.J. Pace supra at 315 n.3.

(husband) is afforded a chance of contributing to the upbringing of the children. In such a case, "the innocent party is given the custody of the child or children, but the care and control is left to the mother. That order is entirely realistic."[1] But that was in the days when the unimpeachable parent (in the matrimonial sense) enjoyed considerable advantages in custody matters over the "guilty" spouse. Today, however, the guilt of the spouse in itself does not warrant a split order. What courts look for, instead, is primarily the likelihood that the two parties would co-operate in doing their best for the welfare of the child involved in a split order situation. For instance in Jussa v. Jussa[2] an Indian moslem man sought a split order from the court in respect of the three children of his marriage to an English woman. Both were admirable parents and well qualified to look after the children. The court held that a joint order was appropriate. Wrangham, J. offered the following guidance as to when joint orders were suitable:

> "In my view, when one has two wholly unimpeachable parents of this character who could, I think, be reasonably contemplated as capable of co-operating with each other in the interests of the children whom they both love, there can be no serious objection to an order for joint custody, and many advantages for the children from that order; and of course, one comes back always to the point that it is the welfare of the children that is the paramount consideration."[3]

---

1. Wakeham v. Wakeham (1954) 1 All E.R. 434 at 436 per Denning, L.J.
2. (1972) 2 All E.R. 600.
3. Ibid at 605.

In other words, once it is clearly or reasonably foreseeable that inter-parental conflict would not arise to threaten the child's welfare, the split custody order would be a viable option to follow.

On the other hand, there are potent arguments against splitting of custody awards in both the internal and international situations. These arguments may be stated as follows:

(a) the split custody order may provide the opposing parties with an opportunity to vie for the child's loyalty, or to use him as an instrument of revenge upon the other spouse. "Such an arrangement can prove extremely disturbing to the young child, and a failure of the experiment is not easily remedied, for the harm is less perceptible than that caused by a failure to provide adequate food, clothing or shelter."[1] So where the split order takes the form of dividing "actual custody" between the spouses for, let us say, equal periods of time during the year, the child may be subjected to double jeopardy in the sense of the child being caught in different and conflicting loyalties and influences. A "multitude of counsels only brings complexity and difficulty"[2] into the life of the youngster. A child in a divided home may not have the same security of mind and adequacy of attention as he would have in a family that is one unit. All these are not in the child's interests.

---

1. See note, "The California Custdoy Decree" 13 Stan. L. Rev. 108, at 112.
2. Jussa v. Jussa (1972) 2 All E.R. 600 at 604-605 per Wrangham, J.

(b) a split custody arrangement may afford greater temptation or opportunity for removing or kidnapping the child out of the jurisdiction.

(c) In practical terms, if a child on holiday with its mother who only has "care and control" of the child happens to be involved in an accident, the hospital may well require parental consent from a distant father who has been awarded legal custody before undertaking an emergency operation. In S. v. S.[1] the Court of Appeal pointed out that it was most inconvenient to have a split order of a girl of one year if, for example, the child needed medical treatment especially as the father in that case was in the Navy and might be overseas.

It should be added, however, that this kind of problem posed by split orders (i.e. requirement of parental consent) is not likely to arise today because the Guardianship Act 1973, in sections 1 and 10 has now stated that in relation to the custody or upbringing of a minor a mother shall have the same rights and authority as the law allows to a father, and the rights and authority of mother and father shall be equal and be exercisable by either without the other. Still these provisions may not completely remove the need to make split or joint custody orders. In Nigeria where there is no statutory equivalent to the above provisions giving equal rights to mother and father in matters of legal custody, the problem of consent associated with split orders would still have to be faced.

---

1. S. v. S. The Times, March 14, 1968; (1968) 132 J.P.N. 197

Would it not be better to leave the child during his impressionable age in the care and control (and legal custody) of one parent who is not found to be unfit to act as sole custodian, while retaining for the other spouse his visitation or access rights?

The arguments for and against split custody orders appear, we would admit, to be evenly balanced. All courts are not likely to agree with reference to the desirability of the split order procedure. The child, on the one hand, is afforded the opportunity to have the experience of two separete homes. The child's frequent association with each parent who is fit to have custody may prove to be beneficial through his associating with both.[1] But on the other hand these supposed benefits may not acrue to the child. Nevertheless, it does seem that split custody orders may have a place in custody disputes involving the international or the inter-racial child. In Jussa v. Jussa Wrangham J. emphasised the point:

> "this was a mixed marriage between a man of Oriental origin and a woman of European origin. The children, therefore, have a mixed inheritance. For my part I would say this that it is much in their interests to get the full value of that mixed inheritance. The husband can contribute to them something which no European can do; the wife can contribute something that no Oriental could do. I feel myself it would be a great advantage to them that they should retain the closest possible contact with their father while remaining of course, in the care and control of their mother."[2]

---

1. See C.A. Weinman, "The Trial Judge Awards Custody" (1943-44) 10 Law and Contemp Prob. 721 at 726.
2. Jussa v. Jussa (1972) 2 All E.R. 600 at 604.

Finally, it would seem that "legal custody" in the context of our discussion here approximates in English law to guardianship in the strict sense. If so, split orders would be an appropriate remedy, certainly in Nigerian conflicts cases, for it preserves the right of a parent not having custody to have a say in the child's upbringing. And such "legal custody" or guardianship can be exercised from a distance although "actual custody" is exercised in a different jurisdiction by the person with whom the child actually lives.

The Lawyer's role and responsibility in custody cases.

Any viable solution to the child custody problem in conflicts and non-conflicts law must remain a joint venture encompassing the vision and wisdom of lawyers, judges, philosophers, sociologists, psychiatrists and child psychologists and educationists. Our concern here is with the role of the lawyer.

We have seen that concurrent custody proceedings in different jurisdictions, frequent child kidnapping across state lines etc., may often not redound to the best interests and welfare of the child. The occurrence of any of these entails unnecessary consumption of judicial effort, as well as the resources of litigants and the legal aid fund, and are disturbing to the child's stability and continuity of environment. In addition they damage the reputation of the

law and the judicial process[1] (of which the lawyer is a part) and are bad for the parties and the children involved. Society is already paying a high price in terms of human misery; it should not pay more in terms of unnecessary public and private financial resources which are expended. Lawyers are usually involved in the planning, counselling and other stages of guardianship litigation, and they can help in soothing the ills associated with custody disputes.

The Rules of Professional Conduct in the Nigerian Legal Profession that urges lawyers to "strive at all times not only to uphold the honour and to maintain the dignity of the profession but also to improve the law and the administration of justice"[2] find particular meaning in custody law. The lawyers who represent either parent in a custody case - either arising as an independent action or as part of divorce proceedings - are officers of the court. Hence lawyers share with the court a responsibility towards children which is no less than the lawyer's obligations to his client. Therefore, the lawyer representing either party in a custody dispute would be discharging his duty properly only if he serves the child's best interests.[3] For the child's benefit is the

---

1. In a recent case where a Spanish father kidnapped his daughter from her English mother, the latter by elaborate counter-strategem succeeded in kidnapping the child back to England from the father's home in Majorca. The girl's maternal grandfather said they would henceforth take their own security measures and would not rely on the courts. He said: "The authorities have been sympathetic, but they did not prevent Helen (the girl) from being taken to Spain" See The Guardian 14 March 1975, p.8.
2. Rules of Professional Conduct in the Legal Profession (Issued by the General Courcil of the Nigerian Bar), Rule 21.
3. See C. Rothenberg, "Custody of Children in Matrimonial Actions: The Lawyer's Function and Responsibility" (1952) Vol 7 Miami L.Q. 73.

parents' and society's gain, and the child's detriment is the parents' and society's loss. Here one must distinguish for purposes of independent emphasis the situation where the lawyer acts for one of the parties and the situation where he acts specifically as the child's counsel either as guardian ad litem, as official solicitor or otherwise. Each of these will be discussed separately.

Where the lawyer acts for either parent, he must emphasise the fact that the children involved are disadvantaged parties whose welfare has to be protected. In such a case, it has been said that the lawyer must "counsel his client to understand that no one 'wins' or 'loses' in custody cases. The children are the innocent victims and the parties most seriously affected. Regardless of which parent receives legal custody, we know that generally the non-custodial parent is an important person in the child's life. The right to know him (or her), have the benefit of the non-custodial parent's love, association and guidance, may become more significant in time than the bare right of legal custody at the outset of a separation or divorce decree. It is important to emphasise that the custody relationships are not permanent and fixed; they are fluid and dynamic, subject to eternal vigilance and concern. The custody decree and arrangements may require periodic review and change, and your client must understand these facts".[1] Of course, there can be no set "rules" as to

---

1. H. Fain, "The Role and Responsibility of the Lawyer in Custody Cases" (1967) 1 Fam. L.Q. 36 at 37.

how the lawyer clarifies his role to the client or as to how he counsels and prepares in the custody case. But the type of attitude revealed by the American Lawyer in the kidnapping case of Re E (D) (An Infant)[1] is not one that we would commend. In that case, the lawyer had actively participated in, and encouraged, the kidnapping of the child from New Mexico via New York and Montreal to England. The lawyer took the view that if the child's mother wanted custody she should follow the child to England. The American trial judge in the course of the proceedings in New Mexico, asked the lawyer how he, an officer of the court, could justify what he had done. The judge asked the lawyer if he had done no wrong in helping to bring about a situation where it would be difficult for the girl's mother to pursue her custody claim in an improper forum in England. The lawyer replied that he had done nothing wrong. And the judge said, "Well, the court is not so sure." In the English proceedings, having reviewed these exchanges[2] between the American lawyer and the judge, Mr. Justice Cross said:

> "I must say that in his (i.e. the American Judge's) place my language would have been far less temperate than that".[3]

---

1. (1967) Ch. 761 C.A.
2. (1967) Ch. 287 at 297.
3. Ibid.

We would expect similar pronouncements to emanate from a Nigerian judge in analogous circumstances. Clearly it is wrong for lawyers to encourage the deliberate flouting and evasion of the orders of courts. Rule 25 of the Rules of Professional Conduct laid down for the Nigerian Legal Profession considers it as unprofessional conduct to forment strife and to instigate litigation. And since the lawyer has his own conscience distinct from his client's, Rule 15 states that the lawyer should use his best efforts to restrain and to prevent his client from doing anything which the lawyer considers as improper. "If a client persists in his action or conduct his lawyer should terminate their relation," the Rule goes on to state. In other words, it would be more honourable and just for the lawyer to withdraw from the case in the absence of co-operation from his client. To go all the way to aid in the client's scheming to kidnap a child is not defensible.

The second type of situation concerns where the child has a counsel of his own representing him. Since the contesting parents themselves (and their lawyers) will often be too subjective in furnishing relevant information, each being primarily interested to discredit the other on such grounds as unfitness, a neutral person may be needed to speak for the child. And since the child himself is usually too young,

the independent lawyer or guardian ad litem would be the best person to speak for the child. It has accordingly been suggested[1] that a better way of dealing with custody hearings is to provide the child with his own independent counsel whose function will be to speak directly for the child concerning his own welfare and best interests. This is seen as a measure inherent in the concept of due process of law and as of the essence of justice to which the child, no less than the competing parents, is entitled. In the words of Inker and Perretta, "When the court seeks independent evidence, it releases itself from the shackles of partisan advocacy and opens the door to the introduction of objective evidence which may be detrimental to either or both parents but beneficial to the child."[2] The authors proceed to spell out the basic policy behind the advocacy of independent legal representation for the child in these words:[3] "The gravity of the dispute in a custody case cannot be resolved by blind faith in the court's ability, after hearing the evidence presented by the parents, to determine the best interests of the child. No one has spoken for the child. No one has raised the issue of whether the parental testimony is in fact objective <u>in relation to the child</u>. Attorneys for the parents, by virtue of their role as advocates, are not qualified to speak for the child. Their concern must be the parent, not the child".

---

1. See M.L. Inker and C.A. Perretta, "A Child's Right to Counsel in Custody Cases" (1970) 55 Massachussettes L.Q. 229.
2. Ibid, at 232.
3. Ibid, at 235. Emphasis in the original.

It is our respectful submission that independent legal representation for the child should be introduced as mandatory in all custody proceedings - whether these arise independently or as part of a matrimonial cause, and whether or not conflict of laws is involved.[1] This may prove to be an additional financial burden. But it is one that should be borne by the state, and it is an expedient that justifies the extra expenses. The child's true welfare would stand a greater chance of being realised through independent legal representation. The child's best interests and welfare have been criticised as inadequate criteria for custody cases. But as it has been rightly said, it is not these standards themselves that produce inadequate results; it is the application of the standards without allowing the child counsel.[2]

In conclusion, therefore, whether counsel is representing the parents or the child himself, it is essential that in all custody cases counsel investigates the custody issues thoroughly, tapping from the vast knowledge of experts in the behavioural and other sciences in the course of his investigations. The lawyer should bring to the court's attention all considerations relevant to the child's welfare and interests.

---

1. Cf. Children Bill (1975) Clause 54.
2. See Inker and Perretta, Supra at 232. It should be added, however, that legal representation per se may not be crucial to a true realisation of the child's interests and welfare, as the experience in the U.S.A. has shown. Much depends on the quality of legal representation.

"The attorney's role will not have been completed upon a determination of custody. Visitation rights are also of major importance because the child's relationship with each parent may be important to his well-being. All investigations should be made with this facet in mind."[1]

---

1. Ibid, at 240.

PART TWO

SPECIAL CONFLICTS PROBLEMS INVOLVING CHILD CUSTODY

CHAPTER FIVE

JURISDICTIONAL RULES AND PROBLEMS

A. Introduction

Jurisdictional questions arise impulsively at the threshold of every problem of private international law and are not readily resolved. In order to attempt a rational appraisal of the bases of jurisdiction in guardianship which is our central concern, we would first present briefly the bases of jurisdiction in private international law in general. This distinction is generally acknowledged to exist between jurisdiction in guardianship and other matters affecting status on the one hand, and jurisdiction in non-status matters on the other hand: it is that in the former case, the appropriate rules of jurisdiction are deemed to be often the same as the choice of law rules, so that once the court has jurisdiction (subject to narrow rules e.g. of forum non conveniens) it would automatically apply the law of the forum. For example, in guardianship or divorce suits, it is generally assumed, at least in common law countries, that once a court has jurisdiction to hear the case, it will apply forum law to determine whether on the facts presented the plaintiff is entitled to the remedy he seeks. This is not the case with general, non-status private international law matters in which jurisdiction and choice of law rules are clearly demarcated. We shall not be concerned in this chapter with the question of the law to be applied in guardianship cases but with the circumstances in

which the courts are empowered by their own law to entertain a guardianship suit.

The problem of jurisdiction in guardianship has not arisen in Nigeria, but it is a problem which the Nigerian courts may soon be called upon to solve. The phenomena which have given rise to problems of jurisdiction in the United Kingdom may be expected to be encountered with increasing frequency in Nigeria. Nigeria's doors are open to foreigners either as businessmen, administrators, industrialists, advisers or mere visitors. These people may enter into matrimonial relations in Nigeria or set up a home in Nigeria with their foreign-born spouses and children. In addition, many Nigerians abroad - especially students - have returned home with their foreign-born wives and children. Furthermore, the Federal Military Government has given priority attention to developing modern and quick means of interstate transportation and this, together with the Nigerian Constitution which encourages the country's inhabitants freely to move from one State into another in search of business, employment, schools and other opportunities, has made Nigerians a mobile people more than we had known in the past. Interstate marriages and interstate children as are known to exist in the United Kingdom or the United States have become a common feature of Nigeria's national life. Accordingly, it is not inconceivable that Nigerian courts will be confronted with the need to pronounce either an initial custody decree in a suit involving interstate or international

marriages and children, or being asked to recognise custody decrees rendered out of state or in a foreign country. Under these circumstances, the Nigerian courts which, as we have seen, are asked to apply the English rules of private international law in certain situations, would find it profitable to give close study to the rules of jurisdiction evolved and evolving in the United Kingdom.

It may be noted further that until 1970 when the Matrimonial Causes Decree was promulgated by the Federal Military Government, the jurisdiction of the Nigerian High Courts in matrimonial causes was exercised in conformity with the law and practice for the time being in force in England. And in all the High Court Laws[1] there is provision to the effect that "Subject to the express provisions of any written law, in every civil cause or matter commenced in the High Court, law and equity shall be exercised by the High Court concurrently and in the same manner as they are administered by Her Majesty's High Court of Justice in England". The application of English law under this provision, it should be noted, is made subject to "written law". When one looks to the existing "written law" one finds that section 8 of the Matrimonial Causes Decree has expressly abolished, as far as Nigeria is concerned, the English rules of jurisdiction

---

1. e.g. High Court Law, Northern States, Section 29.

relating to "matrimonial causes". In the context of guardianship and custody, "matrimonial cause" means the "custody or guardianship of infant children of the marriage".[1] Independent guardianship cases such as those involved in the celebrated Bute Guardianship and Johnstone v. Beattie cases would be excluded. Presumably, therefore, in such cases and others which involve general, non-matrimonial jurisdiction in private international law, the Nigerian courts would continue to exercise their jurisdiction "in the same manner as they are administered by Her Majesty's High Court of Justice in England".[2] For it is doubtful that the Nigerian legislators would have desired that existing lacunae in Nigerian law should not be filled by borrowing from the traditional (English) sources. It remains to be seen, however, whether this historical nexus of Nigerian with English law would mean a mechanical application of the English conflict rules of jurisdiction which has veered from domicile to the almost absurd position of assumption of jurisdiction based on mere transient presence.

---

1. Section 114 (c).
2. See also, Matrimonial Causes Decree, 1970, s.1(2)(a)(i).

B. General Consideration of bases of Jurisdiction in Conflict of Laws

1. Jurisdiction in personam:[1] We shall preface our consideration of the rules of jurisdiction in the specific field of guardianship with a discussion of certain general rules of jurisdiction in personal actions. It should be stated at the outset, first, that an action in personam is one brought against a person to compel him to do or forbear from doing a particular thing. It does not include an action for guardianship or custody of children.[2] Secondly, as Professor Graveson has stated, with regard to the problem of general jurisdiction in groups of law districts having political affiliations as is the case in the United Kingdom and Nigeria, "we enter on mixed questions of constitutional law and conflict of laws".[3] But this question is not of direct interest to us. Thirdly, it should be noted that the English rules of recognition and enforcement of foreign judgments follow closely those of jurisdiction.[4] Hence it is perhaps not surprising that some of the leading pronouncements concerning the bases of jurisdiction in conflict of laws appear in cases dealing with recognition and enforcement. It is an essential requirement

---

1. See generally, H.E. Read, Recognition and Enforcement of Foreign Judgments in the Common Law Units of the British Commonwealth (1938) Chapter 5.
2. See Morris, The Conflict of Laws, p. 58.
3. Graveson, The Conflict of Laws, (6th ed, 1969), p.93.
4. See, e.g. Indyka v. Indyka (1969) 1 A.C. 33.

of recognition and enforcement in English conflict of laws that the foreign court should possess jurisdiction according to English conflict of laws rules. It has become well-established for writers and courts to quote the dicta of Buckley L.J. in Emmanuel v. Symon[1] in which he laid down, for purposes of recognition and enforcement, the compendium of instances which English courts would consider as adequate bases of jurisdiction in an action in personam at common law. We shall start with that pronouncement.[2]

> "In actions in personam there are five cases in which the courts of this country will enforce a foreign judgment: (1) where the defendant is a subject of the foreign country in which the judgment has been obtained; (2) where he was resident in the foreign country when the action began; (3) where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued; (4) where he has voluntarily appeared; and (5) where he has contracted to submit himself to the forum in which the judgment was obtained".

A few observations are called for before proceedings with further comments. First, there are certain well-recognised exceptions to the above rule of in personam jurisdiction; an alien enemy has no right of recourse to the courts;[3] foreign sovereigns and their diplomatic representatives are immune from jurisdiction of local courts[4] in the sense that though they can sue, they may not be sued without their consent; in

---

1. (1908) 1 K.B. 302.
2. Ibid, at 309.
3. See, e.g. Porter v. Frendenberg (1915) 1 K.B. 857 at 869.
4. See, e.g. Rahimtoola v. Nizam of Hyderabad (1958) A.C. 379.

general English courts will not exercise jurisdiction over foreign land even if the party to the action submits to the jurisdiction because, among other reasons, only the lex situs can take an effective action in all matters affecting land within its own territorial boundaries;[1] and of course matters of status generally belong, in Anglo-Scottish law, to the jurisdiction of the courts of the domicile or (habitual) residence. Secondly, we have excluded from our discussion the applicability of these in personam rules of jurisdiction to non-individuals, such as companies and partnerships, and we have also excluded the special extension of jurisdiction under the English Rules of the Supreme Court.

Now, turning to Emmanuel v. Symon itself it should be noted that although the quoted dicta has long been regarded as the epitome of the law concerning jurisdiction in personam, three things are emphasised therein:

(a) Jurisdiction based on physical relations, especially residence and presence;

(b) Jurisdiction based on legal relations, especially domicile and nationality;

(c) Jurisdiction based on submission or consent.

---

1. See, e.g. British South Africa Co. v. Companhia de Mocambique (1893) A.C. 602; Graveson, Conflict of Laws 136-139 (6th ed.).

The brief exposition that follows now, although largely in English legal terminology, is on the whole true for Scots rules as well. We shall take the enumerated bases in turn. Presence: Service of a writ on a foreign defendant in England had been the foundation of assumption of jurisdiction by English courts. Therefore, any person who is present in England - provided he has not been fraudulently induced to come within the jurisdiction for purposes of service - exposes himself to the service of a writ in an action in personam; and long before recent times an 1895 English authority[1] had held that in English law even a fleeting presence within the jurisdiction would suffice for purposes of service. More recently, in Colt Industries Inc. v. Sarlie[2] and in The Maharonee of Baroda v. Wildenstein,[3] the rule was affirmed. In the former case, a writ was served on an American who was staying for a few days in a London hotel, and in the latter case s writ was similarly served on a French art dealer who was only paying a brief visit to England to attend the Ascot races. In both cases jurisdiction was assumed by the English courts. And once competency is found, defendant's sudden departure does not destroy the English court's jurisdiction.[4] Professor Graveson noted, however, that mere presence, although providing a generally effective basis for proceeding against

---

1. Carrick v. Hancock (1895) 12 T.L.R. 59.
2. (1966) 1 W.L.R. 440.
3. (1972) 2 Q.B. 283; (1972) 2 All E.R. 689.
4. See Carrick v. Hancock, note 1 supra; Razelos v. Razelos (No. 2) 1970 1 All E.R. 386.

a party, "is hardly an adequate basis for general jurisdiction".[1] Scots law does not consider temporary presence a sufficient basis for assuming jurisdiction.

Residence: If mere presence would suffice to found jurisdiction there could be no question, in the eyes of English law, that the residence of the defendant within the jurisdiction at the time of commencement of the action against him would be a sufficient basis of jurisdiction in personam regarding him. Indeed, residence is probably the most widely recognised grounds of jurisdiction in personal actions. In the words of Erskine, "Since no judge can pronounce sentence on persons or subjects without his territory, civil jurisdiction cannot be found unless the defender ... resides within the judge's territory ...".[2] In Schibsby v. Westenholz[3] it was remarked obiter that "If the defendants had been at the time when the suit was commenced resident in the country, so as to have the benefit of its laws protecting them, ... we think that its laws would have bound them." To the same effect were the words of Lord Selborne[4] delivering the advice of the Privy Council: "Territorial jurisdiction attaches (with special exceptions) upon all persons either permanently or temporarily resident within the territory while they are

---

1. Graveson, The Conflict of Laws (6th ed. 1969) p. 108.
2. Institutes, i.2,16.
3. (1870) L.R. 6 Q.B. 155, at 161.
4. Sirdar Gurdyal Singh v. Rajah of Faridkote (1894) A.C. 670 at 683.

within it, but it does not follow them after they have withdrawn from it, and while they are living in another independent country."

Nationality: Under the English, Scots and Nigerian rules of private international law, jurisdiction is generally considered as territorial, that is, it is confined to property situated within the territory or persons resident or domiciled in the territory. For this reason, nationality is considered irrelevant as a basis of general jurisdiction. Although the proposition (that nationality founds jurisdiction) has been affirmed obiter in "a long chain of dicta[1] extending from 1828 to 1948",[2] there is no actual decision to support the proposition. The better view is that "nationality per se is not a reason which, on any principle recognised by private international law, can justify the exercise of jurisdiction".[3] Therefore, nationality as a basis of jurisdiction cannot safely be relied upon today.[4]

Domicile: Nationality as a basis of in personam jurisdiction would clearly be unsuitable in a situation where a political unit contains several different law districts, such as the United Kingdom or Nigeria. As a result, some other legal relationship with the territory had to be established. This

---

1. See e.g. Douglas v. Forrest (1828) 4 Bing. 686; Schibsby v. Westenholz (1870) L.R. 6 Q.B. 155.
2. Morris, The Conflict of Laws, p. 426.
3. Cheshire and North, Private International Law (8th ed.) p. 632.
4. Morris, note 2 supra, at 426.

was found in the theory of domicile. But here, jurisdiction based on domicile was usually coupled with actual residence within the jurisdiction. Otherwise it would be absurd to found jurisdiction on, for example, a man's domicile of origin in the jurisdiction when in fact the person has never set foot on the territory. In the words of Lord Kyllachy,[1] "It would not ... be possible to sue, say for debt, in the Scots courts, and to cite edictally, a Scotsman who had resided abroad for many years, supporting the jurisdiction upon the ground merely that having been born in Scotland he had not yet lost his domicile of origin."

Submission or consent:[2] Persons such as absent defendants who would normally not be subject to the jurisdiction of the court in an action in personam become so subject by their conduct which may take the form of submission or consent. Submission may take different forms: it may be by express agreement to submit to the jurisdiction[3] or to submit to arbitration under the laws of a particular territory; but the commonest form of consent is voluntary appearance without compulsion and without contesting jurisdiction, either in person or through an agent. As Bowen L.J. said, "The stream of authority is to the effect that appearance, unless it be appearance under duress, is an election to submit to the

---

1. Buchan v. Grimaldi (1905) 7 F. 917, cited in Duncan and Dykes, Principles of Civil Jurisdiction, p. 27.
2. See Dicey and Morris, The Conflict of Laws (8th ed.) pp. 179-182.
3. See Feyerick v. Hubbard (1902) L.J. K.B. 509.

jurisdiction from which the process has issued."[1] But physical presence of the defendant in the jurisdiction is not essential for submission.[2] And of course any person who begins an action as plaintiff is deemed to confer jurisdiction on the court to hear a counter claim by the defendant on a related matter. In Nigeria this form of consent is expressed in simple terms, for example, in the Area Courts Edict as follows:

> "Any person who institutes or prosecutes any cause or matter in an area court ... shall in that cause or matter be subject to the jurisdiction of that area court and of any other court exercising jurisdiction in that cause or matter."[3]

2. Appraisal of the Scottish and English Rules of General Jurisdiction

The physical relations of residence with a law district, as we have seen, is one of the commonly acknowledged basis of jurisdiction in personam in English and Scots law. However, two main features of the Scottish rules of jurisdiction which English law only exceptionally recognises deserve special emphasis.

First, the Scottish doctrine has always insisted that something more is needed for personal jurisdiction than "mere transient presence"[4] of the defender. Some more substantial

---

1. Voinet v. Barrett (1885) 55 L.J.Q.B. 39 at 42.
2. See Re Dulles' Settlement (No. 2) (1951) Ch. 842; Graveson, The Conflict of Laws, (6th ed.) p. 116.
3. Area Courts Edict, No. 2 of 1967, North Central State, s.14(2).
4. Gibb, The International Law of Jurisdiction (1926) p. 42.

relationship with the jurisdiction is often preferred. Scots law has a rule which requires substantially continuous residence in Scotland for 40 days before jurisdiction is taken, and this factor has meant that "the law of Scotland is more scrupulous in the way of extending its jurisdiction over foreigners within the country than some other systems of jurisprudence".[1] As Professor Anton says,[2] the Scottish courts "required that the courts of the territory should be the appropriate forum to deal with the case either because the defender's residence was within the territory or because of the specific connection of the cause of action with the territory". These differences of approach between the English and Scottish rules have been carried into the guardianship field as we shall see presently. Two points, however, may be made in regard to Professor Anton's statement. First, an exception was created for itenerants who have no residence inside or outside Scotland. Here, jurisdiction was exercised on the basis of personal presence and citation within the jurisdiction. Secondly, Professor Anton's statement indicates that if the Scottish court was deemed inappropriate because the action has more connection with another territory or that it would be more appropriate to try the action in another

---

1. Joel v. Gill (1859) 21 D. 929 at 939 per Inglis L.P.
2. Private International Law, p. 92. Again at p. 95 the learned author writes: "While the English courts hold that the mere personal presence of the defender within the territory is sufficient to constitute jurisdiction, the Scottish courts require something more than presence though at the same time something less than domicile."

forum, the jurisdiction would be declined. This is the foundation of the doctrine of forum non conveniens which the Scottish, but not the English, courts have been willing to invoke in guardianship cases. This doctrine has had, in our view, a more salutary effect on the otherwise mechanical basis of jurisdiction based on "power" or presence which the English courts favour. The doctrine implies that where another court exists "in which the case may be tried more suitably for the interests of all the parties and for the ends of justice",[1] the Scottish court may decline jurisdiction on the principle of forum non conveniens. As Anton has said,[2] "This principle is a distinctly Scottish contribution to the science of international law. It demonstrates that the rational foundation of the Scots rules is not coercive power, but the suitability of assuming jurisdiction in the circumstances".

It is interesting to observe in passing that from an historical point of view the Scottish predecessor of the forum non conveniens rule is the doctrine of forum non competens, which was applicable to cases of both non-existence and non-exercise of jurisdiction. But in the words of Duncan and Dykes, in modern Scots law "the plea of forum non competens has practically disappeared: it is rarely used in any other sense than that of forum non conveniens."[3]

---

1. Sim v. Robinow (1892) 19 R. 665 at 668.
2. Private International Law, p. 93.
3. Principles of Civil Jurisdiction, p.6.

We shall return to a fuller discussion of forum non conveniens rule when we consider specific guardianship jurisdiction.

The second main feature that distinguishes Scots from English law is that the Scottish courts very early recognised the principle of effectiveness in the assumption and exercise of jurisdiction. The Scottish court, in other words, would never assume jurisdiction to pronounce orders "which it knows it cannot enforce".[1] As Erskine said,[2] "Jurisdiction cannot have the least operation when both the person and estate of the defender are withdrawn from the judge's power". Expressing an opinion which stands in so much contrast to the English Court of Appeal in Re P (G.E.)(An Infant)[3] Lord President Inglis said:[4] "It is a sound rule that no Court should arrogate a jurisdiction which it cannot effectively exercise, or pronounce a decree which it cannot enforce; and so it is generally laid down as a proper test of jurisdiction that the decree can be made effectual within the territory". Thus, the Scottish rules of jurisdiction based on possession of heritage in Scotland or upon arrestment of movable property or person in Scotland stem from considerations of effectiveness.[5] The

---

1. Henderson v. Patrick Thomson Ltd. 1911 S.C. 246 at 249 per L.P. Dunedin.
2. Institutes, 1.2.20 cited in Duncan and Dykes, op. cit., p.7.
3. (1965) Ch. 568 esp at 587-589 per Pearson L.J.
4. Fraser v. Fraser and Hibbert (1870) 8 M. 400 at 405.
5. See Duncan and Dykes, op. cit. pp. 73-74 and Chapter 7.

American Restatement, Second, Conflict of Laws is equally clear and concise on the applicability of the principle of effectiveness to custody and guardianship. A custody or guardianship suit may be dismissed, in the Restatement view, "if the court has reason to believe that its decree would not be effective as might be the case if both the child and the defendant parent are in another state."[1]

The Scots rule regarding appropriateness of the forum means that nationality and domicile of defender were largely irrelevant considerations although in the latter case domicile was deemed sufficient in actions relating to status.[2] After a review of the pertinent early authority on domicile and nationality Duncan and Dykes[3] express the view that mere origin, or, "pure and unaided circumstance of nativity",[4] as they put it, taken alone, is not sufficient to found personal jurisdiction. Nationality or allegiance as constituting basis of jurisdiction remains largely an unsettled issue in English and Scots law, although it enjoys the support of Erskine.[5] But the better view is that nationality as a basis of jurisdiction cannot safely be relied upon today, and as we observed earlier, nationality employed as a ground of jurisdiction in a political unit with different law districts

---

1. Section 79, comment(a) at p. 238.
2. See below.
3. op. cit. Chapter 8, pp. 113-121.
4. Ibid at 115.
5. Inst. 1.2, 19 cited in Duncan and Dykes, op. cit. p. 120.

is an absurd doctrine, also, the "national" court does not necessarily possess the means of making its decrees effective.

"Appropriateness of jurisdiction" in Scots law further means that even where the pursuer cannot sue the defender in any other court, the Scottish courts would not by virtue of that consideration alone assume jurisdiction.[1] Thus Lord Anderson has remarked that "If it be the case that there is no forum which has jurisdiction over the defender I am unable to regard that fact as a reason for compelling him to appear in a forum to whose jurisdiction he is not subject on any other ground."[2]

Finally, it should be added that effectiveness by itself is not a sufficient basis for assuming jurisdiction; were it to be sufficient, jurisdiction would be reduced to mere question of power, a notion which Scots law rejects.

C. Interstate and International Jurisdiction in Guardianship Law: any basis for distinction?

Should any distinction be drawn between international and interstate rules of jurisdiction in guardianship and custody? In other words, should the jurisdictional rules for custody cases involving, say England and Scotland or the various states of Nigeria be different from rules for truly international custody cases? It is our aim in this section to provide possible answers to this question.

---

1. See Acutt v. Acutt 1936 S.C. 386; Mangrulkan v. Mangrulkan 1939 S.C. 239 at 245.
2. 1931 S.C. 736 at 768. (Kerr v. McGregor)

To a large extent, courts and writers in England, Scotland, America and Nigeria have not distinguished between international and interstate conflicts in the field of jurisdiction.[1] After a review of leading American authors and cases, Dr. Du Bois writes that "conflict lerning, built up in a world of interstate transactions was applied without hesitation to the international situation."[2] Indeed, Professor Beale who dominated American conflicts field in the early part of this century adverted to the insignificance of maintaining a distinction between interstate and international conflict of laws. In his Treatise on the Conflict of Laws he wrote:

> "We have, it is true, the usual number of questions arising out of conflicts with foreign laws, but we have in addition a much larger body of litigation concerning conflicts of law within the nation. No American lawyer has suggested any important distinction between conflicts of national law and conflicts of local law."[3]

Nevertheless, there are factors which tend to make the distinction between interstate and international conflicts significant. First, the nations of the world have different political, social and legal institutions - differences which are more pronounced than those which exist between states of one nation. This factor may affect matters of proof or the ascertainment and application of foreign law. In the field

---

1. An exception is Ehrenzweig "Interstate and International Conflicts: A Plea for Segregation" (1957) 41 Minn. L. Rev. 717.
2. A.B. Du Bois, "The Significance in Conflict of Laws of the Distinction Between Interstate and International Transactions" (1933) 17 Minn. L. Rev. 361, 362.
3. Beale, Treatise on the Conflicts of Laws, 2nd ed. p. 142.

of domicile, for example, familiarity with sister-state social and legal conceptions may lead to an easier judicial concession that a domicile has been acquired in a sister-state. Thus Kindersley J. in Lord v. Colvin[1] recognised a distinction between interstate and international legal situation when he said[2]: "The court would more readily decide that a Scotchman had acquired a domicile in England than that he had acquired a domicile in France." In the second place, a legal relationship such as polygamy or a father's greater right to custody of a child maybe recognised in a foreign system of law but be unknown to the local law of the forum state. A third distinction may be stated by paraphrasing Dr. Shapira[3] who said that although there is much in common between interstate and international conflicts, "neither an absolute equation nor a sweeping separation" of the two aspects of conflicts law can or should be sought. "No compelling considerations of logic or practical expediency seem to warrant such a basic determination".[4] Dr. Shapira identified[5] several distinctions between the two types of conflicts situation which included this: that there is, within the separate law districts that make up one nation a greater "intensity of socio-political affiliations" than

---

1. (1859) 4 Drew 366, 28 L.J. Ch. 361, 62 E.R. 141
2. Ibid at 423 (4 Drew); 163 (HA 62 E.R.)
3. The Interest Approach to Choice of Law (1970).
4. Ibid at 43.
5. Ibid at 34-41.

exist at the international sphere where there is not much by way of a sense of mutuality, of reciprocity or of unity.[1] This latter has created "problems of accomodation owing to still prevalent lack of a sense of common welfare in the world community".[2] But we may note an exception to this assertion in the existence of a sense of common welfare of the child in most legal systems as we showed in Chapter three. Although the trend towards regional integration in different parts of the world and in different forms may tend to minimise differences between interstate and international legal situations, the fact remains today that a high standard of "multistate mutuality and co-operation"[3] characterises the interstate sphere, while the international sphere is still characterised by parochialism and local biases. In the fourth place, the dangers of forum shopping are greater in a closely knit law district (as U.K., U.S.A., Nigeria). In the words of Shapira, "Generous 'transient' jurisdiction rules, profound mobility and fairly convenient and inexpensive travelling facilities, a general homogeneity of language and way of life, the ease of hiring and communicating with out-of-state counsel - all these factors contribute to enhance the temptations and occasions for forum shopping".[4] At the international level, on the other

---

1. Ibid at 35-36.
2. Id at 36
3. Id.
4. Id. at 39.

hand, the handicaps of long distance travelling, plus "lack of easily available and fairly inexpensive communication facilities, non-familiarity with foreign languages and customs"[1] may act as a deterrent to the forum shopper. Although it may be added that these factors do not appear to have deterred the child kidnapper.

Finally, within one political state which has several law districts, there are usually safeguards under the umbrella of a federal constitution (such as due process of law, full faith and credit and similar clauses) which in many ways guarantee fairness of legal treatment in each state of the Union. In the language of the Restatement, Second, Conflict of Laws, "The lack of such safeguards in an international conflicts case may call for closer scrutiny or different treatment."[2] One may qualify this statement by pointing out that the "safeguards" of "procedural due processes" of adequate notice, opportunity to be heard, and appropriateness of forum are observed equally in interstate and in international conflicts law of jurisdiction. It should also be added that on the whole the distinction between the two types of jurisdiction, as the three-fold factors above indicate, are likely to be of more importance in considerations relevant to choice of law

---

1. Ibid.
2. Section 10, Comment (d) at p. 39.

and recognition of foreign judgments than in jurisdiction. In both recognition and choice of law, the differences in policy and law between the forum and the foreign law district are likely to be greater in the international than in the interstate sphere. And because of these differences in law and policy, Professor Eugene Scoles observed, correctly, that "If a court is wedded to dogma, justice may not be served unless the court distinguishes between interstate and international cases. To apply mechanically a rule developed in interstate cases to an international situation without a consideration of its policy relevance is both wrong and dangerous."[1]

Turning now to the specific field of guardianship and custody, the position is that some of the leading cases in the United Kingdom which have raised questions of both international and interstate conflicts of custody law have not proceeded in a way that suggest that there is any significant difference between international and interstate law of jurisdiction.

Whenever a question of jurisdiction is raised the Scottish courts, more than their English counterparts, have shown considerable respect for "international law". Thus, in Babington v. Babington, Lord Carmont said:[2] "In the eye of

---

1. E.F. Scoles, "Interstate and International Distinctions in Conflict of Laws in the United States" (1966) 54 Cal. L. Rev. 1599 at 1599-1560.
2. 1955 S.C. 115 at 121.

international law it is only the decision of this court which is entitled to the respect due to a court entitled to deal with a matter of status and having the validity of a decision in rem". And in Kitson v. Kitson, Lord Justice-Clerk Cooper observed[1] that "for purposes of international law the pre-eminent (though not the exclusive) jurisdiction in questions of custody is accorded to the Court of the domicile". In Ponder v. Ponder[2] Lord Anderson asked: "what court has jurisdiction ... if this court does not possess it?"[3] It will be recalled that his Lordship was there dealing with a custody case which raised, besides Scots law, the question of the possible applicability of American or French law. There was no doubt in his Lordships mind which of the three countries possesses jurisdiction. He observed:[4]

> "If the jurisdiction of either of these Courts were invoked it would be their duty, in accordance with international usage, to remit the petitioner to the pre-eminent jurisdiction of the Courts of the domicile."

Perhaps the Scottish judges were over-stressing the existence of an alleged consensus of "international law" in questions of jurisdiction. But what is of interest here is that the first two of the cases above involved what might be called an interstate jurisdiction - between England and Scotland.

---

1. 1945 S.C. 434, at 439. Again at p. 443 Lord Cooper said that the "Court of Session ... in the case of a father of Scottish domicile, is the only Court with pre-eminent jurisdiction from the standpoint of international law."
2. 1939 S.L.T. 187.
3. Ibid, at 189.
4. Ibid.

The third case, however, raises a true international custody jurisdiction problem encompassing Scots, French and American law. Yet, in both types of jurisdiction "international law" was invoked without distinction.

Therefore, throughout our discussion in this chapter, the conflicts situation involving international and interstate jurisdiction have been treated together without differentiation for a number of reasons. First, the differences in jurisdictional standards due to differences in morals or justice between different states and different nations do not appear to enter directly into custody matters. In other words, unlike issues of recognition, the assumption of custody jurisdiction does not depend on differences in standards of justice. Secondly, the jurisdictional bases we are about to consider - presence, residence, domicile, nationality - are controversial topics in interstate as well as in international cases. Thirdly, the ultimate basis for assuming jurisdiction in guardianship - parens patriae - is the same whether the case involves an interstate or international guardianship or custody. In both situations the "sovereign", as parens patriae, has the same interest in the welfare of children within the jurisdiction. The words of Sir Page-Wood, V.C. in Nugent v. Vetzera[1] that in matters of jurisdiction "the same authority which we claim here on behalf of the Crown as parens patriae, is claimed by every other independent state" has validity for international, no less that for interstate, guardianship jurisdiction.

---

1. (1866) L.R. 2 Eq 704, at 714.

But there is one area where a clear distinction is maintained between interstate and international law of custody jurisdiction. And it is where the spectacle is presented of direct and actual conflict between courts of proximate jurisdictions as is the case in the United Kingdom. It is reasoned that while nations may be able to live with a conflict of jurisdiction situation, it would be intollerable when that conflict is projected on to the interstate plane. As the Scottish Law Commission puts it, "Though (the) disadvantages are the same whatever the competing jurisdictions, they are the more objectionable within a unitary state, such as the United Kingdom,which has the legislative power to minimise their incidence and to resolve them when they do occur. Further, they are likely to be more frequent."[1] Interstate conflict of jurisdiction has aroused much anxiety in the United Kingdom and the United States of America. It is the theme of a separate discussion later in this chapter.

D. Nature of the Jurisdictional Problem in Guardianship and Custody

Introduction

The rules of jurisdiction governing the appointment of a guardian of the person of the child are similar to those employed in deciding whether a court may award the custody of a child. The problem of the guardianship of the person

---

1. Scottish Law Commission: Family Law - Report on Jurisdiction in Consistorial Causes Affecting Matrimonial Causes (hereinafter, Scot. Law Com. No. 25) para 144 p. 55.

is usually a special instance of a child custody problem.[1] Therefore, although the following discussion proceeds in part from the point of view of custody the principles apply also to guardianship and vice versa. Accordingly, separate discussions of custody and guardianship will not be necessary.

The statutory proclamation that in all cases of custody-guardianship the interest and welfare of the child shall be of paramount consideration has caused not a little confusion in the rules of jurisdiction.[2] Every court before which a custody problem is presented professes that it is interested in the child's interest and welfare mainly, it would seem, because each court is anxious not to be seen to be abdicating its parens patriae jurisdiction. The result has been the existence of different bases of jurisdiction in custody. So subtle and complex are the rationale underlying these different jurisdictional bases that Professor Cavers has expressed his "doubt that any knottier problems of judicial jurisdiction ... can be found than those involving custody."[3] Small wonder, then, that the resolution of jurisdictional problems in conflict of laws of custody has attracted so much attention from law reformers in the United Kingdom, the North American Continent and in Commonwealth countries.

---

1. See M. Paulsen and J. Best, "Appointment of a Guardian in the Conflict of Laws" (1960) 45 Iowa L. Rev. 212.
2. See Note "The Custody of Children and the Conflict of Laws" (1910) 24 Harv. L. Rev. 142.
3. Cavers "Contemporary Conflicts Law in American Perspectives" (1970) III Recueil Des Cours (vol. 131) 75 at 281.

Accordingly, the statement in Cheshire's Private International Law that the jurisdictional rules "are few and simple"[1] may be an understatement.

The basic question of jurisdiction in conflict of laws of custody-guardianship is whether a particular court possesses jurisdiction over a child, let us say, domiciled in another state although present in the forum jurisdiction at the commencement of the action. In other words, what connecting factors must exist between the child and the forum to give the court jurisdiction? Is it necessary to have personal jurisdiction over the father or mother or other guardian?

The world has become extremely mobile so that even after an initial determination of a custody case, one of the parties by fraud or contrary to the wishes of the other party and contrary to the orders of the decreeing court, may remove a child to another jurisdiction. Added to this is the fact that custody decrees normally look to the future and since nobody can foretell what the future will bring, custody decrees have been universally held to be modifiable if circumstances altered. And this raises the second main problem of jurisdiction. Does the jurisdiction of the original court continue after the child has left the state? In other words, which court has jurisdiction to modify an original custody award to conform to changed circumstances.[2]

---

1. Cheshire's Private International Law (P.M. North 9th ed.) p. 474.
2. See Note "Jurisdictional Bases of Custody Decrees" (1939-40) 53 Harv. L. Rev. 1024.

It will be the purpose of the rest of this chapter to explore the various issues raised by differences of bases of guardianship jurisdiction.

I. Guardianship of the person

1. The State of the Law

The American Law Institute's Restatement of the Law (Second), Conflict of Laws lays down three bases for the assumption of jurisdiction in custody and guardianship. The provision reads:

> "A State has power to exercise judicial jurisdiction to determine the custody, or to appoint a guardian, of the person of a child ...
>
> (a) who is domiciled in the State, or
> (b) who is present in the State, or
> (c) who is neither domiciled nor present in the State,
>
> if the controversy is between two or more persons who are personally subject to the jurisdiction of the State."[1]

The rationale for this rule of jurisdiction has been dictated by the different interests involved in custody and guardianship cases. "First, there is the welfare of the child, which is of paramount importance. Second, there is the interest of the state of the child's domicile and, if he is absent from that State at the time of suit, there is the interest of the state where he happens to be physically present at the time. Third, there are the interests of those (normally the parents) who are disputing among themselves for the Child's custody".[2] As far as this study is concerned,

---

1. Section 79.
2. Ibid, Comment (a) p. 237.

a full statement of the bases of jurisdiction and the concerned interests should include the child's residence and nationality in addition to the three identified by the Restatement (Second). Our discussion of the English and Scots rules would be under two main heads: (a) the law before 1974 January and (b) the law after that date. The year which saw the coming into force of the Guardianship and the Domicile and Matrimonial Proceedings Acts has, therefore, been chosen as the dividing date between the two periods.

(a) Law of Jurisdiction before 1974

(i) Inherent Jurisdiction at common law and equity

At common law the care and control of all infants legitimate and illegitimate vested nn the Crown as parens patriae. That function was exercised on behalf of the Crown by the Court of Chancery in England and the Court of Session in Scotland. Part of that inherent jurisdiction included the making of orders with respect to both the custody and guardianship of children. Essentially the jurisdiction was based on allegiance of the child to the Crown which in turn extended its protection to the child. The bond of allegiance is said to exist with a child's mere presence or ordinary residence in the realm or by virtue of the child's birth and nativity as a subject of the Crown. It surely sounds fictional to speak of the child's 'allegiance' to the Crown, hence the courts conveniently emphasised mostly the child's protection. "The benefit of the infant, which is the foundation of the jurisdiction, must be the test of

its right exercise", wrote Lord Campbell in Johnstone v. Beattie.[1] This necessarily implies that technical considerations of domicile, residence etc. were not material: the "benefit of the infant" was all that mattered. With this in mind, in the Bute Guardianship Case[2] Lord Campbell in expressing a preference for the vesting of jurisdiction in the Court of Session said: "The Court of Session had undoubted jurisdiction over the case. By their nobile officium, conferred upon them by their sovereign as parens patriae, it is their duty to take care of all infants who require their protection whether domiciled in Scotland or not". Two judicial statements in particular, represent the epitome of the nature of the inherent jurisdiction. Lord Langdale in Johnstone v. Beattie said:[3]

> "Those who imagine that the Court acts necessarily upon any fixed and inflexible rules in the management of infants, appear to me to forget the paternal and discretionary nature of the jurisdiction, the great care and anxiety with which the interests of the infant wards are constantly attended to, the changes of regulation which are so easily made even from day to day, if required by a change of circumstances, and the extent to which all technical and positive rules are made to bend to the peculiar circumstances which may be from time to time presented by individual cases."

So sacrosanct was this paternal parens patriae jurisdiction that once it is invoked any technical rules of jurisdiction would avail nothing. This was the point being stressed by Buckley J when he said that "apart from authority

---

1. (1843) 10 Cl. & Fin. 42, at 122; 8 E.R. 657 at 688.
2. (1861) M. 1, at 60. This statement was qualified by Lord Dunpark in Kelly v. Marks 1974 S.L.T. 118 at 122.
3. (1843) 10 Cl. & Fin. 42 at 150; 8 E.R. 657 at 698.

the court ought to be very slow to leave (jurisdiction) to be exercised by any other tribunal. It seems to me that authority supports that view".[1] The other statement as to the parens patriae basis of custody jurisdiction was by Lord Simonds giving the opinion of the Board (Lord Merriman, Lord Simmonds, Lord Merton of Henryton, Lord Radcliffe and Lord Tucker) in the famous Privy Council case of McKee v. McKee.[2] The infant, says Lord Simonds, was in Ontario and therefore "within the King's allegiance". That was a sufficient ground to entitle the child "to the protection of his Courts ... owed by the King as parens patriae to infants."

As was indicated earlier on, the Nigerian High Courts are asked, in the exercise of their jurisdiction, to apply law and equity in the same manner as they are administered by the English High Court. And the inherent jurisdiction of the English High Court included, as we have just seen, the making of orders with respect to the custody of infants.[3] After the enactment of the (English) Supreme Court of Judicature Act, 1873, in making orders relating to custody and guardianship the rules of equity prevailed irrespective of whether or not there was a conflict between equity and common law rules. The Nigerian courts would, accordingly, exercise the inherent jurisdiction of the English High Courts as outlined above.

---

1. In Re Karnot (1964) 3 W.L.R. 1210 at 1214. "If it be a case in which the court ought to accept jurisdiction then authority lays it down that the court ought not to delegate to any other tribunal, or to abrogate, its own responsibility". Ibid at 1215.

2. and 3. on following page.

The benefit of the infant is paramount and it is still the foundation of guardianship jurisdiction. But the courts are also being more specific in discussing enumerated bases of jurisdiction. Also, statutory developments in jurisdictional rules have become noteworthy. The Matrimonial Causes Decree in Nigeria, the Law Reform (Miscellaneous Provisions) Act in the United Kingdom, among others, have had their impact on the development of the rules of jurisdiction in custody.

(ii) Alternative bases of jurisdiction

In our treatment of the alternative bases of jurisdiction, we shall not be distinguishing guardianship from custody proper as we have already indicated. As we saw in Chapter Two, Scots law maintains a clear distinction between the two institutions although it would appear that as far as rules of jurisdiction are concerned, the distinction is blurred. This may be because the practical results of assuming jurisdiction in custody is not much different from that of guardianship. As it has been said, "custody decrees and those appointing a legal guardian of the person create the same sort of relationship between the child ... and the person to whose care he is awarded."[1] As for the English rules of jurisdiction the position has been clearly

---

2. 1951 A.C. 352 at 360.
3. See Hope v. Hope (1854) 4 De G.M. & G 328; 43 E.R. 534.
1. Restatement (Second), Conflict of Laws, s.79 Comment (d), at 239.

stated by Dicey and Morris in these words:[1] "English Conflict of Laws does not provide separate rules for determining the jurisdiction of English courts to make guardianship and custody orders respectively". Dicey and Morris have spelled out the rules of jurisdiction of the English courts as follows:

> "Rule 50 - (1) The court has jurisdiction
> (a) to appoint a guardian for, or to make a custody order in respect of, an infant where at the commencement of the proceedings the infant is a British subject or owes local allegiance to the Crown by virtue of his ordinary residence or presence in England;
>
> (b) to make a custody order in respect of an infant where the court exercises its jurisdiction to pronounce a decree of divorce or of nullity or for judicial separation or for restitution of conjugal rights in respect of the marriage of the parents of the infant, ..."

We shall discuss the alternative bases of jurisdiction under presence, residence, domicile, nationality. What we have called the special types of jurisdiction in matrimonial causes, kidnapping cases, and in modifying an earlier custody decree will be discussed in a subsequent subsection.

Presence: As Rule 50 in Dicey-Morris makes explicit, mere presence is a manifestation of local allegiance upon which the jurisdiction of English courts is based. As was said in a 19th century case, "... it is in the interest of the Sovereign that children should be properly brought up and educated, and according to the principle of our law, the Sovereign, as parens patriae, is bound to look to the

---

1. The Conflict of Laws (8th ed.) Rule 50, Comment, at 384.

maintenance and education (as far as it has the means of judging) of all his subjects".[1] Judicial dicta abound in the English cases to the effect that mere presence of an infant within the jurisdiction confers jurisdiction on the courts.[2] It is immaterial that the child is an alien and resident or domiciled abroad.[3] Once his physical presence is secured, however fleeting and transient that may be, jurisdiction would be assumed. It is the same rule as we saw being applied in personal actions. The usual reasoning here is that the child needs protecting by the state - "a need that knows no such barriers as nationality or domicile".[4] And more recently this basis of jurisdiction was aptly stated by Lord Simonds in McKee v. McKee.

> "It was not, and could not, be argued before their Lordship's Board that the Courts of Ontario had no jurisdiction to decide this issue. The infant was resident, if not domiciled, in the Province; he was within the King's allegiance and entitled to the protection of His Courts: he was an infant and therefore entitled to the special protection owed by the King as parens patriae to infants."[5]

And in the uncompromising words of Lord Denning, M.R., jurisdiction would be assumed once the child was physically present in England, "even though the child was not living here and only passing through on a journey."[6]

---

1. Hope v. Hope (1854) 4 De G.M. & G. 328, at 345.
2. See In Re Fynn (1848) 64 E.R. 205; Dawson v. Jay (1854) 43 E.R. 300; Stuart v. Bute (Marquis), Stuart v. Moore (1861) 9 H.L. Cas 440.
3. J. v. C. (1970) A.C. 668; In Re D. (an Infant) (1943) 1 Ch. 305.
4. Cheshire's Private International Law 9th ed. 1974 p.475.
5. 1951 A.C. 352 at 360 (P.C.).
6. Re P (G.E.)(an Infant) (1965) Ch. 568 at 582 (C.A.)

Scots law does not regard mere presence as an adequate test of jurisdiction in custody or other types of suit. As far as we can see, it was only in actions of declarator of nullity on the grounds that a marriage is void, that the suggestion was ever seriously made to constitute mere presence as a test of jurisdiction in Scots law. That suggestion came in a 1956 Royal Commission Report.[1] But this basis of jurisdiction, whatever its merits, was roundly rejected by the Scottish Law Commission[2] in 1972.

Ordinary residence: In Johnstone v. Beattie Lord Campbell said: "I do not doubt the jurisdiction of the Court of Chancery on this subject, whether the infant be domiciled in England or not. The Lord Chancellor, representing the Crown as parens patriae, has a clear right to interpose the authority of the court for the protection of the person and property of all infants resident in England."[3] The English cases have consistently rejected domicile as the exclusive or primary basis of custody jurisdiction, and they have preferred, instead, the ordinary residence of the child. This is usually justified on the ground that the state of the child's ordinary residence has a legitimate interest in the child's welfare and may be the best informed of the concerned

---

1. Report of the Royal Commission on Marriage and Divorce (1956) Cmnd 9678 para 882-885.
2. Scot. Law Com. paras 44-46. (Scot. Law Com. No. 25, 1972)
3. (1843) 10 Cl. & Fin. 42 at 119-120; 8 E.R. 657 at 687.

courts about the evidence and other information relevant to determination of the child's welfare. Moreover, it is argued that since the rival concept of domicile as applied to children is traditionally patriarchal, curious technicalities would often govern the case if domicile were the exclusive or primary basis for jurisdiction. The English courts therefore would exercise jurisdiction where the child was ordinarily resident within the jurisdiction even though he is an alien and was in the meantime physically abroad. This rule was firmly laid down in Re P (G.E.)(An Infant).[1] In that case the husband and wife, both stateless Jews, had settled in England after the Suez crisis. They set up a matrimonial home in Brighton but later separated and the wife went to live with her mother in Hendon. They had a son aged six years who, be arrangement spent weekends with the father and the rest of the week with the mother. During one weekend when the child was visiting the father, the latter failed to return him and instead flew to Israel with the aid of travel documents which had earlier been issued to father and son as stateless persons by the Home Office pursuant to an international convention. On learning of this kidnapping by the father the mother sought to make the child a ward of court. Neither presence nor nationality could furnish a basis for jurisdiction. And after strenuous argument by counsel on both sides,

---

1. (1965) Ch. 568 C.A.

the Court of Appeal fell on ordinary residence, as an arm of allegiance, notwithstanding the admission of counsel for the mother that "it may appear artificial to speak of infants of tender years owing allegiance to the Sovereign."[1] Lord Denning M.R., rejected domicile as the basis for custody jurisdiction on the ground that "the tests of domicile are far too unsatisfactory. In order to find out a person's domicile, you have to apply a lot of archaic rules. They ought to have been done away with long ago. But they still survive. Particularly the rule that a wife takes the domicile of her husband. And the rule that a child takes the domicile of its father. If you were to ask what was the domicile of the child in this case, you would have a pretty problem".[2] Domicile was also rejected by Russell L.J. who, disagreeing with the Scottish authorities, said:[3] "The whole trend of English authority on the parental jurisdiction of the Crown over infants bases the jurisdiction on protection as a corollary of allegiance in some shape or form. Domicile is an artificial conception which may well involve no possible connection with allegiance". In the opinion of the Master of the Rolls, ordinary residence "is the right test".[4] for a child of tender

---

1. Ibid at 576.
2. Ibid at 583.
3. Ibid at 592. And at p. 589 Pearson L.J. said "the rules for ascertaining domicile are in some respects artificial and unrealistic and would produce strange results if domicile were taken as the basis of jurisdiction to make a wardship order".
4. Ibid. at 584.

years, the ordinary residence would normally be at the place of the matrimonial home if the parents live together. That "is his base, from whence he goes out and to which he returns".[1] But what about where the parents are separated? The Court of Appeal had a word or two to say. Conscious of the fact that the child may well be settled in Israel for good as a result of the kidnapping action, the Court nevertheless said that the child's ordinary residence remained in England if "his settlement was in England, and his absence was out of the ordinary run of his life, which was to live with his mother in Hendon, where he was at school."[2] In other words, the ordinary residence of a child cannot be changed by the unilateral act of one parent in kidnapping the child out of the jurisdiction.[3]

In our respectful submission, the decision is open to a number of criticisms. An alien, even after his departure from England, the Court says, is still ordinarily resident in England if he leaves "his family and effects" behind.[4] Clearly, the husband in this case - a stateless refugee - had no family left behind after the total breakdown and "failure of his marriage"[5] and his departure with his only son"to the land of his own birth, the land of their religion, and the land where his family lived".[6] And whatever personal effects he may have left

---

1. Ibid at 585 per Lord Denning, M.R.
2. Ibid at 593 per Russell L.J.
3. Ibid at 586.
4. Ibid at 584-585.
5. Ibid at 590 per Pearson L.J.
6. Ibid.

behind were mere camouflage to conceal his intention to kidnap the child away.

Again, as Lord Denning, M.R. admitted, he drew for his conclusions analogy from "a strange quarter"[1] - the law of treason which "is peculiarly susceptible to the temper of the moment".[2] This is strange indeed. In all this, their Lordships relied on the connection between possession of travel documents and the concept of allegiance.[3] But as Dicey and Morris say, "the relevance of this (matter of travel documents) is not entirely clear".[4] And finally one can only respectfully agree with Dicey and Morris that the extension of the jurisdiction of English courts to infants ordinarily resident but neither present nor domiciled in England "has increased the danger of conflicts of jurisdiction"[5] especially as between the courts in England and Scotland.

The foregoing account does not represent the law in Scotland as was clearly shown in the case of Oludimu v. Oludimu.[6] In that case, the parties, Nigerians by nationality and domicile had, for some time, been ordinarily resident in Scotland with their two children. The husband was a doctor and the wife a nurse. After the parties separated, the wife, fearing that

---

1. Ibid at 584.
2. Id at 594 per Russell L.J.
3. For a welcome criticism of the notion that allegiance is necessarily linked with possession of travel documents, see Grenville L. Williams, "The Correlation of Allegiance and Protection" (1948) 10 Camb. L.J. 54.
4. The Conflict of Laws 8th ed. p. 387 n. 52.
5. Rule 50 Comment (1)(a), at 386.
6. 1967 S.L.T. 105.

the husband was about to kidnap the children out of the Scottish jurisdiction, presented a petition to the Court of Session seeking custody of the two pupil children of the marriage. At the date of presentation of the petition both children were in Scotland but by the date of hearing the children had been spirited away to Nigeria. It was argued on behalf of the mother that the Scottish court had jurisdiction to pronounce the decree sought since the children were ordinarily resident in Scotland (though not actually present therein). Heavy reliance was placed on the English case of Re P (G.E.) (An Infant). The Court refused to exercise its invoked jurisdiction and refused to follow Re P (G.E.) (An Infant). In the succint words of Lord Fraser, "the decision in that case proceeds from principles which are quite alien to the law of Scotland".[1] The law of Scotland would exceptionally permit departure from the Scottish rule of pre-eminent domiciliary jurisdiction when "a temporary and protective jurisdiction dependent on de facto residence in"[2] Scotland is being exercised, e.g. to protect the child from immediate danger. And that is far from suggesting that "any residence, however fleeting, would necessarily" confer jurisdiction.[3]

---

1. Ibid at 107.
2. Babington v. Babington, 1955 S.C. 115 at 121 per Lord Carmont.
3. Kelly v. Marks 1974 S.L.T. 118 at 123 per Lord Dunpark.

Nationality: In an interstate custody dispute, such as might arise between England and Scotland or between the different states in Nigeria or the United States, nationality would be inappropriate as a basis of jurisdiction. Not surprisingly this is not one of the stipulated basis of jurisdiction in the Restatement (Second), Conflict of Laws. Also, as Dr. Morris says, "today the circumstances would have to be exceptional before a minor was made a ward of court on this basis".[1] This is because the concept of "British nationality" or "British subject" has changed drastically since the dissolution of the Empire, and the place of the term "British subject" has now been taken by citizenship of the different countries of the Commonwealth. Nevertheless, until fairly recent times, the courts have exercised their prerogative powers of parens patriae jurisdiction to appoint a guardian to a British subject resident abroad[2] or to make a custody order in respect of such a person even though his parents were abroad and he had no property in England and even though he is not present in England.[3] So strong was the nationality test that according to Graveson, "The predominant function of the law of domicile in questions of family status is in matters of guardianship largely abandoned in favour of the law of nationality."[4]

---

1. J.H.C. Morris, The Conflict of Laws, p. 180.
2. Hope v. Hope (1854) 4 De. G.M. & G. 328, at 345; Harben v. Harben, 1957 1 W.L.R. 261 at 264.
3. Re Willoughby (1885) 30 Ch.D. 324 at 328; Dicey-Morris op. cit. p. 385.
4. Graveson, The Conflict of Laws 6th ed. p. 409.

In exercising their jurisdiction in this connection the courts have not felt the lack of effectiveness as a drawback to any guardianship or custody orders they might pronounce over an absent child. Lack of effectiveness is a "plausible objection",[1] Lord Chancellor Cranworth admitted. But that did not stop the English courts ordering a parent who was resident abroad to return an infant to the jurisdiction although there was no chance of enforcing such an order in the case of disobedience.[2]

Finally, it should be observed that the Hague Convention of October 1961 on the Powers of Authorities and the Law Applicable in Respect of the Protection of Infants conceded jurisdiction in guardianship matters to the Courts of the child's nationality,[3] as an alternative to jurisdiction vested in the courts of the child's habitual residence.

Domicile: Domiciliary jurisdiction which dominates so much of the family law field finds little or no room in the English conflict of laws of custody. Instead, as Dr. Morris says, "allegiance assumes prominence in the jurisdictional rules of the English court."[4] The position can be stated briefly as concerns English law: the domicile of the infant within the jurisdiction of the English courts is not a sufficient basis for assuming jurisdiction. This "quietus to domicile as a basis of jurisdiction so far as the English courts are concerned"[5] was given

---

1. Hope v. Hope, supra.
2. See Re Liddell's Settlement Trusts (1936) Ch. 365 (C.A.); Harben v. Harben, supra.
3. See Article 4, and also Articles 3, 6 and 11.
4. The Conflict of Laws, p. 180.
5. P.R.H. Webb "Wardship of Court and the English Conflict of Laws" (1965) 14 I.C.L.Q. 663 at 672.

by the Court of Appeal in Re P (G.E.)(An Infant)[1] in which, as we have seen, their Lordships were unanimous in rejecting domicile mainly on the grounds that the rules relating to it are archaic, artificial, unrealistic and capable of producing odd results.

The Scottish courts, on the other hand, "insistent as ever on principle",[2] have been more faithful to domicile as constituting the basis of guardianship jurisdiction. This represents the farthest swing away from the normal general rules of jurisdiction which we surveyed at the beginning of this chapter. As we saw earlier, the mere fact of defender's domicile in Scotland does not by itself subject him to the jurisdiction in personal actions. On this Lord President Inglis said that[3] "Any other rule would lead to the most inconvenient and absurd results; for if it were necessary in every case to fix where is the domicile of the defender, by which his succession, status, and personal rights and privileges will fall to be regulated, before ordinary civil jurisdiction can be exercised over him, it is obvious that one might live for years in a country and carry on the most extensive business, without being subject to the ordinary civil tribunals." When we turn to guardianship jurisdiction, however, a different rule, domicile-centred, prevails. Here, the Scottish courts have erected the domiciliary rule of jurisdiction on the basis of custody-guardianship being a question of status.

---

1. (1965) Ch. 568 C.A.
2. Boys v. Chaplin, (1968) 2 Q.B. 1 at 26 per Lord Denning M.R.
3. Joel v. Gill (1859) 21 D. 929 at 938.

Duncan and Dykes, in their examination of the circumstances in which the Scottish courts would have jurisdiction to appoint a guardian, furnished one of the clearest statements of the status theory of jurisdiction. In the field of guardianship, they wrote:

> "we are in the branch of law which deals with status or capacity, and therefore there is a pre-eminent jurisdiction in the courts of the ward's domicile".[1]

According to Scots law, therefore, jurisdiction exists over pupils and minors under sixteen[2] who are domiciled in Scotland even though not physically present or resident therein. And because custody is viewed as a matter of status, the domiciliary custody order should be recognised everywhere since, the Scots judges say, it is a judgment in rem. Because of the patriarchal view of the father as head of the family, Scots law took the position before 1974 that the pre-eminent jurisdiction in custody lies in the courts of the father's domicile.

This approach, which we may describe as the traditional approach, possesses the advantage, it is usually argued, that confining jurisdiction to the domiciliary state promotes stability and discourages the reprehensible practice of child kidnapping from one jurisdiction to another. An English judge, Russell L.J. sums up this rationale behind the Scottish approach when he said that "there is something to be said for the view that this approach derives from an attempt to resolve internal conflicts in the United Kingdom."[3]

---

1. Principles of Civil Jurisdiction p. 242.
2. See Custody of Children (Scotland) Act, 1939, s.1. The courts may also have jurisdiction to deal with the custody or guardianship of minors over sixteen, but the limits of this jurisdiction are not clearly settled. See Harvey v. Harvey (1860) 22 D. 1198.
3. Re P (G.E.)(An Infant) (1965) Ch. 568 at 592.

The domiciliary rule of jurisdiction has been affirmed in a series of cases but perhaps one could illustrate this by considering the leading case of Ponder v. Ponder[1]. In that case, a petition was brought by the wife of a domiciled Scotsman for custody of the only child of the marriage. At the time of the action, neither party was resident in Scotland. The husband was resident in the United States where he was a professor of physiology; the wife-petitioner, a domiciled Englishwoman, was resident in England, and the pupil child of the marriage was under the care of her grandmother at Antibes in France. The respondent-husband argued that the Court had no jurisdiction but this was rejected. It was held that the Court of Session as the Court of the husband's domicile had jurisdiction to determine questions of custody and access, and that the mere fact that the parties were outwith Scotland did not render ineffectual any decree which the Court of Session might pronounce since such a decree, being a decision as to status, was a judgment in rem which had universally binding effect. Lord Justice-Clerk Alness in the course of his judgment after reviewing earlier authorities laid down the major proposition that:

> "only the court of the domicile of the spouses can deal with questions of custody and access, and that no other court will interfere in that matter. Of that doctrine - in so far as it relates to the custody of or access to a child - I am aware of but two qualifications. A Court

---

1. 1932 S.L.T. 187.

> other than that of the Court of the domicile will interfere (1) to enforce an order of the Court of competent jurisdiction, and (2) if there is reason to apprehend immediate danger to the child, an application may competently be made to a Court of the territory where the child is in order to regulate ad interim its custody".[1]

In other words, the three alternative conditions to be met before the Scottish courts assume jurisdiction in custody, are first, the child's domicile in Scotland; second, apprehension of immediate danger to the child; and third, in order to enforce an order of a foreign court of competent jurisdiction. The second of the two exceptions mentioned by Lord Alness L.J-C. is important and must be properly emphasised. It is a valuable qualification to the pre-eminence of the domiciliary jurisdiction. The Scottish courts will exercise jurisdiction to appoint a temporary guardian where it is necessary to do so if the child is found in Scotland. In Babington v. Babington, Lord Sorn said,[2] obiter dictum: "I am not prepared to say that circumstances could never arise under which it might not be desirable for the Court of the domicile to hold its hand, and to allow custody to be regulated, in the meantime, by the Court of the country where the child is residing, in the exercise by that Court of the protective jurisdiction which presence within its territory confers." And only last year (1974) Lord Dunpark said emphatically that "It has ... never been a rule of (Scots)

---

1. Ibid at 190.
2. 1955 S.C. 115, at 124.

law that the courts of the country in which the father is domiciled have exclusive jurisdiction in matters affecting the welfare of a child".[1] Besides the special case of alleviating the hardship caused to a wife, circumstances which might justify deviation from the domiciliary rule of jurisdiction would include situations of extreme danger to the child, e.g. neglect, battering, acts of cruelty etc. Such situations were not found to exist in the cases of Ponder, Oludimu and McShane v. McShane.[2] But should they arise, it would be the duty of the courts under their nobile officium or parens patriae doctrine to act in the best interests of any child within the jurisdiction irrespective of formal rules of jurisdiction.

(b) Recent Trends in the United Kingdom

Developments in the rules of jurisdiction in guardianship have taken a new turn with the enacting of the Domicile and Matrimonial Proceedings Act, 1973, which came into force on January 1, 1974. The Act introduces significant changes in the law of domicile which have repercussions for rules of jurisdiction in guardianship-custody. Our aim here is not to review in extenso the law pertaining to the child's domicile,[3] but to examine the effect on custody jurisdiction brought about by the changes in the law of domicile.

---

1. Kelly v. Marks 1974 S.L.T. 118 at 122.
2. 1962 S.L.T. 221.
3. For which, in addition to discussions in standards texts, see Clive, "The Domicile of Minors" (1966) Jur. Rev. 1; Spiro, "The Domicile of Minors without parents" (1956) 5 I.C.L.Q. 196.

We must begin by first observing generally that the 1973 Act[1] in spite of its salutary provisions removing the dependent domicile of the wife[2] as espoused in such cases as Lord Advocate v. Joffrey[3] has nevertheless preserved the pre-eminence of the father's domicile in the sense that the domicile of a legitimate child continues to follow that of the father where the parents maintain a joint matrimonial home. But there is a major innovation under section 4 of the Act. Subsection (1) of section 4 provides that "at any time after the coming into force of this section when his father and mother are alive but living apart" the domicile of the child shall be that of his mother if -

> "(2)-(a) he then has his home with her and has no home with his father; or
> (b) he has at any time had her domicile by virtue of paragraph (a) above and has not since had a home with his father."

This new rule has abolished the much criticised rule in Shanks v. Shanks[4] and it proceeds, instead, along the more enlightened lines indicated by the Irish case of Hope v. Hope.[5] In addition, the Act provides[6] for England that a child has

---

1. For a short commentary on the Act, see Hartley and Karsten (1974) 37 M.L.R. 179.
2. Section 1(a)
3. 1921 A.C. 146; MacKinnon's Trustees v. Inland Revenue 1920 S.L.T. 240.
4. 1965 S.L.T. 330 (after divorce or separation, child's domicile follows father's, even if mother awarded custody).
5. (1968) N.Ir.L.R.1.(after divorce, child's domicile follows that of mother if she has custody).
6. Section 3(1).

capacity to acquire an independent domicile of choice when he attains the age of sixteen or marries under that age. In Scotland, of course, a minor always had capaicty to acquire an independent domicile at the ages of 12 (girls) and 14 (boys).[1]

As far as the jurisdictional rules are concerned, under the previous law as we have seen, jurisdiction depended on domicile, residence, presence or nationality. The relevant domicile was usually that of the father. The domicile of the child himself was often disregarded. The above cited provisions of the Domicile and Matrimonial Proceedings Act, 1973, now imply the following in terms of the rules of jurisdiction.

1. Custody in matrimonial proceedings

(a) If the court has jurisdiction in a matrimonial cause, it will also automatically possess the jurisdictional powers to make orders relating to custody, guardianship and education of children of the family.

It will be recalled that in Scots law there were two conflicting approaches to questions of jurisdiction to make custody orders. One approach suggested that section 9 of the Conjugal Rights (Scotland) (Amendment) Act, 1861, as extended by the Matrimonial Proceedings (Children) Act, 1958, in conferring powers on the Court to make orders of custody necessarily implies

---

1. Dr. Clive has criticised these ages as too low, and would prefer the new (English) age of 16. See his "Changes in the Law of Domicile" 1973 S.L.T. (News) 241 at 244.

that the court would have jurisdiction to make ancillary custody orders whenever it had jurisdiction in the principal action. A rule to this effect seems to apply in England.[1] The defect of this approach, as Professor Anton points out, is that "it does ... mean that the court may be regulating the custody of a child who may be neither domiciled nor resident in the territory of the court."[2] The other approach states that section 9 of the 1861 Act does not confer implied jurisdiction to make ancillary orders of custody. This was the holding in McShane v. McShane[3] where the court stated that custody jurisdiction depends on the normal criteria of the child's domicile or his residence coupled with the risk of danger to him and was propounded in Ponder v. Ponder.[4] The Scottish Law Commission questioned "whether this approach is appropriate",[5] thus implying a preference for the first approach. Contrary to Professor Anton's doubts, the 1973 Domicile and Matrimonial Proceedings Act has now enacted into law the principle that jurisdiction in the divorce etc action will confer jurisdiction either to make, vary or recall ancillary custody orders.[6] The Act, therefore, has brought about a "welcome clarification"[7] of the law of custody jurisdiction.

---

1. See Dicey and Morris, Conflict of Laws p. 303 8th ed; Harben v. Harben (1957) 1 W.L.R. 261 at 264; Re P (G.E.) (An Infant) 1965 Ch. 568.
2. Private International Law, p. 375.
3. 1962 S.L.T. 221; See also Jelfs v. Jelfs 1939 S.L.T. 286 at 290
4. 1932 S.C. 233.
5. Scot Law Com. No. 25 para 125 p. 48.
6. See section 10 and Schedule 2.
7. Clive, (1973) S.L.T. (News) 249 at 250.

(b) Also, the new provisions mean that whereas Scots law, for example, hitherto proceeded on the basis of domicile as the paramount jurisdictional criterion in custody, after January 1, 1974, this domicile will no longer be the father's by viture of the doctrine of unity of domicile. Scots courts would now be able to proceed on the basis of either the wife's or the husband's domicile in Scotland at the date of commencement of proceedings, whether or not the spouses are living apart or together. Thus, where the parties are domiciled in different states or countries, each of these states would have jurisdiction based on domicile. But such concurrent jurisdiction would most likely increase the incidence of conflicting decrees. The new legislation has partly remedied this by providing for a separate dependent domicile of the child based on the "home" concept.

2. Independent custody suits.

In independent custody actions not connected with matrimonial disputes, the courts would be able to proceed on the basis of the acquired domicile of choice of the child, or the dependent domicile of the child based on the new concept of "home". In either case, this concept of dependent domicile, unlike the position under the previous law, now proceeds on a theory of jurisdiction based on close and real connection of the child with the territory where the court sits. Clearly the courts of the child's "home" would be the best to assume jurisdiction to determine matters connected with its custody

and welfare, since these courts would have access to relevant evidence and other material circumstances. This is bound to have some effect on the residence and mere presence rules of jurisdiction as represented by the statement that "The Crown protects every child who has his home here and will protect him in respect of his home".[1] Equally, with the current departure from the child's dependent domicile of the father, the rule of domicile as the primary basis of custody jurisdiction in Scots law will become increasingly dispensable as inquiry will be directed more to the child's home than to his domicile.

However, in spite of these possible developments in the rules of jurisdiction affecting custody, certain problems remain. In the first place, the basic rule that the dependent domicile of a child follows that of the father where the parents have a joint home can be criticised. It has been suggested[2] that the dependent domicile of the child should follow the mother's domicile, a main reason being that this does not involve discrimination between a legitimate and an illegitimate child, as is still the case under the 1973 Act. Again, under the present law, a child below sixteen (in England) and a pupil (in Scotland) cannot acquire an independent domicile.

---

1. In Re P (G.E.)(An Infant) 1965 Ch. 568 at 584.
2. Clive, "Domicile and Guardianship of Children" 1973, S.L.T. (News) 84 at 86. Some more general problems with the 1973 Act have been examined by A.L. Polak, "The Domicile and Matrimonial Proceedings Act 1973" (1973) 3 Family Law 193-196.

Were the law otherwise it would mean, for purposes of jurisdiction, establishing a direct connecting factor between the child and the territory, rather than establishing the (child's) connecting factor through another person - its father or mother. Acquisition of an independent domicile for a small child is certainly far from realistic since he lacks the requisite intention. In defence of the proposition, however, it would be best to quote the words of a main advocate of this "simpler solution" which is

> "to allow all children, of whatever age, to acquire an independent domicile. Even allowing for the difficulties inherent in the formation of intent (and possibly this could be solved by relegating its significance to a lower level than that which it occupies in the ordinary domicile case) this solution could have provided a way of taking all the relevant factors, including family upheaval, into account without the peril of unreality which may prove to be attendant upon the present rules".[1]

The second major difficulty with the provisions in the new Act is likely to centre round the vague term "home" which, incidentally, revives original notions of domicile which traditionally was defined, in the words of Lord Cranworth, as "home, the permanent home, and if you do not understand your permanent home I'm afraid that no illustrations drawn from foreign writers will very much help you to it".[2] As Professor

---

1. N. Palmer, "Domicile and Matrimonial Proceedings Act - II" (1973) New L.J. 960 at 961. The learned author further develops and clarifies his thesis in "The Domicile of an Infant - Some Comments upon the 1973 Act" (1974) Family Law 35 at 38.
2. Whicker v. Hume (1858) 7 H.L. Cas 124 at 160. In a highly mobile and commercialised world, it may not be all that easy to "understand""home, the permanent home".

Anton points out,[1] "it is not possible to define domicile simply in terms of home".

The very notion of a child having a "home" with its mother at birth raises nice problems. The domicile of origin of a child is the domicile assigned by law to him at birth, and "is it realistic to say at that split-second of time that the infant 'then has his home' with his mother?"[2] Again, take the case of a child who is kidnapped by the mother from the father, say from Scotland to England. Does the child have his home with the mother after the first week? Perhaps he does; "but it could hardly be said that he had no home with his father. A person's home does not cease to be his home merely because he leaves it involuntarily."[3] Furthermore, by providing that the child's dependent domicile follows that of his mother, the new Act has created "the intriguing possibility"[4] that a child may acquire concurrently a domicile of origin from its father and a different domicile of dependency from its mother. Clearly, to have two operative domiciles at any particular time "would be contrary to all principle."[5] And of course the Act does not state what would be the child's dependent domicile where it has a "home" not with either parent, but with a third party, such as an aunt.

---

1. Private International Law p. 161.
2. N. Palmer "The Domicile of An Infant - Some Comments upon the 1973 Act" (1974) Family Law 35 at 36.
3. E.M. Clive, "Changes in the Law of Domicile" 1973 S.L.T. (News) 241 at 244. Cf. Re P (G.E.)(An Infant) (1965) Ch. 568 at 586.
4. Clive ibid, at 245.
5. Ibid.

In the third place, even if these difficulties with the "home" concept were to be overcome, that would not be the end of the quagmire. The "home" rule applies, as the statute says, only if the parents are "living apart". As Norman Palmer has shown,[1] this "elastic and colourless phrase" covers a multitude of situations for which it presumably was not intended. For example, situations involving "living apart" may arise involuntarily (as where a man is hospitalised or imprisoned abroad) or it may be the result of voluntary separation (such as being abroad on business postings). At first glance the "colourless phrase" seems to cover both situations. It was suggested by a commentator[2] that "the courts will read the words 'with intention to do so indefinitely' into the expression 'living apart'." This requirement of intention or mental element had in fact been approved by the English Court of Appeal in Santos v. Santos[3] which is a leading authority on the meaning of 'living apart' as used in statutes concerned with matrimonial affairs. In that case a wife's petition for divorce from her Spanish husband under the Divorce Reform Act 1969, s.2(1)(d) was unsuccessful in the lower court which took the view that the parties were not living apart in the circumstances presented. But the Court of Appeal reversed that decision. After a review of Australian, New Zealand and Canadain statutes in which the

---

1. N.E. Palmer (1974) Family Law, 35 at 38.
2. Ibid.
3. 1972 FAM 247 C.A.

phrase "living apart" (or its equivalent) was used, Sachs L.J. said that the stream of Commonwealth authorities "ran uniformly and clearly in favour of mere physical separation not constituting 'living apart'."[1] "Therefore", the Court concluded, that phrase as used in section 2(1) of the Divorce Reform Act, 1969 "is a state of affairs to establish which it is in the vast generality of cases arising under (the statute) necessary to prove something more than that the husband and wife are physically separated."[2] It seems that short of legislative clarification "having a home" and "living apart" may well be expected to trouble the courts in the times ahead.

(c) Domicile and Residence as bases of guardianship jurisdiction: A critical examination.

The domiciliary rule of jurisdiction in Scots law is rooted, as we pointed out earlier, in the theory that orders affecting custody, care and control of children relate to matters of status. And from this it is said that jurisdiction to determine matters of status depends upon the domicile of the person whose status is in controversy. In this regard an analogy is drawn between custody and such matters as marriage, legitimacy, legitimation and adoption - in which matters the state has evident social interest. We question whether this status approach is an

---

1. Ibid at 257.
2. Ibid at 263.

appropriate one. The legal consequences attaching to status matters as marriage, adoption, legitimacy are different from the legal regime of custody. As Professor Stansbury says: "A child whose custody is awarded to his mother is still his father's child; the father is still under a duty of support, and the child's right of inheritance is in no way altered. The relationship between custodier and child is in its essence a physical rather than a legal one; it is temporary in its nature, and about the only attribute of status which it possesses is the parties' lack of power to terminate it at their will".[1] And as the learned author added,[2] "There is no principle of natural law, or constitutional law, that inexorably connects 'domicil' with 'status' or separates it from things that are not status".

It was also noted earlier that domicile is not an appropriate criterion of jurisdiction in view of the divergence between law and factual situations of a child; and we observed that the new independent domicile of the wife and the concept of the child's "home" is bound to effect changes in the results traditionally associated with invoking the father's domicile. We may add a few more comments to bring into sharper relief some further defects in the domicile concept. It is a well-recognised practice that custody orders may be split between

---

1. D.F. Stansbury, "Custody and Maintenance Law Across State Lines" (1943-44) Law and Contemp. Prob. 819 at 820.
2. Ibid, at 820-821.

father and mother. Now, if the custody is awarded to the parents alternatively for equal periods of the year, does domicile shift back and forth with each change in custody? And is each shift in domicile governed by the calendar or by the change in custody in fact? If it be right to say that the child's domicile shifts back and forwards, then this solution is "strangely inconsistent with the fundamental idea of domicile as a permanent home".[1] Or take the case of the "joint", as distinct from "split" custody orders. Where is the infant's domicile when the joint custodians live in different states? It does not appear that the concept of the child's "home" in the Domicile and Matrimonial Proceedings Act, 1973, will satisfactorily resolve problems of the split of joint custody although the Guardianship Acts may require that split orders be adopted because of the distinction which these statutes[2] have drawn between "legal custody" and "actual custody" (i.e. care and control). All this shows, as Stansbury says, that "domicile is an extremely insecure hook upon which to hand any cloak of jurisdiction".[3]

If jurisdiction in matters considered beneficial to the child, his interest, and welfare is premised on domicile, then one would expect, in consistency, to find the same jurisdictional

---

1. Ibid, at 822.
2. E.g. Guardianship of Infants Act, 1925, s.7(5); Children Bill (1975) Clause $7_4(2)$.
3. Stansbury, op.cit. at 822.

basis invoked where the issue is not the child's welfare within a custody context but, let us say, cruelty to the child, or its neglect, abandonment or abuse. But surely no one would support a view which attributed jurisdiction in such situations to the domicile of a child.

It may be observed further that Scots law which follows domicile as a basis of custody jurisdiction is out of line on this matter with international conventions which tend to favour the tests of ordinary residence or nationality. For example, the Hamburg Draft Convention on the Recognition of Orders on the Custody of Infants[1] provides in Article 1 that "The courts of the country in which the infant is ordinarily resident at the time of the commencement of the proceedings shall have jurisdiction to make an order for the custody of the infant." Apart from this "primary jurisdiction", Article 2(i) goes on to provide for a "subsidiary jurisdiction" in the courts of the country "of which the infant is a national".

It would be inconsistent to retain and operate together the two principles of the welfare of the child and of exclusive or predominant domiciliary jurisdiction. "Technical concepts of jurisdiction based on domicil", writes Professor Stumberg, "seem far removed from problems of child welfare".[2]

---

1. For text, see The American Journal of Comparative Law (1960) Vol. 9, p. 519-521.
2. G.W. Stumberg, "The Status of Children in the Conflict of Laws" (1940-41) 8 U.Chi.L. Rev. 42 at 62.

The high-water mark of the rule that to domicile belongs the pre-eminent jurisdiction in custody came, as we saw, in Ponder v. Ponder[1] and in Radoyevitch v. Radoyevitch.[2] But since these early 1930s cases, time and the conflict of laws have marched on. In the words of Lord Dunpark:[3]

> "The rules of private international law have evolved since 1932. The Court of Session now exercises jurisdiction in consistorial and custodial questions on grounds other than that of the husband's domicile in Scotland, and a decree of custody pronounced by a foreign court of the husband's domicile has lost some of its former sanctity."

We shall now turn to the alternative test of residence. Professor Graveson has written that "the domicile of a minor child has no necessary connection with his residence, and the courts of the place where a child resides are in the best position to care for his welfare."[4] No one would dispute the manifest good sense in conceding that a state where a child has resided for a substantial period of time has such a tangible interest in the child's welfare that it should not feel constrained to defer the question of the custody to the foreign domiciliary state where the child may have lived only briefly or not at all. But is residence as an alternative basis of jurisdiction an improvement on domicile? Is it a satisfactory alternative?

---

1. 1932 S.C. 233; 1932 S.L.T. 187.
2. 1930 S.C. 619; 1930 S.L.T. 404.
3. Kelly v. Marks 1974 S.L.T. 118 at 123.
4. Graveson "Boardman v. Boardman Through English Eyes" 23 Conn. Bar Journal 173 at 178.

The concept of "residence", with or without qualifying adjectives, is one of many meanings[1] and merits closer examination. In legislative provisions within the same field of family law, one form of "residence" or another variant of it has been employed. But what do these terms mean? Does "ordinary residence" mean something more or less than residence simpliciter? Is "habitual" residence different from "ordinary" residence? What, in any case, is the requisite length and quality that attaches to residence? What is the place of intention in the criterion of ordinary or habitual residence?

These questions are not simply of theoretical importance; they have practical significance as far as Nigerian law is concerned. In the Nigerian case of Aderawo Timber Trading Co. Ltd. v. Federal Board of Inland Revenue,[2] it was held by the High Court of Lagos that where terms which are used in Nigerian enactments are similar to those employed in English statutes, and are used in the same context and with the same connotation, the decisions of the English courts interpreting those terms may be resorted to in construing the like terms in Nigerian statutes when the latter do not themselves provide some definition. And of course many terms may not have been

---

1. Professors Reese and Green have not concealed their dislike for the term residence. "Domicile has a reasonably constant meaning. Residence, on the other hand, is one of the most variable words in the legal dictionary". See "That Elusive Word 'Residence'" (1953) 6 Vand 1. Rev. 561. And at p. 580 residence is said to be "one of the most nebulous terms in the legal dictionary."
2. (1966) 2 All N.L.R. 449.

judicially construed in England itself, in which case the English courts resort to aid from dictionaries. Thus, Harman J. in In Re Adoption Application 52/1951[1] resorted to the Shorter Oxford Dictionary for the meaning of the expression "to reside". This practice has been adopted by the Nigerian courts. For example, the Supreme Court of Nigeria in the case of Ashekoya v. Olawunmi[2] which involved prosecution for illegal installation as a chief under the Chiefs Law[3] of Western Nigeria in which law the word "purports" was used, the Court explicitly sanctioned resort to literal sources as an aid to interpretation. In the words of the Chief Justice, one does not expect to see in legislation a word which is not in recognised use, and he approved of the propriety of consulting "the Shorter Oxford Dictionary which is a standard dictionary".[4] And in Onwuka v. Taymani,[5] Alexander J. in the Lagos High Court, construing the term "resident" in the Exchange Control Act (No. 16 of 1962), defined "residence" as equivalent to "ordinary residence". The learned judge referred to Stroud's Judicial Dictionary and said:

> "the word 'resident' and cognate expressions admit of a variety of meanings depending on the intent and scope of the particular enactment in which the word occurs."[6]

---

1. 1952 Ch. 16 at 22.
2. (1962) All N.L.R. 125.
3. No. 20 of 1957 section 17(1).
4. Ibid, at 128.
5. (1965) L.L.R. 62.
6. Ibid, at 75.

We have referred to these Nigerian authorities to show that in Nigeria, just as in the United Kingdom, in interpreting these terms in the custody or matrimonial field the courts do not hesitate in turning to non-matrimonial fields where the terms have become "familiar to the courts".[1] Nigerian courts should not, therefore, be oblivious to what the United Kingdom courts are doing since the former might be called upon to supply the lead in situations involving the interpretation of residence in custody law.

"Ordinary residence" is the term suggested in 1959 by the Hodson Committee.[2] Although the Committee in its Report did not define the term, it has been said that "ordinary residence"

> "connotes residence in a place with some degree of continuity and apart from accidental or temporary absences."[3]

Again of this term it was also said that "If it has any definite meaning I should say it means according to the way in which a man's life is usually ordered."[4]

The 1973 Domicile and Matrimonial Proceedings Act has adopted a different test: it is the test of "habitual residence" as a basis of jurisdiction in divorce[5] etc and ancillary[6] suits.

---

1. Report of the Committee on Conflicts of Jurisdiction Affecting Children (1959) CMND 842 para 46 p. 11.
2. Ibid p. 11.
3. Levene v. I.R.C. 1928 A.C. 217 at 225 per Lord Cave.
4. Ibid at 232 per Lord Warrington of Clyffe.
5. See sections 5(2)(b) (England) and 7(2)(b) (Scotland).
6. See S. 10 (1) and Schedule 2 (Scotland).

But what does "habitual residence" mean? Is its meaning controlled by the recognised meanings of "residence" and "ordinary residence"? According to Dr. J.H.C. Morris,[1] there is as yet no English authority on what the term habitual residence means. In the House of Lords case of Indyka v. Indyka,[2] Lord Reid pointed out that older jurists tended to use "habitual residence" in the sense of domicile. But no one would today ascribe such a meaning to habitual residence, since the element of intention in domicile is now generally regarded as an obstacle to clarification of thought in this field. Habitual residence is used in The Hague Convention on the Recognition of Divorces and Legal Separations, as well as in a number of United Kingdom statutes.[3] The term was recommended for inclusion in the 1973 Domicile and Matrimonial Proceedings Act since it would "facilitate the recognition of United Kingdom (judicial decrees) in other countries".[4] The Scottish Law Commission was of the opinion that the quality of "residence" in habitual residence should indicate "some stability and duration of ties with the place of residence."[5] But this

---

1. The Conflict of Laws, p. 36; also Dicey-Morris, op. cit. p. 88. But see Cruse v. Chittum, The Times, March 15th 1974 p.10
2. (1969) 1 A C. 33 at 61.
3. E.g. Administration of Justice Act 1956 (c.46) s.4; The Wills Act 1963 (c.44) s.1; The Adoption Act 1958 (c.53) s.11; and the Recognition of Divorces and Legal Separations Act 1971 (c.53) s.3.
4. Scot. Law Com. No. 25 para 72, p. 29.
5. Ibid para 71. p. 28. Mrs. Justice Lane in Cruse v. Chittum (above note 1) defined "habitual residence" as used in S.3(1) of the 1971 Recognition of Divorces and Legal Separations Act as denoting "a regular physical presence enduring for sometime." It differed from ordinary residence because it "was similar to the residence required as part of domicile, but there was no need of animus, so necessary in domicile."

qualitative element becomes meaningless[1] when it is transferred to a statutory rule of jurisdiction that a child or party must be "habitually resident in Scotland (or England or Nigeria) throughout the period of one year ..." as sections 5(2)(b) and 7(2)(b) of the Domicile and Matrimonial Proceedings Act have enacted. At the end of the day whether a person is habitually resident within the jurisdiction will be a question of fact. Three months may be enough in some cases; whilst in other situations a longer period may be insisted upon.

To turn specifically to custody jurisdiction it has been stated by Lord Denning M.R.[2] that a child of tender years "who cannot decide for himself where to live" is ordinarily resident in his parents' matrimonial home "even while he is away at boarding school" which may "be in another country".[3] If these opinions are right, then it is clear that "in common speech at least, a child may have more than one ordinary residence at one time."[4] The Court of Appeal added that the child's ordinary residence cannot be altered by one parent without the consent of the other. But where the parents are living separate and apart and the child is, by agreement between them, residing with one of them, then he is ordinarily resident in the home of that one even though the other parent and the child have regular

---

1. See E.M. Clive "The New Law on Jurisdiction in Divorce" 1973 S.L.T. (News) 249.
2. In Re P (G.E.)(An Infant) (1965) Ch. 568 at 585. This follows the like opinion in Miesegaes v. C.I.R. (1957) 37 T.C. 493 per Pearce L.J.
3. Dicey-Morris, Conflict of Laws p. 89 n. 89.
4. "H.M." (Contributor), "Legal Kidnapping" (1959) LXXV Scottish L. Rev. 165 at 168.

access and visitation to each other. That ordinary residence cannot be changed simply because the other party kidnaps the child from that home.[1]

The upshot of the foregoing discussion, then, is that residence, ordinary residence, or habitual residence are not free from difficulties. In practical terms the advantages of ordinary or habitual residence over domicile are not overwhelming. If the preference of "habitual residence" be that it is the place with a real and substantial connection with the child, then the concept of domicile would also have an equal claim as basis of jurisdiction. For domicile is a concept which has traditionally and basically been associated with the country with which a person has very close personal connections in matters of domestic law. Mere substitution of residence for domicile as a test of custody jurisdiction is not a cure-all for conflicts problems.

It will be noticed that in this appraisal we have focused on domicile and residence to the exclusion of nationality and mere presence as basis of jurisdiction. Our submission is that these latter should have no locus standi, or at best should have only exceptional utility in the jurisdictional calculations. The nationality test is at times favoured in international conventions on conflict of laws. But it would have no place

---

1. (1965) Ch. 568 at 585-86.

in the ("interlocal") private international law of the United Kingdom or of Nigeria which is our main interest. The standing of mere presence as a basis of custody jurisdiction is the weakest of all. As the Hodson Committee rightly points out in its Report, most people would agree that

> "as a test of jurisdiction the mere physical presence of a child within the jurisdiction of the court at the time of the application would serve to aggravate the situation that already exists, whereby possible advantages may be obtained by one or other of the parents moving the child from one country to another."[1]

Notwithstanding assertions of parens patriae, the courts, in an international or interstate custody case should not assume jurisdiction where a real and substantial connection between the child and the law district is lacking - with an exception for emergency situations. The courts must not be used as Latey said, "for the convenience of birds of passage."[2]

Without any attempt to anticipate the Law Commissions' findings, it would seem likely that future legislation dealing with jurisdiction in custody will lean towards a fusion of the disparate bases of jurisdiction in favour, simply, of the convenient forum. The child's interests and welfare are so important that technical concepts of jurisdiction based on residence, domicile, nationality or presence should be made to yield to the convenient forum because the former might be

---

1. Cmnd. 842 para 45 p. 11.
2. Arnold v. Arnold (1957) P. 237 at 253.

found, as Stumberg says, to be "far removed from problems of child welfare".[1]

To summarise, there are two possible attitudes one might adopt towards the problem of jurisdiction in guardianship-custody. Either to say rules of jurisdiction are not relevant at all because the child's welfare and the state's duties as parens patriae should not depend on the niceties of jurisdiction, or to say that rules of jurisdiction are essential. Professor Nygh best expresses the first of these positions. "Indeed, it might be asked", he writes,"whether in light of the statutory injunction that courts exercising jurisdiction concerning the custody and upbringing of a child 'shall regard the welfare of the child as the first and paramount consideration', the courts should pay regard to any formal rules of jurisdiction at all. This would mean that the court should only inquire whether the child needs its protection and whether its orders have a reasonable chance of being effective".[2] But if the second attitude is adopted (as is overwhelmingly the case at the moment and which we support), then we ought to have rules of jurisdiction which will serve the objectives of child custody law. Therefore we would submit the following rules of jurisdiction for the purposes of custody:

---

1. (1940-41) 8 U.Chi.L.Rev. 42 at 62.
2. P.E. Nygh The Conflict of Laws in Australia, p.585

(a) Jurisdiction should vest in the courts of the place which has substantial ties or connections with the child (and the disputants) since such courts are best able to say what physical, mental, psychological, spiritual and material facilities exist to promote the child's welfare. Viewed under this test, the following short propositions emerge -

(i) domicile need not and does not offer itself as an attractive or viable rule of custody jurisdiction;

(ii) mere fleeting presence within the jurisdiction would equally be inadequate, since it would encourage the evil of child kidnapping and consequential forum shopping;

(iii) ordinary or habitual residence within the jurisdiction would seem to offer a viable alternative since any settled residence in a given place for a given period of time satisfies any reasonable test of real and substantial connection with the jurisdiction. It avoids the intractable problem of intention which is such a bane of domicile.

(b) Rules of jurisdiction should be reasonably certain and should command acceptance in both interstate and international custody situations. The rules for ascertaining the domicile of a person (or a child) are difficult and unrealistic, especially because of the prominent place of intention in those rules. Of intention it has been said that "there is perhaps no chapter of law that has, from such extensive discussion, received less satisfactory settlement".[1]

---

1. Bell v. Kennedy (1868) 6 M.(H.L.) 69 at 79 per Lord Colonsay.

In other words, proof of domicile is fraught with too much uncertainty, especially where the child's domicile of origin (which follows the parents') is involved. Ordinary residence avoids most of these pit falls and it would seem to strike an acceptable mean between the domiciliary and the nationality schools of connecting factor in private international law.

But it seems there would still remain some scope for the criterion of domicile. As Willmer J. remarked,[1] "there are of course nomadic people who have no ordinary residence anywhere". So that in the present unsettled state of the law of "residence", the retention of the criterion of domicile is not wholly superfluous. Firstly because difficulties may arise where a person has more than one place of habitual or ordinary residence. And as we have seen, a person may not possess a habitual residence anywhere at all. As Lord Reid has said with reference to those whose fate or choice it is to "remain nomads": "Every one must have a domicile but not everyone has a real home. In such cases we would have to fall back on domicile".[2] In addition, ordinary (or habitual) residence is so fluid that it can, as has been pointed out, be changed in a day,[3] although we would admit that this is a characteristic of domicile as well. Secondly, once

---

1. Lewis v. Lewis (1956) 1 W.L.R. 200.
2. Indyka v. Indyka (1967) 3 W.L.R. 511 at 526.; (1969) 1 A.C.33 at
3. Macrae v. Macrae (1949) P. 397 at 403.

it is accepted that nationality is an inappropriate criterion, domicile is, in the present state of Scots law,"the only jurisdictional criterion available to Scottish expatriates".[1]

(II) Jurisdiction in matters of guardianship of the child's property

The rules of jurisdiction that we have considered so far pertain to guardianship and custody of the person of the child. Our concern in this section is with jurisdictional rules relating to guardianship of the property of the child. The proprietary aspects of guardianship in private international law have been much neglected from the standpoint of remedial legislation, judicial pronouncements or treatment in legal literature.[2]

It will be recalled that in relation to the administration of any property belonging to or held on trust for an infant or the application of the incomes of any such property, two rules are now to prevail:

(a) that the child's welfare shall be regarded always as the first and paramount consideration;[3] and

(b) that "the mother shall have the same rights and authority as the law allows to a father and the rights and authority of mother and father shall be equal and be exercisable by either

---

1. Scot. Law Com. No. 25 para 51 at p.21.
2. Useful discussions of property aspects of guardianship are contained in T.B. Smith, A Short Commentary on the Law of Scotland, pp. 380 et seq; E.M. Clive, "The Guardianship Act 1973" 1973 S.L.T. (News) 225. See also, Gloag and Henderson, Introduction to the Law of Scotland (6th ed.) pp. 622-633.
3. S.1 Guardianship of Infants Act, 1925; S.24 Infants Law, Western Nigeria, 1959; S.1 Guardianship of Minors Act 1971 (England).

without the other."[1] For Scots law this means that the mother has been given the right to hold the office of tutor to a pupil or, as the case may be, curator to a minor.

Notwithstanding this statutory scheme which clearly demarcates guardianship of the person from guardianship of property, these two forms of guardianship are sometimes confused in discussions upon the subject. We have seen, earlier on, that Scots law, unlike English law, recognises two institutions of guardianship: that of a tutor who is guardian of a pupil child, and a curator who is the guardian of a minor. The former acts for the pupil in the administration of property while the latter acts with the minor. Both a tutor and a curator are persons in a fiduciary position and must not use their office or position to advance their own private interests.

A child may acquire or have interest in property e.g. through a donor who leaves an estate to a pupil by will, or through being involved in litigation. In these situations, the need to appoint a guardian, tutor or curator who is not a parent might arise. Yet it is not clear what would be the answer to the question, On what basis is jurisdiction exercised to appoint a guardian or curator[2] for a child? Scots law which otherwise is tidier than English law in its distinction of guardianship from

---

1. Guardianship Act 1973, s.1 (England) and s.10 (Scotland)
2. We have used the term "curator" in a broad sense to cover any guardian of the property of an incapax, including tutors, factors loco tutoris, curator bonis, and foreign guardians of such property. See Anton, op. cit. Private International Law p. 380 n. 65.

custody and in its distinction of guardianship of the person and guardianship of property furnishes no clear picture on jurisdictional questions relating to the appointment of curators where the child's property is situated either in Scotland or abroad. According to Professor Anton,[1] "No Scottish case has been traced in which the grounds of jurisdiction to appoint curators are comprehensively examined." As the learned author stated further, many Scottish cases express no opinions at all on the subject whilst in others it is not easy to say whether a particular decision was based upon general principles or upon the particular facts of the case. In Scots law, however, it is thought that jurisdiction to appoint curators is based upon the domicile of the incapax.[2] Hence, a foreign appointment of curator does not remove jurisdiction of the Scottish courts in respect of a person domiciled in Scotland,[3] and likewise the jurisdiction generally will not be exercised by the Scottish courts in respect of an incapax of foreign domicile. Jurisdiction may also be grounded on the location of heritage in Scotland since the Scottish courts do not concede to a foreign curator any powers in relation to heritage in Scotland.[4] Furthermore, proprietary jurisdiction may be founded on ownership of movables in Scotland by the incapax coupled with the

---

1. Private International Law, p. 380.
2. Reid v. Reid (1887) 24 S.L.R. 281.
3. Earl of Buchan v. Harvey (1839) 2 D. 275.
4. Ogilvy v. Ogilvy's Trustees 1927 S.L.T. 83.

physical presence of the incapax in Scotland and the urgency of the situation.[1] These are just tentative guidelines for, as Anton says,[2] "no tidy general rule ... is likely to be established and the cases suggest that such rules as have been evolved should be stated as directing principles rather than as hard and fast rules."

English judicial decisions have not adverted to the basis of jurisdiction to appoint guardians of property. Even as regards the authority of a foreign guardian over movables in England, "The decisions of English courts provide little authority".[3] And concerning immovables, Dicey and Morris again write that "no English authority can be cited, and the literature provides little guidance."[4]

Finally, it is generally believed that a person residing outside Scotland may not be appointed a curator because, as a Scottish judge puts it, "No tutory should be conferred upon a person who is not amenable to the jurisdiction of the court".[5] But when the curators reside in England a more neighbourly attitude generally prevails and such curators may be appointed upon fulfilling certain conditions.[6]

---

1. Anton, Private International Law, p. 381.
2. Ibid, at 380.
3. Dicey and Morris, The Conflict of Laws p. 382.
4. Ibid p. 383.
5. Craven v. Elibanks Trustees (1853) 15 D. 781 per L.J.-C. Hope
6. See Anton, Private International Law p. 381.

Whatever may be the appropriate basis for assuming jurisdiction to appoint guardians of property, "The benefit of the infant, which is the foundation of the jurisdiction, must be the test of its right exercise."[1] It is to be hoped that the defects and uncertainties in the jurisdictional rules relating to property guardianship will, before too long, be made good by the English and Scottish Law Commissions which are at the moment reviewing the whole law on minors and pupils.

E. Special Kinds of Jurisdiction

1. Kidnapping cases

Special jurisdictional considerations apply to the phenomenon of kidnapping. If the children have been brought by one parent within the territorial jurisdiction of the courts by stealth against the wishes of the other parent who has rights of custody or access or in contempt of the order of a foreign court that the children are not to be removed out of the jurisdiction of the foreign court, the question often turns on whether to assume jurisdiction and hear the case afresh, or to send the children back summarily. Dicey and Morris state that[2] "it will be unusual for the court to assume jurisdiction." This is understandable. Custody jurisdiction is an equitable jurisdiction. So courts frown at the kidnapper because equity does not

---

1. Johnstone v. Beattie (1843) 10 Cl. & Fin. 42 at 122, per Lord Campbell.
2. Conflict of Laws, at p. 388.

countenance that the parent who breaks up the home and/or who abducts the child should benefit from his or her wrongdoing. For it is manifestly inconvenient and unjust for the impecunious parent to be made to roam the world until he or she "caught up", so to speak, with the kidnapper and child. Sachs J. sums up the position in these words:[1]

> "...if the High Court of Justice were asked, contrary to the desires of a mother, to make an order on the application of a father who had by false means or fraud brought but a short time previously into this country children, and it then appeared that neither they nor the parents nor grandparents had before that display of false means or fraud lived here, and that proceedings had already been recently instituted in the country where the court would more aptly assume the function of parens patriae, it is my view that this court would be more than chary of acceding to such an application."

It is not very clear what is the purpose of extending the residence rule to grandparents. However, Mr. Justice Cross[2] (as he then was) has given us the factors to be weighed in such a case. A paramount consideration here seems to be that self-help, or the rule of seize-and-run should not be encouraged especially when the child's home abroad is intact and there is no risk of harm to him on return to the foreign jurisdiction. Lord Justice Pearson (as he then was) had no doubt that jurisdiction exists in kidnapping cases: "justice and convenience require it. It would be absurd and unjust if the wronged parents or parent were prevented from relief in the English court by the wrongful act of 'kidnapping'."[3] A most useful note has been

---

1. Harben v. Harben (1957) 1 W.L.R. 261 at 266.
2. In re H (Infants) 1966 1 W.L.R. 381 at 393.
3. Re P (G.E.)(An Infant) (1965) Ch. 568 at 588-589.

struck by the statement that[1]

> "In such cases all that is required of the court is to assume jurisdiction to determine whether to send the children back to the jurisdiction whence they came[2] without necessarily going into the last dregs of the dispute between the parents and without more than such investigation as satisfies the court that the children will come to no harm."[3]

Perhaps the gravest issue raised by kidnapping cases pertains to recognition of foreign custody orders. And this we shall discuss at the appropriate juncture in chapter 7.

2. Time factor and Jurisdiction to modify custody decree

Custody awards invariably look to the future in terms of the child's welfare. And one thing which no one can be certain about is the pace of the changing needs of a child. Thus, today's commonly held notions of what the welfare of a child requires may change with improving knowledge of child psychology as well as psychoanalytic theory. The jurisdiction of a court may therefore be invoked in order to modify a prior custody decree because of altered conditions. It may also be desired to modify the court's own earlier order or the decree of a foreign court in which case the exercise of jurisdiction verges on recognition of foreign custody orders.

---

1. Cheshire's Private International Law 9th ed. p. 476.
2. Re P (G.E)(An Infant) (1965) Ch. 568 at 588.
3. Re T (Infants) (1968) Ch. 704 at 716; and see J. v. C. 1970 A.C. 668 at 720.

The necessity to modify a custody decree may arise from two main sources. The first is changed circumstances which may take several forms - fluctuation in material or other conditions of the parents; alterations in the needs of the child as regards guidance, education etc.; and new evidence which may pertain to the unfitness of one party or the other. In the second place, modification may be sought because certain facts which existed were unknown at the time the first decree was rendered but have since become known. The variety of these circumstances supply justification for Harman L.J.'s statement: "I never heard of binding authority in an infant case before".[1]

The jurisdictional question that inevitably must be faced in this connection is: which court can modify the original award of custody to conform with the changed circumstances? Is it the court that first rendered it, or the later court before which modification is sought? This question has been the subject of scant discussion in Anglo-Scottish custody law. The better opinion, at least in the United States,[2] would seem to support the proposition that in order to achieve the much needed stability of custody arrangements and to avoid forum shopping, the jurisdiction to modify should continue to reside with the first court that made the decree so long as that jurisdiction continues to have sufficient contact with the case. In particular, this

---

1. In Re H (Infants) 1966 1 W.L.R. 381 at 402.
2. The American position is discussed more fully at pp 97-107 infra.

rule would be supported where the child was kidnapped out of the jurisdiction of the first court. But if the child was moved from State A to State B but not in violation of the custody award in State A, it is generally held that jurisdiction to modify rests with the courts of State B.[1]

3. Jurisdiction in matrimonial causes

We made brief reference to custody in matrimonial proceedings in our discussion of the recent trends concerning the rules of jurisdiction in the United Kingdom. Our aim here is to consider matrimonial jurisdiction as a special type of jurisdiction in custody.

The basis of jurisdiction which is uniformly recognised in the laws of England, Scotland and Nigeria turns on the second clause to Rule 50 in Dicey-Morris, Conflict of Laws and[2] the analogous section 79(c) of the Restatement (Second) Conflict of Laws. If the courts in the three law districts have matrimonial jurisdiction over the parents whenever the courts are asked to pronounce a decree of divorce etc, they would automatically have jurisdiction in respect of the custody and education of the child[3] who may be the subject of competition between the parents even though the child may be neither a national of, nor present

---

1. See Note, "Jurisdictional Bases of Custody Decrees" (1940) 53 Harv. L. Rev. 1024, 1027-28.
2. These provisions are set out above, at pp. 497 and 502.
3. See Matrimonial Causes Act, 1973, s.42(1) (England); Matrimonial Causes Decree 1970 sections 57(1) and 71 (Nigeria).

nor ordinarily resident within, the law district.[1] It would be recalled that the rule of domicile as a basis of divorce jurisdiction was firmly cemented in the notorious case of Le Mesurier v. Le Mesurier.[2] And in Scots law the rule was carried over into the field of custody law as witnessed by decisions in a string of cases.[3] For a long time this matrimonial jurisdiction was founded almost exclusively on the domicile of the father. But in a recent case a Scottish judge said that he was not prepared to accept the earlier judicial pronouncements which came "at a time when the doctrine of the husband's domicile as governing jurisdiction in all matters of personal status was pure and unsullied, as necessarily applicable to the present time without consideration of the extent to which that doctrine may have been eroded and the effect of such erosion on the jurisdiction of (the) court ...".[4] But even before this case, Scots, English and Nigerian law had worked out exceptions to the main rule in Le Mesurier's case, principally via the Law Reform (Miscellaneous Provisions) Act which, in section 2(1), gave jurisdiction notwithstanding that the husband is not domiciled

---

1. See Dicey-Morris, op. cit. p. 388.
2. 1895 A.C. 517.
3. Barkworth v. Barkworth, 1913 S.C. 759; Westergaard v. Westergaard 1914 S.C. 977; Ponder v. Ponder 1932 S.C. 233; Radoyevitch v. Radoyevitch 1930 S.C. 619.
4. Kelly v. Marks 1974 S.L.T. 118 at 122 per Lord Dunpark.

in England, Scotland or Nigeria.[1] In addition, Scots law evolved the exception of assuming jurisdiction if the husband's domicile was in Scotland at the time of the matrimonial offence.[2] A Scottish judge has summed up the effect on custody jurisdiction of the 1949 Act read in light of other legislation in these words:

> "The effect of that section (2(1)), read along with section 9 of the Conjugal Rights (Scotland) Amendment Act 1861 and s.8 of the Matrimonial Proceedings (Children) Act 1958, is that the Court of Session now has jurisdiction, and indeed an imperative duty, to regulate the custody of children in an action of divorce at the instance of a wife in certain circumstances, although neither the children nor their father is domiciled in Scotland."[3]

And today the Domicile and Matrimonial Proceedings Act, 1973 has further extended the cases in which the court may have jurisdiction in divorce, although the children are not domiciled in Scotland.[4]

Although most cases of divorce are undefended, in a vast number of such cases both parents would be within the jurisdiction of the court. And although appearing to focus on the parents, this special basis of custody jurisdiction is, besides being grounded on the convenient forum, justifiable

---

1. See Adeoye v. Adeoye (1962) N.R.N.L.R. 63 which turned on the applicability in Nigeria of section 18(1)(b) of the English Matrimonial Causes Act, 1950; see also Odunjo v. Odunjo (1964) L.L.R. 43; Arinze v. Arinze (1966) N.M.L.R. 155.
2. Clark v. Clark 1967 S.C. 296.
3. Oludimu v. Oludimu 1967 S.L.T. 105 at 107 per Lord Fraser; see also Battaghia v. Battaghia 1967 S.L.T. 49.
4. Cap. 45, s. 10 and Sch. 2 Part I.

in that "it does not, however, lose sight of the child's own welfare, since a court can better determine which of two parties is more fitted to have control over the child when it has both of them before it."[1]

4. Jurisdiction by consent

The question here is whether the parties to a custody dispute should have power to confer by consent jurisdiction upon a court which is not in the country of the child's ordinary or habitual residence or in the child's domicile or home state. It is doubtful that all courts concerned with custody adjudication would agree with reference to the desirability of jurisdiction by consent. The procedure does have certain advantages and disadvantages. A main advantage would be that by conferring jurisdiction by consent, the parties would be selecting a forum convenient to both of them and this may save time and expense. Professor Ratner has, in addition, argued as follows:[2]

> "A forum selected by one parent and accepted by the other without objection provides a venue convenient to both in which a full adversary proceeding is likely to occur. Since such an adversary proceeding increases the availability of the evidence and the probabilities of a correct decision, the same values that underlie the established home principle support the jurisdiction of such a forum. Consent has long provided a basis for jurisdiction over person in conventional two party litigation; in custody proceedings, too, an effective disposition is likely to result from the decision of a court whose authority is recognised by both claimants."

---

1. Restatement, Second, Conflict of Laws, s.79, Comment (a), at p. 237.
2. L.R. Ratner, "Child Custody in a Federal System" (1964) 62 Mich. L. Rev. 795at 819-820.

But a venue convenient to both parties is not of overriding importance in custody proceedings. As Buckley J. reminded us in Re Kernot (An Infant),[1] in considering questions of forum conveniens, the court has to take into account not only such matters as the physical convenience of the parties, and the witnesses and matters attendant on the trial and other things of that kind, but also the system of law which is to be applied; and the judge must consider what court is really the appropriate tribunal to reach a proper answer in applying that system of law.

The disadvantages of allowing jurisdiction by consent include the following:

(a) it would be wrong in principle to allow the parties to confer jurisdiction upon a court in matters affecting status;

(b) the range of persons with a legitimate interest in the wardship or custody of children may extend beyond their parents and may include the grandparents of a child, another relative, such as an aunt who has brought up the child, and it may even include a local authority. It would not always be easy to ensure that all appropriate consents had been obtained;

(c) it may be that the court's jurisdictional competence would not be recognised abroad. One notices, for instance, that the Hague Convention of 5 October 1961 does not provide for the assumption of jurisdiction by consent of the parties.

---

1. (1964) 3 W.L.R. 1210 at 1214.

The majority of the Hodson Committee in their Report on Conflicts of Jurisdiction Affecting Children in 1959 came out against the procedure of jurisdiction by consent of the parties. The majority did not consider "that the parties concerned should be at liberty to confer jurisdiction by consent on the courts of any country in which the child is not at the time ordinarily resident."[1] It seems, in our view, that on the whole the arguments against the assumption of jurisdiction by consent of the parties slightly out-weigh the arguments in favour, and we would not be enthusiastic for the adoption of such a procedure in the law of jurisdiction in custody matters in either Nigeria or the United Kingdom.

F. Conflicts of Jurisdiction

1. Introduction

We shall begin by pointing out briefly the nature and causes of conflict of jurisdiction in guardianship. The problem of conflicts is an old one. It is encountered in both interstate and international cases, not only in custody but also in divorce and other fields of law. This is how Sir Francis Bacon, long ago, expressed the problem of conflict of jurisdiction:

---

1. Cmnd. 842, para 52. The Report is discussed more fully at pp. 88-97 infra.

> "For Courts to quarrel and contend about Jurisdiction, is a piece of human frailty; and the more, because of a childish opinion, that 'tis the duty of a good and able Judge to enlarge the Jurisdiction of his Court; whence this disorder is increased, and the spur made use of instead of the bridle. But that Courts, thro' this heat of contention, should, on all sides, uncontrollably reverse each other's decrees, which belong not to Jurisdiction, is an intollerable evil, and by all means to be suppressed by Kings, the Senate, or government. For it is a most pernicious example that Courts, which make peace among the subjects, should quarrel among themselves."[1]

The practical problems created by conflicts of jurisdiction are familiar ones. Concurrent custody actions and conflicting judicial decisions are, first and foremost, contrary to the best interests of the children concerned. They often lead to undesirable and unwelcome press publicity and possibly emotional strain to one or both parents. In terms of expenses they are wasteful of judicial efforts and the parties' and legal aid resources. As the Scottish Law Commission puts it, conflicts of jurisdiction "are bad for the parties, for the children, and for the reputation of the law, the courts and the legal profession."[2] Different substantive laws, different bases of jurisdiction and different and conflicting decisions often contribute to the phenomenon of "legal kidnapping" which in turn leads to "tension and unhappiness for children and their parents and to the acceptance under duress of terms which otherwise could have been effectively resisted."[3]

---

1. Bacon's Aphorisms, quoted in Patrick Fraser, The Conflict of Laws in Cases of Divorce. p1
2. Scot. Law. Comm. No. 25 para 132 p. 51.
3. Cmnd. 842 para 37 at 9.

And in a nutshell, the causes of conflicts of jurisdiction in the United Kingdom have been stated as arising "in part in the differences in the substantive law of England and Scotland relating not only to custody of children and wardship of infants but also to age of capacity to marry without parental consent, and in part in the different views which the courts of the two countries have taken of the nature and extent of their jurisdiction in these matters."[1]

Given such a situation as this, one would have expected to find strenuous efforts being made to accommodate the differences in order to avoid some of the evils we mentioned earlier. Instead, the situation was aggravated by what Professor O. Kahn-Fruend calls[2] the "free exercise of English jurisdiction" in custody matters and this, predictably, led to "very considerable fraternal strife" between the English and Scottish legal professions and courts.

The type of conflict which may arise is best illustrated by the case of Babington v. Babington.[3] In that case, Colonel and Lady Babington, (husband and wife) were domiciled in Scotland where the matrimonial home was situated. After certain differences between the parties the wife went to live

---

1. Ibid para 4 at p.1.
2. O. Kahn-Freund, The Growth of Internationalism in English Private International Law, pp. 25, 26.
3. 1955 S.C. 115.

in England. The child concerned, an eleven year old girl, was at a boarding school in England but normally spent her holidays in Scotland. On her arrival in London, the wife made the child a ward of court. From that moment and without any investigation of the merits of the case, the child could not be removed out of England without the sanction of the Chancery Court. The husband petitioned for custody in the Court of Session, a plea of forum non conveniens on behalf of the wife was refused, and the husband was granted interim access during the Christmas holidays. The husband then applied for leave of the Court of Chancery to take the child out of England for the short period of access under the Scottish order but was met by a corresponding application on behalf of the wife who sought leave to take the child to Switzerland for a holiday. The English court refused the husband's application thus setting at naught the order of the Scottish court, but awarded interim access to the wife. The case, as might be expected, caused much misgivings on both sides of the border.

It was only after this sort of situation had made conflicts of jurisdiction unbearable that efforts were intensified at finding a means of reconciling the existing differences. It is certainly a reproach on conflict of laws that conflict of jurisdiction should be allowed to continue to plague interstate as well as international custody cases. Such a state of affairs is inimical to a proper functioning of the system of conflict of laws. As

Professor Anton states, the rules of private international law "seek to achieve justice by avoiding conflicts of jurisdiction and by securing international harmony of decisions."[1] It is not surprising that Scots, English and American lawyers recently have been striving to formulate conflict of laws rules of custody, such as would avoid (or at least minimise) the conflict of interstate (interlocal) and international custody jurisdiction. We shall now turn to a consideration of the efforts made in this direction on both sides of the Atlantic.

2. Mode of reconciling the conflicting bases of Jurisdiction

No constructive suggestion should be lightly dismissed when it comes in connection with finding a way out of the existing situation of conflicting jurisdictions in guardianship. It might be desired, for instance, that such conflicts be resolved informally by the concerned courts or by involving the machinery of arbitration. In this part of our work we have considered some six possibilities.

(a) The Hodson Committee

(i) Terms of Reference: In February 1958 a Committee, under the Chairmanship of Lord Hodson and consisting of both Scottish and English judges and lawyers, was set up with the following terms of reference:

---

1. Private International Law, p.2. Private international law, says Lord Ardmillan, springs from the general consensus "in the utility and propriety of avoiding conflicting jurisdiction". Johnstone v. Beattie (1856) 18 D. 343, 358.

> "To consider and report what alterations in the law and practice are desirable to avoid conflicts of jurisdiction between courts in the different parts of the United Kingdom in proceedings relating to the custody of children and to wards of court and to ensure the more effective enforcement of orders made in such proceedings outside the part of the United Kingdom in which they were made."[1]

In July 1959 the Committee, after a study of the different bases of jurisdiction submitted its Report in which significant recommendations were made. Although this unimplemented Report now has mainly a historical relevance, it is the principal published effort made to date in the United Kingdom, and therefore it cannot be ignored. It will be noted that the terms of reference (like Bacon's statement above) covered both jurisdiction and enforcement. Our concern here is with the former; the enforcement of foreign custody orders is the subject of distinct treatment in chapter 7. It should be further observed, before turning to the recommendations in the Report, that as far as jurisdiction proper is concerned, conflicts spring from two major sources: First, it arises as a result of differences in substantive law; and secondly, it arises from the different views held as to the proper bases for exercising custody jurisdiction. The Committee's recommendations pertain entirely to the different bases of jurisdiction. We shall, however, make brief comments on unification of substantive

---

1. Report of the Committee on Conflicts of Jurisdiction Affecting Children, Cmnd. 842 (hereinafter, Report) para. 1 p. 1.

law as a mode of avoiding conflicts of jurisdiction. This issue was deemed[1] to be outside the Committee's terms of reference and, as the Report rightly points out, "The question of uniformity of substantive law raises very wide social issues."[2] It is difficult to disagree with this verdict. There can be little doubt that this issue would constitute the greatest barrier to avoidance of conflict of jurisdiction. Judicial opinions on differences in substantive law have not contributed to the resolution of this problem. Very often, uncompromising language has been used on both sides of the border. In Re O (Infants),[3] for example, when Scottish authorities were drawn to the attention of Lord Evershed, M.R., his Lordship doubted whether "some of the language used in those Scottish cases would be in complete conformity with the interpretation of the Act by the English courst."[4] That case, it would be recalled, concerned the interpretation of section 1 of the Guardianship of Infants Act, 1925, which is a common statute to both England and Scotland. And more recently in Re P(G.E.) (An Infant) the Court of Appeal when invited to follow certain Scottish opinions declined to do so, saying such opinions "should not be accepted as part of English law".[5]

---

1. See Report, para 5 p.2.
2. Ibid.
3. 1962 1 W.L.R. 724.
4. Ibid at 726.
5. (1965) Ch. 568 at 589 per Pearson L.J.; see also Lord Denning M.R. and Russell L.J. at pp. 583, 592 respectively.

Such attitudes as these are surely not one-sided. Again to take just two cases where Scottish courts were asked to follow English decisions the courts refused to do so. Lord Dunpark[1] was "not so bold" as to follow the English case of Re P (G.E.)(An Infant). His Lordship was content "to take the law of Scotland as it is". And in Oludimu's case, Lord Fraser[2] said that "English principles ... are quite alien to the law of Scotland". What we desire to stress here is that these languages do not leave room for manoeuvre when it comes to unification of substantive law. At any rate, although somewhat exaggerated, it has been said that "there is a great gulf fixed between the two systems"[3] due to the different origins of Scots and English law. Therefore, from the Scottish point of view, unless there is guarantee "that fair play is to be shown at every turn"[4] there would be no point in seeking to unify or amalgamate the substantive law pertaining to custody, guardianship and children's welfare, as a means of solving conflict of jurisdiction. What is involved in opting for this course of action - "concessions on a big scale on either side"[5] - does not appear today to be evident in either judicial, juristic, or public temperament.

---

1. Kelly v. Marks 1974 S.L.T. 118 at 122.
2. 1967 S.L.T. 105 at 107.
3. "Letter to the Editor" 1960 S.L.T. News p. 47 (William Gillies).
4. Book Notice (Book Review) 1962 S.L.T. (News) 22 at 23 (A.D.G.)
5. "Letter to the Editor" 1960 S.L.T. (News) p. 47 (Andrew Dewar Gibb).

(ii) The Recommendations of the Committee

The majority Report started with a general survey of jurisdictional bases in the different law districts in the United Kingdom - bases in which "the seeds of a possible conflict are to be found".[1] The Report stressed the importance of establishing a basis of jurisdiction which, while it should not be rigidly exclusive, should be pre-eminent among all other competing jurisdictions.[2] As to the criterion of "pre-eminent jurisdiction", bare residence in itself was considered insufficient as a test since it was very likely to "aggravate" the existing conflicts difficulties,[3] and the test of domicile was rejected because domicile mattered only in "conflicts of international law".[4]

The crux of the Committee's recommendations comes in paragraph 49;

> "there should be a pre-eminent jurisdiction, that the test of this pre-eminent jurisdiction should be the ordinary residence of the child at the time when the application to the court is made, and that this is plainly to be preferred to a test based on physical presence. We have considered the arguments put forward in favour of setting some limit of time to distinguish ordinary residence from physical presence, but have rejected those arguments as unnecessarily hampering the courts in determining whether or not in a given case residence qualifies as ordinary or does not do so, recognising that in deciding this question the courts have had experience in other fields."

---

1. Report para 36 p. 8.
2. Report para 43 p. 10.
3. Report para 45 p. 11
4. Report para 44 p. 10.

Although the suggested test of ordinary residence as pre-eminent jurisdiction was welcomed by Lord Denning M.R. in Re P (G.E.)(An Infant),[1] the test was criticised by the dissenting member[2] of the Committee and it has also not been favourably received by most commentators on the Report.[3] For one thing, it would mean "the complete abrogation of the Scottish rule that domicile confers jurisdiction".[4] Besides this main recommendation there are others worthy of note.

1. The court of ordinary residence is to remain seised of a custody suit until it is satisfied, following a specific application, that the child has acquired a new ordinary residence,[5] and if there are concurrent proceedings "those which were commenced first should prevail and that other competing proceedings ought to be stayed until the court to which the first application was made has determined this issue."[6]

2. When an application fails in limine by reason of the test of ordinary residence not being satisfied, the proceedings are to be dismissed.[7] But surely this contradicts an earlier

---

1. (1965) Ch. 568 at 586: "I would myself support the view stated by Lord Hodson and the majority of his Committee in 1959".
2. Michael Albery Esq., Q.C.
3. See O. Kahn-Freund (1960) 23 M.L.R. 64; G.H. Jones, (1960) 9 I.C.L.Q. 15; "H.M." in (1959) 75 Scottish Law Review 165; "W.C.H." in (1960) S.L.T. (News) 89.
4. "H.M." supra 165 at 167.
5. Report para 50 p. 12.
6. Report para 51.
7. Ibid.

recommendation that a basis of jurisdiction should only be pre-eminent and not exclusive, and that "it would be wrong to seek a solution in an exclusive jurisdiction."[1]

3. In cases of urgency - which the Committee did "not seek to define ... precisely" - the court of the country where the child is physically present would have jurisdiction for the welfare of the child but this could be varied by the court of the ordinary residence.[2]

4. That sections 2 and 8 of the Matrimonial Proceedings (Children) Act, 1958, be amended so that "where proceedings as to the custody of children have been instituted in a court of pre-eminent jurisdiction ... the future of the children should be left to that court."[3]

5. Others: That when an application is made to the Chancery Division of the English High Court to have a child ordinarily resident within its jurisdiction made a ward of court, if the child concerned is domiciled in Scotland and is over sixteen years of age, he should be able to raise a plea to the fact of his age in bar to wardship proceedings;[4] that the Outer House of the Court of Session should have jurisdiction to entertain applications for custody;[5] and that all courts should have jurisdiction to entertain private applications for custody.[6]

---

1. Report, para 43 p. 10.
2. Report, para 52 p. 12.
3. Report, para 53 p. 13.
4. Report, para 54 and 55.
5. Report, para 59 p. 14. This has now been implemented by Rules of Court of Session (Rule 189 (a) (XX)).
6. Report, para 58 p. 13.

(iii) A Note of Dissent

In his separate dissenting note, Mr. Michael Albery, Q.C. disagreed[1] with the majority report that the question of uniformity of substantive law of England and Scotland was outside the Committee's terms of reference. But the more important part of the dissent was Mr. Albery's disagreement with the majority finding as to the desirability of selecting ordinary residence as a test of pre-eminent jurisdiction. Most commentators have expressed preference for the dissent. It is a "completely convincing criticism"[2] of the majority Report; it represents the "least of all evils",[3] and, since it is "convincing", there is no reason why one should not "emphatically endorse"[4] aspects of the dissent. The dissent has "some degree of force",[5] others have said.

Mr. Albery made three main points in his dissent.

1. That the test of jurisdiction should be based on "the last joint home in the United Kingdom of the child's parents",[6] because the test of pre-eminence of ordinary residence is undesirable and is difficult to apply especially where the issue is the ordinary residence of a child of a recently

---

1. Note of Dissent (hereinafter, Dissent) para 14, p. 19.
2. G.H. Jones (1960) 9 I.C.L.Q. 15 at 21.
3. O. Kahn-Freund (1960) 23 M.L.R. 64 at 67.
4. Ibid.
5. "W.C.H." (1960) S.L.T. (News) 89 at 90.
6. Dissent, para 2 p. 15.

broken home, which situation constitutes the ideal setting for conflicting decisions. Moreover, residence requires the formation of an intention which may be difficult in the case of a young child; and in any case the "ordinary residence" test does not, unlike the "last joint home", avoid the danger of legal kidnapping. Although Mr. Albery states that his test would "work with greater practical justice",[1] not every one would agree. Professor Otto Kahn-Freund has stated that Mr. Albery's test might in fact "lead to injustice and grave inconvenience",[2] especially in cases where it has taken a long time since the break up of the home. After the break up of the joint home both parents, possibly after remarriages, may have gone to live in different parts of the country, and why should the courts of the last joint home, perhaps after many years, have any say over the custody of the child? And what about cases involving the semi or full orphan or the illegitimate child?

2. As an alternative, the dissent suggested that if the test of ordinary residence is adopted, there ought to be a further rule that the courts should ignore any change of residence made within six months prior to the application.[3]

3. Finally, the dissent suggested that whatever connecting factor may be chosen as the pre-eminent jurisdiction, that test "should only be made where one of the parties objects

---

1. Dissent para 10 at p. 18.
2. (1960) 23 M.L.R. 64 at 67.
3. Dissent, para 11 p. 18.

to some existing jurisdiction different from that of the pre-eminent jurisdiction."[1] This common sense solution would preserve the existing jurisdictions and prejudices which the English and Scottish courts are not yet ready to discard. The courts should be allowed to proceed with the exercise of their normal jurisdiction where the parties do not raise an objection. Fleeting presence and forum non convenience would be exceptions to this suggestion.

(b) U.S. Conference of Commissioners on Uniform State Laws

The problem of conflict of jurisdiction in matters affecting child custody which is acute as between Scotland and England could become very unmanageable when it arises in a multistate federal system as the United States or Nigeria. The main machinery which has been utilised in the United States of America for tackling this problem is the National Conference of Commissioners on Uniform State Laws which has produced the Uniform Child Custody Jurisdiction Act now adopted by some of the states of the American Union. Before turning to the major provisions of the Act, a brief word about the history of the Conference of Commissioners will be in order.

(i) History.[2] The origin of the Conference dates back to 1889 when the American Bar Association appointed a special committee on Uniform State Laws. The aim of the body was

---

1. Dissent, para 12 pp. 18-19.
2. See Handbook of the National Conference of Commissioners on Uniform State Laws (1920) p. 1 (Hereinafter, Handbook).

to examine certain subjects of national importance where conflicts of law are most likely to arise so as "to promote uniformity in State laws on all subjects where uniformity is deemed desirable and practicable."[1] The body is composed of commissioners from each of the main political units in the country and these representatives are usually leading practising lawyers, judges and law teachers. If a subject is proposed as worthy of the Conference's attention, it is studied, drafts of an act are prepared and discussed, and, when the drafts are finally approved by the Conference, the draft Uniform Act is then recommended for general adoption throughout the jurisdictions of the United States as well as being submitted to the American Bar Association for its own approval. Several uniform acts have been drafted and approved, including the Uniform Child Custody Jurisdiction Act.

(ii) The Uniform Child Custody Jurisdiction Act.[2]

The need for a uniform child custody jurisdiction act arose, as in the case of the United Kingdom, because of the movement of children from state to state and endless struggles over the children, often facilitated by differences in bases of jurisdiction as well as ease of mibility of people. This uncertainty about a child's fate has an obvious detrimental

---

1. Ibid. p. 2.
2. See B.M. Bodenheimer, "The Uniform Child Custody Jurisdiction Act" (1969) 3 Fam. L.Q. 304.

effect on the children, besides being wasteful of financial resources and judicial time. And because of the frequency of resort to self-help measures by one parent or the other, a situation is created whereby even normally law-abiding citizens are "driven into these tactics against their inclinations; and ... lawyers who are reluctant to advise the use of manoeuvres of doubtful legality may place their clients at a decided disadvantage."[1]

The underlying philosophy of the Act which is designed to bring about some semblance of order into the existing chaos has been well stated in the Commissioners' Prefatory Note to the Act:[2]

> "Underlying the entire Act is the idea that to avoid the jurisdictional conflicts and confusions which have done serious harm to inumerable children, a court in one state must assume major responsibility to determine who is to have custody of a particular child; that this court must reach out for the help of courts in other states in order to arrive at a fully informed judgement which transcends state lines and considers all claimants, residents and non residents, on an equal basis and from the standpoint of the welfare of the child. If this can be achieved, it will be less important which court exercises jurisdiction but that courts of the several states involved act in partnership to bring about the best possible solution for a child's future."

The Act utilises several devices to deal with the problem of conflict of jurisdiction. These devices which ensure that litigation concerning the custody of a child will "take place ordinarily in the state with which the child and his family have the closest connection and where significant

---

1. Handbook (1968) p. 196.
2. Ibid p. 197.

evidence concerning his care, protection, training and personal relationships is most readily available,"[1] are as follows: First, that custody jurisdiction is limited to the state where a child has his home. Secondly and as an alternative, jurisdiction is conferred on a state which has strong contacts with the child and his family. Thirdly, physical presence of the child within the jurisdiction does not confer custody jurisdiction[2] although in cases of emergency where a child's welfare is threatened or endangered jurisdiction is conferred on the state where the child is "physically present".[3] This is the parens patriae jurisdiction in its more usual form and, as it has been said, "This extraordinary jurisdiction is reserved for extraordinary circumstances."[4] Fourthly, the Act provides for direct lines of communication and for exchange of information[5] between courts of different states so as to prevent conflicts of jurisdiction and to effect judicial assistance in custody cases. To this end, the novel concept of a child custody registry[6] is introduced. Fifthly, child kidnapping is expressly frowned upon as founding jurisdiction and here, as in other parts of the Act, provision exists in the form

---

1. Section 1(a)(3).
2. s.3(c)
3. s.3(a)(3).
4. Comment to s.3 at p. 202.
5. See ss. 17-22.
6. s.16.

of financial deterrents to the party who unnecessarily brings about a custody litigation. Other provisions deal with joinder of out-of-state parties. It would be useful to consider some of these devices in greater detail.

Home state rule. In order to ensure a fully informed custody decree, it is provided that jurisdiction exists in a state which either "is the home state of the child at the time of commencement of the proceeding" or which "had been the child's home state within six months before commencement of the proceeding" even though the child is not present there. But in such a case a parent or guardian should live in the state.[1]

There is always a danger of arbitrariness when minimum or maximum periods are prescribed as an antidote for a problematic legal situation. But the 6 months period in the above rule has been selected against the background of American child family life. As Professor Ratner says,[2] "Most American children are integrated into an American community after living there six months; consequently, this period of residence would seem to provide a reasonable criterion for identifying the established home. While children under two years of age do not usually have close friends or an organised pattern of education and cannot become as familiar with the environment as older children, the doctors, nurses, domestic helpers, baby sitters, neighbours,

---

1. S. 3(a)(1).
2. Ratner, "Child Custody in a Federal System" (1964) 62 Mich. L. Rev. 795, 818.

and visitors likely to become acquainted with a young child and its family during half a year probably constitute the largest source of evidence relating to its custody." Moreover, the six month period has to be seen as an equitable rule designed to protect the interests of the stay-at-home parent against the wrongful act of child kidnapping by the deserting parent. The former thus has a reasonable period during which to commence custody proceedings in respect of an absent (i.e. abducted) child.

Significant contact rule. The Act enacts as an alternative basis of jurisdiction that in the interests of a child a court may assume jurisdiction because "the child and his parents, or the child and at least one contestant, have significant connection with" the State and there is available in the State "substantial evidence concerning the child's present or future care, protection, training and personal relationships."[1] The situation envisaged by this provision would be where a home state cannot be established, e.g. because the family has moved frequently and the child has not lived for six months in one state prior to litigation. The term "significant connection" is capable of varied and flexible interpretation. Because of this, the provision has to be read with section 3(c) which says that mere physical presence does not confer jurisdiction. So construed, the purpose of section 3(a)(2) is "to limit jurisdiction rather than to proliferate it."[2]

---

1. S. 3(a)(2).
2. Comment to s.3 at p. 201.

These alternative bases of jurisdiction could easily lead to concurrent jurisdiction in more than one state. Here again, the Act utilises two techniques for dealing with the issue of concurrent jurisdiction. First, there is what may be called the technique of "first come, first served". This is spelled out clearly in section 6(a). If a custody petition is pending in a foreign court which has not stayed the action, then the local court cannot exercise jurisdiction. This provision presupposes that the court will have information about other custody proceedings which are pending in the foreign court. To this end the Act provides first, that the court must examine "the pleadings and other information supplied by the parties"[1] as well as consulting the child custody registry established under section 16. As the Comment[2] to the section puts it, the "Courts are expected to take an active part under this section". Hence there is the novel provision that if the Court "has reason to believe"[3] that proceedings are pending in another state, it shall have power to order an inquiry into that matter. In the second place, in order to have the necessary information, the Act places a duty on "Every party in a custody proceeding" to furnish information under oath concerning not only the child's address and contacts over a period of 5 years preceding the action but also about "any

---

1. S. 6(b).
2. p. 204 Handbook. (1968)
3. S. 6(b).

custody proceeding concerning the child pending in"[1] any other court. And both plaintiff and defendant remain under "a continuing duty to inform the court of any custody proceeding concerning the child in any court".[2] As has been rightly remarked, this duty would facilitate the elicitation of "information as to custody litigation and other pertinent facts occuring in other countries".[3]

If in the course of the proceedings the local court learns that another state court had earlier assumed jurisdiction, the former court shall stay the proceedings and inform that other court where the issue may be more appropriately determined. But if the local court has made a custody decree before being informed of the earlier proceedings in the foreign court, it shall immediately inform the latter court of the decree rendered.

The second technique utilised for situations raising concurrent jurisdiction is that of forum non conveniens.[4] The rule of priority in time considered above may even be made to yield to this second technique even where the claims to jurisdiction are not equal because "the policy against simultaneous custody proceedings is so strong that it might in a particular situation be appropriate to leave the case to the other court,"[5] which

---

1. S. 9(a)(2).
2. S. 9(c).
3. Comment to s.9 p. 208 Handbook. (1968)
4. See s.7(a).
5. Comment to s.6 at p. 204 Handbook. (1968)

would not have had jurisdiction under the Act's provisions. A finding of forum non conveniens may arise out of the court's own motion or upon the application of any party.[1] The Act then provides that in determining inconvenient forum the court shall have regard, among other factors, to the parties' own agreement, the location of substantial evidence pertaining to the child's welfare, the closeness of the connections of other states to the child and his family etc.[2] In any case, before declining or retaining jurisdiction, the court should communicate and exchange pertinent information with the other (foreign) court so that in the end jurisdiction is exercised "by the more appropriate court".[3] These provisions which are designed to "encourage judicial restraint in exercising jurisdiction"[4] underline heavily, throughout, the need for consultation and co-operation among the concerned courts.

The "clean hands" doctrine and kidnapping cases. Three situations where a party to custody proceedings may not have "clean hands" are dealt with in section 8.

(i) where the petitioner has wrongfully taken the child from one state into another in the absence of custody decree access will be denied to the courts of the second (forum) state. Here

---

1. S. 7(b).
2. S. 7(c).
3. S. 7(d).
4. Comment to s.7 at p. 206.

the declinature of jurisdiction is discretionary;[1]

(ii) where the petitioner has improperly removed or was improperly retaining the child from the physical custody of the person so entitled contrary to an existing out-of-state (foreign) custody decree, the refusal of jurisdiction as to interfere with the prior foreign custody order is mandatory and not just discretionary;[2]

(iii) where the petitioner has violated "any other provision of a custody decree of another state" the court again has a discretion to refuse the exercise of its jurisdiction.[3] In all these three situations, however, jurisdiction will not be declined where it would mean sacrificing the welfare of the child as a result of parental misconduct.

Financial (deterrent) provisions. There are two types of financial provisions:

(a) those which aim at equalising travel expenses where an out-of-state party is made to travel long distances in order to put in an appearance with the child,[4] or those involving sharing of the costs of assistance rendered by a foreign court in the form of investigations (social studies);[5] and

(b) those which are penal in character. Thus, for example, if a court is, under the convenient forum guidelines of section 7(c)

---

1. S. 8(a).
2. S. 8(b).
3. Ibid.
4. See e.g. s.11(c).
5. S. 19(a).

"clearly an inappropriate forum", the plaintiff may be liable to bear the costs incurred by defendant for travel, attorneys fees and witnesses expenses. This, it has been said, is meant to discourage "frivolous jurisdiction claims".[1] Again, in "appropriate cases" involving child kidnapping the petitioner (kidnapper) may be made to pay for expenses incurred by defendant (law-abiding parent).[2]

(c) Comments on Resolution of Jurisdictional Conflicts in the U.K. and the U.S.A.

Some comparative comments will now be made on the similarities and differences between the United Kingdom and American attempts at resolving the problem of conflict of jurisdiction and their possible relevance for future attempts in this field. The importance of conferring pre-eminent jurisdiction on one state is recognised in the two countries. This is basic to any progress in the field. The Hodson Committee would prefer the child's "ordinary residence" while the Conference of Commissioners preferred the notion of a "home state". As the Dissent to the Hodson Committee Report points out, there is immense advantage in preferring the "last joint home"[3] of the parents. The "home" test avoids the difficulties surrounding the elusive word "residence" and it would also remove any temptation for one

---

1. Comment to s.7 p. 206 Handbook. (1968)
2. S. 8(c); see also s.15(b) for further penal provisions.
3. Dissent, para 2 p. 15.

parent to abduct the child out of the jurisdiction with the hope of establishing an ordinary residence elsewhere. And moreover, the 1973 Domicile and Matrimonial Proceedings Act has introduced the notion of a child's "home"[1] state as the appropriate connecting factor for establishing a child's dependent domicile. Therefore it would seem that the notion of "home state" as possessing pre-eminent jurisdiction will find increasing use in future enactments on guardianship and custody.

To this must be added the mechanism which is meant to avoid the inevitable concurrent exercise of jurisdiction by two or more "home states" or "ordinary residences" or anything else chosen as the connecting factor. That device which we referred to as the rule of "first come, first served" is warmly endorsed in both the United Kingdom[2] and U.S.A.[3] It is a useful device which should be incorporated into any custody legislation in England, Scotland or Nigeria. We must next point out the similarity in the proposal concerning changes in residence or home state some while before custody proceedings are commenced. Mr. Albery in his dissent,[4] it would be recalled, had suggested that should the test of ordinary residence be

---

1. S. 4(2).
2. See Report, para 51 p. 12; Similar notion is contained in Domicile and Matrimonial Proceedings Act, 1973 Schedule 1 para 9 (England) and Schedule 3 para 9 (Scotland).
3. See s.6(a) Uniform Child Custody Jurisdiction Act.
4. Dissent, para 11 p. 18.

preferred, then a proposal by the Faculty of Advocates in Scotland to the effect that any changes of residence made without the consent of both parents within six months of commencement of proceedings ought to be disregarded. This might furnish the "best solution",[1] as Professor Kahn-Freund says. But it was rejected by the majority on the ground that the suggestion would result in hardship in border line cases and that it presupposes that every kidnapping occuring within the said period of six months is made for tactical reasons and not a bone fide change of residence. As Mr. Albery noted in reply, no solution ever avoids the difficulty of borderline cases.[2] And among the merits of the "six months" suggestion is that it is practical and easy to apply so that irrespective of motive, a change of residence during the six months peri od without mutual consent should not confer jurisdiction. An analogous proposal forms a cornerstone of the Uniform Child Custody Jurisdiction Act.[3] It would be desirable that any custody legislation contain such a provision according to which changes in residence (and hence jurisdiction) are discountenanced, in order to enable the stay-at-home parent to commence proceedings in what was the child's home prior to its unilateral removal to another jurisdiction. It would effect a desirable alteration in the present English law which founds jurisdiction on mere presence. The necessity of emergency

---

1. (1960) 23 M.L.R. 64 at 67.
2. Dissent, para 11 p. 18.
3. S. 3(a)(1)(ii).

situation conferring jurisdiction based on mere presence remains an accepted (exceptional) basis in all legal systems .

The contrasts between the United Kingdom and United States positions are equally striking. Under the American enactment, jurisdiction exists in a state with which the child and his parents or parent have "a significant connection".[1] Although the concept of pre-eminent jurisdiction in a "home state" or in a state of "ordinary (habitual) residence" embraces in essence a "significant contact" idea, that specific legal terminology has not yet been fully transplanted into United Kingdom law.

There are other differences. The United States Conference of Commissioners has elevated into the status of statutory rules the "clean hands"[2] and "forum non conveniens"[3] doctrines, as well as the need for joinder of out of state parties;[4] they have also provided for financial deterrence[5] when a custody action has been needlessly brought about, as well as providing for interstate co-operation through exchange of pertinent information.[6] In the prevailing antipathy to "rules" these

---

1. S. 3(a)(2)(i).
2. S. 8.
3. SS. 6 and 7. The notion of forum non conveniens has found statutory reception in the United Kingdom Domicile and Matrimonial Proceedings Act, 1973 Schedule 1 para 9(1)(2) (England) and Schedule 3, para 9(1)(2) (Scotland).
4. S.10.
5. SS. 8(c), 7(g).
6. SS. 17-22.

United States examples may not be followed in United Kingdom legislation. But there is no reason why Nigerian legislation should not follow the American model. In our respectful view, there is much to be said for embodying the clean hands and forum non conveniens doctrines in any future custody legislation in either the United Kingdom or Nigeria. (The judicial reception of forum non conveniens is discussed below).

Finally, the rejection of domicile as a basis of jurisdiction by the Hodson Committee was because, as the Report points out, the Committee's concern was with "conflicts of domestic jurisdiction and not conflicts of international law".[1] But as Professor Kahn-Freund was quick to point out, this is a "less convincing ground"[2] for rejecting domicile. The Hodson Committee, in so stating, appears to be misconstruing the principle of the paramountcy of the child's welfare. First because the welfare test is an absolute one. It is either wholly applied or wholly rejected - which latter is impermissible; it admits of no subtle distinctions between "interlocal" and "international" conflicts cases. Secondly the dissenting member[3] was not convinced that the Committee was only concerned with "interlocal" conflicts as can be seen from the citation of Ponder v. Ponder[4] which was an "international", not an interlocal

---

1. Report para 44 p. 10.
2. (1960) 23 M.L.R. 64 at 66.
3. See Dissent, para 12 at p. 19.
4. 1932 S.C. 233.

custody case. Thirdly, the Uniform Child Custody Jurisdiction Act in making a similar attempt to solve problems of "inter-local" conflicts has not segregated "international" conflicts from treatment. Section 23 of that Act states that "The general policies of the Act extend to the international area". Surely the basic policy of avoiding conflict of jurisdiction and multiple litigation are as strong, if not stronger, in international custody cases as in interlocal ones. In short, the American efforts, unlike the United Kingdom ones, have not relegated the "welfare" concept in international cases to a distinct treatment

(d) Forum non conveniens

We are now in a position to consider the (judicial) reception of the doctrine of forum non conveniens into Scots and English law and whether it is capable of being used as a means of resolving conflicts of jurisdiction in custody.

The general principle of law that when jurisdiction exists the court is bound to exercise it and to render a decision for the suitor who comes before the judgement seat gives way in cases where it is "more proper for the ends of justice"[1] that the suitor should seek his remedy in some other forum which is open to him. In such a case the court will dismiss the action on the plea of forum non conveniens.

---

1. Longworth v. Hope (1865) 3 M. 1049 at 1053 per Lord M'Neal L.P.

A main objective of the doctrine of forum non conveniens is to avoid blatant forum shopping, so that persons with no substantial connections with the law district would not be able to invoke the jurisdiction of its courts. Mr. Justice Frankfurter has described the doctrine as one of the "manifestations of a civilised judicial system"[1] and Cardozo J called it "an instrument of justice".[2] The usefulness of the doctrine, then, has long been recognised in both the United States of America[3] and Scotland[4] where it has been elevated to a general rule of law. But in this respect English law remains insular. As Lord Chancellor Selborne has said, in England the doctrine of forum non conveniens "seldome comes into consideration when jurisdiction exists, apart from service of process abroad, unless there is an actual competition of suits."[5] The principle on which the English courts arrive at a somewhat similar doctrine to that of Scots law is that "the Court can and will interfere whenever there is vexation and oppression to prevent the administration of justice being perverted for an unjust end."[6]

---

1. Baltimore and Ohio Railroad v. Kepner (1941) 314 U.S. 44 at 55-56.
2. Rogers v. Guarantee Trust Co. (1933) 288 U.S. 123, 151.
3. See Restatement, Second, Conflict of Laws, s.84. See also Comment, "Forum non conveniens, A New Federal Doctrine" (1947) 56 Yale L.J. 1234.
4. The standard formulation of the doctrine in Scots law comes in Sim v. Robinow (1892) 19 R. 665, at 668; see also Anton, Private International Law pp. 148-154, Duncan and Dykes, op. cit. chapter 12.
5. Orr Ewing's Trustees (1885) 13 R. (H.L.) 1 at 7.
6. McHenry v. Lewis (1882) 22 Ch.D. 397 at 408 per Bowen L.J.

The attitude of the English courts, therefore, is to modify the rules of jurisdiction now and then by adopting what they regard as a flexible and liberal attitude rather than adopting a general rule of forum non conveniens. And even this English approach was thrown overboard by Lord Denning M.R. with his famous statement in which he nearly created a charter for that ubiquitous figure of private international law - the "blatant" forum shopper which had been so roundly condemned by the House of Lords in Chaplin v. Boys.[1] That statement reads:

> "No one who comes to these courts asking for justice should come in vain ... This right to come here is not confined to Englishmen. It extends to any friendly foreigner. He can seek the aid of our courts if he desires to do so. You may call this 'forum shopping' if you please, but if the forum is England, it is a good place to shop in, both for the quality of the goods and the speed of service."[2]

This statement earned appropriate rebuke from the House of Lords on appeal in The Atlantic Star.[3] Lord Reid drew a distinction between a situation where England is the natural forum for the plaintiff who therefore should "not be driven from the judgment seat"[4] and a situation where the plaintiff merely comes before the courts to serve his own ends. In the latter case, the plaintiff should "be expected to offer some

---

1. (1971) A.C. 356 at 406.
2. The Atlantic Star (1973) Q.B. 364 at 382 C.A.
3. 1973 2 W.L.R. 795 (H.L.)
4. Ibid at 801.

reasonable justification for his choice of forum if the defendant seeks a stay."[1] In Lord Reid's opinion, the comments of the Master of the Rolls were behind the times, suggesting in his rebuke that those comments seem "to recall the good old days, the passing of which many may regret, when inhabitants of this island felt an inate superiority over those unfortunate enough to belong to other races."[2] However, apart from this dictum of Lord Reid, the House of Lords overwhelmingly rejected any general doctrine of forum non conveniens which, it may be pointed out, was never even discussed in Cheshire's Private International Law until 1974. P.M. North, the learned editor of the 9th edition of Cheshire sums up the English attitude to the doctrine when he wrote:[3] "Liberalisation there may be ; a general doctrine of forum non conveniens there is not."

It may be asked why in an area of law such as custody which is rife with problems of conflict of jurisdiction and child kidnapping forum non conveniens doctrine has not been actively resorted to as a method of solution. It is true, as Anton says, that the doctrine is "generally inappropriate"[4] to actions affecting status in relation to which the Scottish courts

---

1. Ibid.
2. Ibid, at 800.
3. Cheshire's Private International Law (9th ed. 1974) p. 126. See also The Maharanee of Baroda v. Wildenstein (1972) 2 Q.B. 283.
4. Private International Law p. 153.

claim jurisdiction. But it has long been recognised that Scottish courts do not claim exclusive jurisdiction in such matters. And although actions for the permanent custody of a child have been classified as actions relating to status,[1] in regard to such actions the jurisdiction of Scottish courts though pre-eminent is never exclusive. What do the authorities say about forum non conveniens doctrine in guardianship and custody?

The doctrine is recognised in the Restatement, Second, Conflict of Laws where it is stated that a court which would normally have jurisdiction on any of the acknowledged bases would not exercise that jurisdiction if it believes that in the interests of the child another court is more convenient.[2] It is also recognised, as we noted earlier, in the Uniform Child Custody Jurisdiction Act.[3] P.M. North who argued that in English law there is no general doctrine of forum non conveniens, has nonetheless conceded that "there are situations where considerable emphasis is placed on this factor (of forum non conveniens), such as ... cases concerning wardship and custody of children."[4]

---

1. See, e.g. Radoyevitch v. Radoyevitch, 1930 S.C. 619; Ponder v. Ponder, 1932 S.C. 233.
2. S. 79 Comment (a) at p. 238.
3. Sections 6 and 7.
4. Cheshire's Private International Law 9th ed. p. 125.

The question of forum non conveniens was raised in Babington v. Babington, but there Lord Sorn was not prepared to say that

> "circumstances would never arise under which it might not be desirable for the court of the domicile to hold its hands and to allow custody to be regulated, in the meantime, by the court of the country where the child is residing, in the exercise of that protective jurisdiction which presence within its territory confers."[1]

In certain classes of custody cases there would appear to be every reason for invoking a doctrine of forum non conveniens[2] in the interests of the child, of the parties, of justice and of comity. Such would be cases involving kidnapping. In such situations, where it is patently clear that material evidence about the child's background and prospects - home and school life, friends and environment - are predominantly in the foreign jurisdiction, it would be better for the local court to decline jurisdiction. The parent with "clean hands" would be spared financial and other problems if the doctrine is applied. Furthermore, as the Scottish Law Commission has said, "The court with jurisdiction to entertain a consistorial action is likely to be a court appropriate to deal with the affairs of the family as a whole. In any event, where there are concurrent proceedings for custody ... in another jurisdiction it

---

1. 1955 S.C. 115 at 124.
2. It is worth noting that the doctrine of forum non conveniens is said to exist in English law in the form of the doctrine of forum conveniens, and that "There is perhaps little difference, except in approach, between the Scottish rule of forum non conveniens and the English rule of forum conveniens". See B.D. Inglis "Jurisdiction, The Doctrine of Forum Conveniens, and Choice of Law in Conflict of Laws" (1965) 81 L.Q.R. 380 at 382 n.8. The author added that the English doctrine has now "been rescued from comparative obscurity by the (1964) decision in Re Kernot (An Infant)" Ibid, 380.

would not be available in the principal status action".[1]

There is increasing tendency in Scottish[2] and English[3] judicial decisions to discuss the plea of forum non conveniens in custody cases. While the guiding principles cannot as yet be formulated with precision, the plea would be sustained in a proper case. Among the important factors to be taken into account in a kidnapping case, Cross J. said,[4] is "the question of forum conveniens." The courts have tended to emphasise what would not, rather than what would, sustain the plea. Peculiarity of procedure followed by the local court is not of itself sufficient to sustain the plea; neither would priority in time of institution of proceedings in the foreign court suffice.[5] It is true that Buckley J.[6] sustained the plea "from the point of view of the convenient forum" and ordered that relevant issues about a custody dispute be "investigated in the Scottish courts which had seisin of the matter before" the English courts.

---

1. Scot. law Com. No. 25 para 128 p. 50.
2. E.g. M'Lean v. M'Lean 1947 S.C. 79 at pp. 84, 87-88; Sargeant v. Sargeant 1973 S.L.T. 27 (upholding convenient English forum).
3. In re Kernot (1964) 3 W.L.R. 1210 at 1214; Re T. (Infants) (1968) Ch. 704 at 716 (upholding proper forum in Alberta, Canada).
4. In re H. (Infants) (1966) 1 W.L.R. 381 at 393.
5. Babington v. Babington 1955 S.C. 115 at 120, 125 per Lord Carmont and Lord Sorn.
6. In re G (J.D.M.)(An Infant) 1969 1 W.L.R. 1001 at 1004.

But the better view would seem to be that of Goff J. who preferred the Scottish courts as forum conveniens "despite the fact that the English originating summons was first in point of time".[1] A fuller statement is that by Buckley J. who in the earlier case of Re Kernot said that the relevant considerations to the problem of forum non conveniens include the system of foreign law involved, in addition to personal convenience and expense to the parties.[2]

The circumstances for invoking the doctrine are carefully circumscribed. The courts are slow to abdicate their jurisdiction and so the adoption of the doctrine in guardianship would not open any flood gates. "The emphasis of the doctrine is not on the conveniens of the parties, nor even upon their interests, but rather upon whether the ends of justice would be better served by the trial of the action elsewhere. A court, however, is naturally reluctant to declare that the proceedings before it are less likely to secure justice than those of a foreign court."[3]

Though the problem of conflicts of jurisdiction would not be prevented entirely, their disadvantages would be considerably

---

1. In re S (M)(An Infant) (1971) 2 W.L.R. 216 at 220.
2. In re Kernot 1964 3 W.L.R. 1210 at 1214.
3. Scot. Law Com. No. 25 para 136, p. 53. See also Babington v. Babington 1955 S.C. 115.

reduced if the principle of forum non conveniens were applied generally in the private international law of custody. The English and Scottish authorities considered above suggest that the forum non conveniens doctrine is gaining wider recognition in the law of jurisdiction in custody. We would suggest the adoption of a general principle of forum non conveniens in the Nigerian law of guardianship and custody.

(e) A More Neighbourly Attitude

What Dr. J.H.C. Morris has felicitously called "a more neighbourly attitude"[1] towards problems of conflict of jurisdiction between Scotland and England was foreshadowed as long ago as 1843. Lord Langdale in Johnstone v. Beattie dismissed arguments as to the possibility of "a direct conflict between the laws or the Courts of England and Scotland"[2] and urged, instead, the need not to "anticipate differences of opinion".[3]

> "We ought to presume that the Courts of England and Scotland will be equally anxious to do that which may appear to be most beneficial to the infant ... Instead of conflicting with one another, why should not the respective Courts of the two countries be mutually assistant in promoting their common object? We are not to presume the existence of any feeling likely to prevent them from so acting as to promote the common object, in the manner authorised by their respective and independent jurisdictions and forms ... (I)f it

---

1. The Conflict of Laws p. 184.
2. (1843) 10 Cl. & Fin. 42 at 148-149; 8 E.R. 657 at 698.
3. Ibid at 151; 699.

> should unhappily become necessary to call upon the Courts of the two countries to exercise their powers, I know of nothing which would render it impracticable for the English Court of Chancery to order the guardian resident in England to deliver up the infant to the guardian resident in Scotland. And why should we doubt that the Scottish courts would consider beneficial to the infant the same course of management, which upon evidence and consideration had been approved by the English Court of Chancery; and, if necessary order the guardian resident in Scotland, being the tutor or curator there, to deliver up the infant to the guardian resident in England?"[1]

It is needless to say that Lord Langdale's expectations were not fulfilled as conflicting opinions on jurisdiction cascaded, so much so that over the years in Scotland "the 'Court of Chancery' has almost become a dirty word".[2] Realising, however, that the only alternative to judicial co-operation is judicial competition which discredits the courts besides being wasteful of resources, we seem to have entered a new era in custody disputes. This began with the "soothing words"[3] of Vaisey J. in Re X's Settlement.[4] In that case the matrimonial domicile of the parties was Scottish but the mother had made the two infant children wards of Court in England. The Scottish father petitioned for divorce in the Court of Session in Scotland. Having been advised about the difficulties the latter court might encounter in the exercise of jurisdiction over children who were wards of court in England, he sought first to obtain

---

1. Ibid at 149-151; 698-699.
2. Morris, Conflict of Laws p. 185.
3. Ibid at 183.
4. (1945) Ch. 44.

the leave of the Chancery Division to apply for custody in the Scottish divorce action. The judge refused the application because it was unnecessary, saying:[1] "The care and protection of infants, who, by reason of the dissensions of their parents or otherwise, are in need of care and protection is exercised for and on behalf of the Sovereign as parens patriae by the courts of England and Scotland concurrently, with the sole desire of seeing that this important duty is effectively discharged. Conflict between these two courts is entirely out of the question. Each acts in the manner which it considers right as occasion arises. Neither court is avid of jurisdiction, and neither court will disclaim the jurisdiction with which it is entrusted. In the present case it may ... be for the benefit of the infants that orders should be made in the courts of both countries, but, if so, those orders will always be complementary and not contradictory in character." These pronouncements were approved in the Scottish case of M'Lean v. M'Lean[2] although their Lordships in that case appeared to have confused[3] Re X's Settlement with the earlier case of Re B's Settlement.[4] But there were still some aberrant decisions[5] in which conflicts and differences between the English and Scottish courts were

---

1. Ibid at 47.
2. 1947 S.C. 79.
3. Ibid at 86-87 per Lord Mackay who quotes Vaisey J.'s words as the pronouncements of Morton J. in Re B's Settlement.
4. (1940) Ch. 54.
5. E.g. Hoy v. Hoy 1968 S.C. 179.

emphasised more than co-operation. However, the overall movement is in the direction of more neighbourly attitudes whereby the earlier hostilities in jurisdictional matters are giving way to more liberality. In both Scotland[1] and England[2] the courts depricate the shuttling of children backwards and forwards from one jurisdiction into another and strive to avoid conflicts. This is particularly the case where custody arises as an incidental issue in divorce proceedings. Since divorce jurisdiction normally followed the domicile or residence of the spouses, the English and Scottish courts have taken the view that the courts that determine the principal (divorce) action should also determine the custody issue. In the absence of international or interstate accord there would seem to be no end to kidnapping cases unless this neighbourly attitude is actively encouraged albeit as an arm of the forum non conveniens doctrine.

(f) The Law Commissions and the House of Lords

The importance of the English and Scottish Law Commissions as a vehicle for sorting out the problem of conflict of jurisdiction should not be underestimated. We have already noted that the Law Commissions have been invited by the appropriate Ministers to make a comprehensive review of the basis of

---

1. See e.g. Robb v. Robb 1958 S.L.T. 44; Kelly v. Marks, 1974 S.L.T. 118 at 122; Calder v. Calder, 1960 S.L.T. (Notes) 52.
2. See, e.g. In re G (J.D.M.) (An Infant) 1969 1 W.L.R. 1001; cf. In Re S (M)(An Infant) 1971 2 W.L.R. 216; see also pp. 587-588 supra.

jurisdiction to make custody orders as well as the basis for their recognition and enforcement. The problem of ancillary custody jurisdiction in which conflicts is no less damaging has already received the attention of the Scottish Law Commission which came out firmly in favour of reciprocal legislation as a means of avoiding conflicts of jurisdiction in custody matters.[1] Success in this field calls for close collaboration between the two Law Commissions, and it may well be that reciprocal legislation, unification of substantive custody law, or a rule of pre-eminent jurisdiction in a child's "home" state would commend themselves to the Law Commissions as effective measures for dealing with conflict of jurisdiction between United Kingdom countries.

The potential of the House of Lords for resolving the problem of conflict of jurisdiction is equally considerable, although in the past[2] their Lordships' opinions were marked more by strife and disagreement than by co-operation and fraternity in the matter of proper basis for guardianship jurisdiction. If adequate legislation eventually covers the field of conflicting jurisdiction, the House of Lords would still have ultimate responsibility for its interpretation.

---

1. Scot. Law Com. No. 25 para 130 p. 51.
2. Johnstone v. Beattie (1843) 10 Cl. & Fin. 42; 8 E.R. 657
   Stuart v. Moore (1861) 4 M.1.

Perhaps amidst all the attempts to evolve a workable via media in this matter of conflicts, the House of Lords may prove to be the one critical factor in the whole scheme. As Dicey and Morris write:[1]

> "It may be that the control of the exercise of this jurisdiction by the House of Lords as the final court of appeal from the courts in all three parts of the United Kingdom rather than a common test of jurisdiction will ensure that serious conflicts are avoided."

G. CONCLUSION

There is need to be meticulous in selecting an acceptable basis of guardianship-custody jurisdiction since it is generally thought that choice of law is irrelevant to custody determinations, the attitude being that once jurisdiction exists, the forum will apply its own law. Therefore, a careful selection of bases of jurisdiction grounded on the child's (and the parties') substantial connection with the territory where the court sits will lessen the objections to automatic application of forum law.

It might be objected that rules of jurisdiction are irrelevant to custody in private international law because by their nature, custody problems do not lend themselves readily to resolution by the traditional adversary rules of

---

1. The Conflict of Laws p. 387.

jurisdiction. This reasoning lies behind the suggestions that formal jurisdictional rules should be abandoned in custody law in favour of "a separate category of extralitigious proceedings in which the state, through its judicial and administrative agencies, acts, with the parties' assistance, as parens patriae".[1] The prospects of this coming to pass are not very good, at least as far as the law in England, Scotland and Nigeria is concerned. What is needed is a refining of the rules of jurisdiction and active collaboration in matters of custody jurisdiction both at the interstate and international levels.

With regard to conflicts of jurisdiction, the interests of the children require that struggles between the parents and between courts be avoided. There is no international convention on conflicts of jurisdiction which is acceptable to most nations or which is in force. Yet one is badly needed. The efforts that have been made in this connection have been mainly at the interstate level. Legislators and judges are unanimous that it is far more urgent to resolve first interstate conflict of jurisdiction where the chances of success are, in any case, greater. As Lord Dunpark says, "it is obviously more important for a court in one part of the United Kingdom to avoid a conflict of jurisdiction with a court in another part than with a foreign court."[2]

---

1. Ehrenzweig, "The Interstate Child and Uniform Legislation: A Plea for Extra-Litigious Proceedings" (1965) 64 Mich. L. Rev. 1 at 9.
2. Kelly v. Marks 1974 S.L.T. 118 at 122.

But it should be emphasised that struggles between courts at the international level are as unedifying as struggles between sister state courts. Probably the greatest blemish on custody law pertains to the conflict of jurisdiction. And since this is generally condemned, any legislative or treaty solution to the jurisdictional problem must make removal of sources of conflict a focal point. It is a bad example for courts which should discourage child stealing across state lines or international boundaries to be seen to be participating, in effect, in such acts of "theft" themselves. To borrow the words of Professor Radcliffe,[1]

> "The filching of a jurisdiction that does not belong to one is no more admirable than any other act of theft."

---

1. Book Review: "Final Appeal - A Study of the House of Lords in its Judicial Capacity" (1973) M.L.R. 559, at 565.

Chapter Six

CHOICE OF LAW

A General Background

The problem for discussion in this chapter is that of ascertaining what system of law to apply in the judicial determination of guardianship disputes once requisite jurisdiction has been assumed. Several writers including Cheshire[1] and Morris[2] do not give the problem any specific attention, all being contented to focus discussion on jurisdictional and recognition problems. Dicey-Morris[3] and Nygh[4] each dismiss the theme in one brief paragraph. Although Anton[5] rightly isolates the property aspects of guardianship for separate treatment, he does so from the view point of jurisdiction and recognition, not of choice of law. Therefore, the assumption[6] that if a court has jurisdiction in guardianship it will automatically apply its own law will be the subject of scrutiny in the succeeding pages.

1 Introduction: It is axiomatic that in private international law the questions of jurisdiction and choice of law are generally independent of one another. When one enters the field of guardianship, however, a different regime prevails. There one finds that the general attitude to the question of choice of law

---

1 Private International Law

2 The Conflict of Laws

3 The Conflict of Laws

4 Conflict of Laws in Australia

5 Private International Law

6 It may be observed that Martin Wolff, among English writers, is an exception to the statement in the text. And of course European continental writers have generally subscribed to the relevance of choice of laws considerations in guardianship.

is unduly subordinate to and dependent upon that of jurisdiction. And this remains so notwithstanding that the interests of justice and of the parties themselves demand that the proper law should be applied by the courts to the matter in dispute: In guardianship and custody cases, the parties involved are generally more interest in substantive law and a fair hearing than in questions of jurisdiction.[1]

But choice of law is not constricted in guardianship field alone. In private international law in general, but particularly in the field of domestic relations, choice of law considerations lose ground to the other two major departments of conflict of laws - jurisdiction and recognition. For example, as between jurisdiction and choice of law, the former often completely ousts the latter,[2] and the nature of that subordination was expressed by Professor Graveson in these words:

> "One cannot justify the preponderance of the question of choice of jurisdiction over choice of law or vice versa without some attempt to assess first the relative importance of the two questions. Procedure admittedly provides the frame for substantive law and fixes its pattern; but it is the substantive law which determines the rights of individuals, even though such rights can only be enforced through procedural machinery. Substantive law is thus the end to which procedure is the means, and certainly in popular thought parties are more concerned that any dispute between them should be determined on the merits according to the substantive law properly applicable rather than that this court or that should have exclusive jurisdiction."[3]

---

[1] R. H. Graveson, "Jurisdiction in Matters of Child Custody" (1952) Conn. Bar Journal 44 at 47.

[2] As Dr. Morris writes, "in the English conflict of laws, questions of jurisdiction frequently tend to overshadow questions of choice of law." The Conflict of Laws p. 5

[3] R. H. Graveson, "Choice of Law and Choice of Jurisdiction in the English Conflict of Laws" (1951) 28 B.Y.B.I.L. 273 at 286. Dr. Cheshire expressed a similar thought when he said "It matters little where the machinery is put in motion provided that the correct law is applied." Private International Law (3rd ed) p. 447

When one looks at choice of law in relation to recognition of foreign judgments in conflicts law, the former once again is subsumed under the latter in relative importance. The following statement points out the incongruity of giving pre-eminent place to recognition as against choice of law. "(In) the field of recognition of foreign judgments absence of jurisdiction in a foreign court will prevent recognition of the judgment, even though the proper system of law is applied with scrupulous accuracy; while the judgment of a foreign court properly exercising jurisdiction will be recognised even though the court's understanding of the facts and application of the law, whether its own or any other, are completely wrong."[1]

With respect, choice of law, in our opinion, is the very heart of conflicts law and it should receive at least parity of emphasis with jurisdictional and recognition questions. The subsumption of choice of law questions to jurisdiction returns, regrettably, Anglo-Scots law to the pre-Mansfield days. For before Lord Mansfield's epochal decision in Holman v Johnson[2] English courts made no distinction between choice of law and jurisdiction. English courts would either have jurisdiction in a case and then decide that case according to English law, or they would have no jurisdiction to decide the case at all. But Lord Mansfield discerning the primitiveness of such an approach, laid down the rule that "Every action tried (in England) must be tried by the law of England but the law of England says

---

[1] Graveson, supra note 1, p 578 at 46-47.

[2] (1775) 1 Coup 341; 98 E.R. 1120

that in a variety of circumstances ... the laws of the country where the course of action arose shall govern."[1]

2 Choice of Law and jurisprudential underpinnings.

A close relationship exists between the system of choice of law and the prevailing jurisprudential philosophy in a given society.[2] For instance, the traditional choice of law conception was firmly rooted in Austinian positivism and analytical school of jurisprudence. Choice of law theories based on the doctrines of territorial sovereignty and vested rights were manifestations of this positivism in conflicts law. This explains why Dicey's vested rights theory flourished in 19th century England when positivism held sway, for it offered the way out of the necessity to answer the questions of how and why foreign law can have effect within the forum without impinging on the forum state's territorial sovereignty. "If legal obligations are solely the product of sovereign command, then it is only plausible to urge a reciprocal recognition of rights duly vested by fellow sovereigns."[3] For a long time this position remained basically true for guardianship law.[4] However, civil libertarian movements[5] had brought about the emancipation of women, of the legal equality of husband and wife and of the need to recognise the interest of the child as of paramount importance

---

1 Ibid. In the earlier case of Robinson v Bland (1760) 97 E.R. 717 at 748, Lord Mansfield said "The law of the place can never be the rule, where the transaction is entered into with an express view to the law of another country, as the rule by which it is to be governed." See also Dalrymple v Dalrymple (1811) 2 Hag Con 54 per Sir W. Scott.

2 See e.g. Shapira, The Interest Approach to Choice of Law pp 9-10; 61-62; Prebble, "Choice of Law to Determine the Validity and Effect of Contracts: A Comparison of English and American Approaches to the Conflict of Laws". (1972-73) 58 Corn. L. Rev 433. Katzenbach, "Conflicts on an Unruly Horse: Reciprocal Claims and Tolerances in Interstate and International Law" (1956) 65 Yale L. J. 1087, 1105, 1116.

3 Shapira, op. cit, supra note 2 at 61

4 See e.g. Nugent v Vetzera (1866) L.R. 2 Eq. 704; Kahn-Freund, The Growth of Internationalism in English Private International Law p.25.

5 See, e.g. J. S. Mill, The Subjection of Women where the author referred to the "legal subordination of women" as constituting "one of the chief hinderances to human improvement". Quoted in (1971) Jo. Fam. L. 347 at 362.

in all custody cases. By 1925, the philosophy of child custody law was based wholly on consideration of the child's welfare. The child's welfare more than ever before began to be seen, to varying degrees, as involving the consideration of an amalgam of state interests, parental interests and the child's own interests. This development coincided roughly with a new phase in jurisprudential theorising. As Austinian positivism came to be seen as no longer the sole explanation of the phenomenon of law,[1] other theories, particularly sociological jurisprudence, or the jurisprudence of social engineering (as well as American realist schools), came into being. And modern, particularly American, conflicts thinking started to slide along the lines of interests and policies underlying legal prescriptions, which approach was in tune with the prevailing notions not only of the nature of the judicial process but also of the nature of law and its function in society in general. A host of American conflicts writers[2] came to exemplify the new trend and among these writers were Currie, Cavers, Ehrenzweig, Leflar, Reese, to name just a few.

It is curious that though jurisprudential climate has changed for the better concerning the child's welfare, this change has not been reflected in the choice of law rules or methodologies as applied in the guardianship field. One would have expected that the introduction of value-judgments via

---

1 See e.g. H.L.A. Hart, The Concept of Law 182-207.

2 Cf Professor Kay's statement that "conflict of laws is a field, not of laws, but of men." H. Kay, "Ehrenzweig's Proper Law and Proper Forum." (1965) 18 Okla L. Rev. 233.

the "welfare" formula in guardianship would have been accompanied by explicit invocation of such current choice of law methodologies as "the better rule of law" or the "principles of preference" in vogue in the United States of America. But this was not so. The law in the guardianship field is still no more than the command of the sovereign. The sovereign has control and authority over all children within the realm and its law determines the consequences of any controversy about guardianship occurring within the sovereign's territory. Therefore choice of law rules and choice influencing considerations and, strictly speaking also, rules of jurisdiction and recognition, are irrelevant in custody law once parens patriae jurisdiction is invoked. It is submitted that such notions as these are at variance with a true and objective interpretation of the child's "welfare" in interstate or international guardianship cases.

B Relevance of Choice of Law Methodologies

Much of the writings on the methods for solving choice of law problems have emanated from the United States of America where torts law has offered an especial exploratory field for the new methods. The writings also deal mainly with interstate as opposed to international conflicts of laws. For both of these reasons the writings may not appear to be immediately relevant to guardianship and they may not have very favourable reception outside the United States. "Transplanted to a different environment", it has been said, "it is difficult to see how (some of these theories) would work in the absence of constitutional checks and balances".[1] Nevertheless, as

---

[1] J.H.C. Morris, The Conflict of Laws p. 533.

Dr. Morris rightly observed, in a rapidly shrinking world, "we can no longer afford to neglect the American contributions entirely."[1] And certainly it would be ill-advised for Nigerian conflicts law not to pay close attention to the American experimentations. Our concern here is to discuss briefly the methods of solving choice of law problems as associated with the writings of Ehrenzweig (interpretation of forum policy), Currie (governmental interest analysis) and Leflar (the better rule of law). It is going to be our submission that the thesis put forward in the different methods we shall be discussing offer a more plausible basis for applying forum law (English, Scottish or Nigerian) than the present attitude that holds choice of law considerations as mostly irrelevant. Since English choice of law rule is inclined generally to apply forum law[2] especially in family law matters, the American methods achieve congruency with the English approach. The American methods place ultimate emphasis on the lex fori, and hence they would seem to constitute a useful peg on which to hand English or Scots conflicts rules of the applicable law in the guardianship or custody field.

1 Favouring the lex fori. Dr. Amos Shapira writes that "a dominant theme of the majority of private international law doctrines, since the era of the medieval Italian city-states, has been to minimise (the) natural tendency to apply local laws and to curtail as far as possible all symptoms of 'prejudice', 'short sighted intolerance', 'parochialism', 'provincialism', and 'chauvinism'."[3] The English and Scots rules of conflicts did not

---

1 Ibid. at 517

2 See O. Kahn-Freund, "Reflections on Public Policy in the English Conflict of Laws" (1953) 39 Grotius 39, at 43-59.

3 The Interest Approach to Choice of Law p.44

pursue a different theme. Traditionally, choice of law was regarded in Anglo-Scottish law as an even-handed process; neither forum law nor foreign law was regarded as superior, the one to the other. We indicated in Chapter One that the Scots and English courts follow a jurisdiction selecting method when confronted with a choice of law problem, by which is meant that these courts in their decisions merely select a particular jurisdiction whose law will govern the controversy without an initial regard to the content of the indicated law. This jurisdiction-selecting approach harmonised well with the even-handed process of choice of law. As Dr. Prebble has stated,[1] "if the choice of law process is merely a preliminary step towards a final decision, then there should not be any value judgments made between the conflicting rules as to which rule will result in the better decision." But this even-handedness has no room in the (American) interest analysis approach which, as we again saw in Chapter One, is based upon an evaluation of the actual conflicting rules (as opposed to conflicting jurisdictions) and of the relative intensity of interests of the different legal systems that may have connection in one form or the other with the case before the court because "it (i.e. even-handedness) offers no assistance to a court confronted with a difficult case in which choice of law principles favouring opposite rules seem to be evenly balanced."[2] Similarly, even-handed approach to choice of law has not been conceded a place in the field of guardianship

---

[1] Prebble (1972-73) 58 Corn. L. Rev. 433 at 449

[2] Ibid. at 449

where the lex fori tends to be invariably applied though not by way of a systematised theory or method of choice of law.

The leading advocate of this theory of favouring the lex fori in all cases where a choice has to be made is Professor Ehrenzweig of the University of California, Berkeley. He argues that forum law should be applied in conflicts cases both as a starting point and as a last resort.[1] Ehrenzweig's views, it has been said, are "uncertain" and "difficult to describe",[2] but his suggestions include the following: that the first canon of judicial propriety in conflicts law is to apply the laws of the jurisdiction within which the court sits. In searching for the appropriate rule for the choice of law, therefore, the court is to give paramount consideration to the lex fori. If foreign law had to be applied, this would be in very exceptional or abnormal circumstances, such as where the application of the lex fori would be unfair to the parties or would be contrary to their intention. Under this scheme, there is thus a clear bias of the choice of law process for the forum law.

Clearly, then, Ehrenzweig's thesis can be used to rationalise the present Anglo-Scottish rule on guardianship in private international law as far as it concerns choice of law. And there are good reasons for such bias for the lex fori. First, foreign guardianship law may be

---

1 A summary of Ehrenzweig's views is contained in Schlesinger, Book Review, (1968) 16 Am. J. Comp. L. 608, 610 - 612. Ehrenzweig himself made his latest formulation of this theory in (1968) Recueil Des Cours II, 178 at 214-215. Cf Ehrenzweig, Conflict of Laws esp. 309 - 326.

2 Morris, The Conflict of Laws p. 535

unfamiliar to the local judges. As we saw in Chapter Three, even as between Scotland and England operating an identical statute on guardianship, different interpretative conclusions have been reached by the judges in the two law districts. Risks of such divergencies would be greater if a local judge attempts to interpret a foreign rule of law on guardianship. And this is not a risk to be lightly taken in a field of law where the child's interests and welfare are enjoined as paramount. The substance of this argument then is that on the basis of the judge's training and familiarity with the local guardianship law, it would be much more sound to base a decision on the lex fori, thus avoiding risks of error and costs in the ascertainment of foreign law. In the words of one writer, "ease of application, economy, convenience, and efficiency in the judicial process strongly militate against a frequent recourse to foreign rules of law."[1] It has been said[2] that Ehrenzweig's basic rule of lex fori is not exportable to foreign climes from its peculiarly American legal laboratory. This may be so as a general proposition, but it is not true for custody where the basic rule of the lex fori is, in any case, "home grown" and is applied in most jurisdictions. Ehrenzweig's basic rule of the lex fori has the further advantage, it has been suggested, that it "needs no justification"[3] (as is well illustrated in the application of the lex fori in Chaplin v Boys[4]) and his insights "conform to the actual practice of the courts."[5]

---

1 Shapira op. cit. p. 51. See also Leflar, "Choice - Influencing Considerations in Conflicts Law" (1966) 41 N.Y.U.L.Rev. 267 at 268.

2 O. Kahn Freund, (1968) Recueil des Cours II 5 at 60.

3 P.E. Nygh, Conflict of Laws in Australia (2nd ed) p. 94.

4 (1971) A.C. 356

5 Nygh, op. cit. supra note 3 at 94.

Although rationalisation of United Kingdom or Nigerian choice of law rules of guardianship along the lines proposed by Ehrenzweig might be more acceptable than bare assertion of parens patriae or offering no reasons at all, the forum-favouring theory is open to the objection that it may lead to forum shopping. Ehrenzweig recognises this danger and, as a cure, he urges the further development of the doctrine of forum non conveniences - "such as we do not have in England."[1] There is thus an incongruous situation that while in general English law is unlikely to opt for a choice of law rule laying paramount emphasis on the lex fori, it nevertheless approves of such a rule in the field of guardianship. A further objection to the forum-favouring rule in guardianship law is that section 1 of the Guardianship of Infants Act 1925 is cast in universal terms. It applies in "any proceedings" before any court. There is neither explicit nor implicit legislative mandate in the section directing the courts to apply domestic law which the forum is bound to obey. Accordingly, while there may perhaps be some implied restriction in section 1 on the application of foreign law - especially where the foreign law is not grounded on the rule of the welfare of the child - it cannot be rationally asserted that choice of law considerations are foreclosed from the outset by the section. It is far from evident that there is a bias in the section against the application of foreign law.

2 Governmental Interest Approach

The choice of law philosophy propagated by the late Professor Currie would seem to offer another ground for justifying the English and Scottish over-reliance on the lex fori in custody cases. Since English and Scots

[1] Morris, The Conflicts of Laws p. 536

laws on the whole do not consider choice of law as a relevant consideration, Currie's methods at first glance are akin to the English approach. Professor Currie had written "We would be better off without choice of law rules."[1] This, no doubt, largely expresses the present English and Scots legal attitudes in guardianship. However, if a rational explanation is sought for such attitudes it might well be found in Currie's techniques for solving choice of law problems.

The Theory: According to Currie, the proper approach to choice of law should be dictated by the governmental interests of the states involved. Shortly before his death, Professor Currie stated his thesis as follows:[2]

1 When a court is asked to apply the law of a foreign state different from the law of the forum, it should inquire into the policies expressed in the respective laws, and into the circumstances in which it is reasonable for the respective states to assert an interest in the application of these policies.

2. If the court finds that one state has an interest in the application of its policy in the circumstances of the case and the other has none, it should apply the law of the only interested state.

3. If the court finds an apparent conflict between the interests of the two states it should reconsider. A more moderate and restrained interpretation of the policy or interest of one state or the other may avoid conflict.

4. If, upon reconsideration, the court finds that a conflict between the legitimate interests of the two states is unavoidable, it should apply the law of the forum.

5 and 6 .....

---

[1] Selected Essays on the Conflicts of Laws p. 183

[2] See Currie, "Comment on Babcock v. Jackson"(1963) 63 Col. L. Rev. 1233 at 1242-1243; Similar statements are made in Currie, Selected Essays on the Conflicts of Laws pp. 183 - 184. A full summary of Currie's views is also contained in Cheatham, Griswold, Reese, Rosenburg, Cases and Materials on Conflict of Laws (5th ed) pp. 477-479.

In Currie's own words, the pertinent inquiry in choice of law "is essentially the familiar one of construction or interpretation".[1] He allows room for flexibility by his formula of "restraint and enlightenment"[2] in the process of interpretation. Furthermore, if by the above processes the court finds that the problem is a false one, then the court will simply apply the law of that state which has been shown to possess the sole interest. But in all these processes, Currie emphasises that no question of "weighing" is involved: the forum is not entitled to weigh its interests on the scales against those of the foreign state because "the process of weighing competing interests is likely to obscure the problem and the motivating reasons for the decision, and moreover to assume a mystical form that tends to paralyse the legislature."[3]

Rationale: The rationale behind Professor Currie's theory may be briefly stated: first, that there is no reason why foreign law should be promoted at the expense of forum law. "A court need never hold the interest of the foreign state inferior; it can simply apply its own law as such."[4] Furthermore, Currie sees resort to forum law as the only rational method available for the disposal of genuine conflicts. As he puts it,[5] "The counsel that each state should pursue its moderate and legitimate interest proceeds not from any love of selfishness or parochialism, nor from any disregard of the values of uniformity as an ideal, but from the need to seek a rational method of dealing with conflict of laws problems ... The rational pursuit of self-interest is preferable

---

1 Currie, Selected Essays on the Conflict of Laws pp. 183 - 184

2 Ibid. at 186

3 Ibid. at 604: "A court is in no position to 'weigh' the competing interests, or evaluate their relative merits". Ibid. at 181.

4 Ibid. at 181 - 182.

5 Ibid. at 191.

to ... irrational altruism". And lastly, Professor Currie recognises that important political decision-making is involved in a true conflict of laws case and he felt that such a problem ought to be handled only by the legislature. "(A)ssessment of the respective values of the competing legitimate interests of two sovereign states, in order to determine which is to prevail, is a political function of very high order. This is a function that should not be committed to the courts in a democracy. It is a function that the courts cannot perform effectively, for they lack the necessary resources."[1]

Professor Currie's governmental interest method has the virtue of enabling false conflicts problems to be identified and avoided. Also, although one would doubt the legitimate assertion of governmental interest in private law cases in general, such an interest is one which could readily be made and substantiated in cases of guardianship and custody on the nebulous concept of parens patriae. Such interest could readily be asserted in an international (or interstate) custody case where the child is either a national or domiciliary or resident of the forum state. Resort to such subterfluge as governmental interest in cases where the child is transiently present within the jurisdiction would be inappropriate but could be asserted under Currie's method. In such cases of transient presence, in our view, the legal system which has the most significant relationship to the parties and the child would be the most appropriate to decide the issue. In short, Currie's governmental interest approach

[1] Ibid at 182. "Resolution of a conflict between the interests of coordinate states is a function of high political order which courts are not equipped to perform." See Currie, "The Disinterested Third State" (1963) 28 Law and Contemp Prob 754 at 758.

would seem very likely to enjoy qualified acceptance if it is used as justification for the prevailing English or Nigerian lex fori rule in guardianship.

Criticism. However, the governmental interest approach can be and has been severely criticised.[1] One difficulty with the theory, as Leflar points out, is that "it is possible for good lawyers to discover and assert plausibly a governmental interest in just about any state that has any connection with a set of facts."[2]

In the conflicts field involving guardianship it does not even require a good lawyer to establish a governmental interest. Parens patriae doctrine and the transient presence rule in English law are palpably available and ready to hand. Currie's focus on governmental interest is misleading. "The state rarely has a direct interest in the matter. The persons who are directly interested are usually private citizens."[3] But this statement should not be over-emphasised. The state's responsibility for the welfare of children constitute a direct state interest in any guardianship litigation.

Other criticisms may be directed at Currie's theory. Yntema,[4] for example, has condemned the notion of "a calculus of governmental interests" as a "vague and perverse idea, suggesting that laws are made

---

1 "The chief hazard, as I see it, may spring from the misleading air of substantiality that the term 'interest' exudes. It suggests that the state's concern ... is comparable to the state government's interest in the achievement of public objectives it is actively pursuing or would vigorougly defend. Perhaps equally important is the tendency of this 'interest' concept to obscure the often-noted fact that the purposes of a given domestic rule are not the only policies of the state that may bear upon the choice of law question before the court". Cavers, The Choice of Law Process 100 - 101.

2 Leflar, "True'False Conflicts', et alia" (1968) 48 Boston U.L.Rev 164 at 170 - 171.

3 Nygh, Conflict of Laws in Australia p. 93; also Shapira, The Interest Approach to Choice of Law p. 178. Cavers writes that "the claims of the parties to the litigation ... to fair treatment must be kept in mind." The Choice of Law Process p. 121.

4 Yntema, "Basic Issues in Conflicts Law" (1963) 12 Am. J. Comp. L. 474, 482.

for the bureaucracy." It is difficult, moreover, to see the distinction between "weighing" of interests which Currie condemns and the process of avoiding false conflicts problems through "restraint and moderation" in interpretation.[1] Furthermore, the auto-limitation which is sought to be imposed on courts through the formula of interpretation "with restraint and enlightenment" is not borne out in most cases. Certainly it is not borne out in custody or guardianship law where such "restraint and enlightenment" could very easily be equated with "abdication of jurisdiction". The concept of the "disinterested state" is hardly known in custody law. And what would happen if all states are interested? Currie's answer[2] was never satisfactory. Moreover, it is not a very satisfactory solution that where the process of interpretation yields no clear answer, we should fall back on the lex fori. In conflicts cases, the paramount consideration is that justice should be done, an objective that will often by unattainable if the lex fori is automatically applied whenever the state of the forum has an interest in the exclusive enforcements of its own policy."[3]

It may often be impossible to determine the underlying "interests" of foreign law or even of forum law. As Dr. Morris points out,[4] Currie laboured for forty pages to identify the policy behind a North Carolina statute of 1933. Therefore, "It is unrealistic to suppose that the purposes behind substantive rules of law are so clear, so unambiguous

[1] See Shapira, op. cit p. 183; Morris, Conflict of Laws pp. 533 - 534.
[2] See Currie, Selected Essays on the Conflict of Laws pp. 606 - 609, 721.
[3] Cheshire's Private International Law (9th-North ed. 1974) p. 29.
[4] The Conflict of Laws p. 534.

and so singular that we can hope to discover them in the course of a trial with some degree of certainty and without risk of error ... For a rule of law is often the outcome of conflicting social, economic, political and legal pressures. It is an amalgam of conflicting interest. It does not express unequivocally a single 'governmental interest' to the exclusion of all others."[1] Finally, Currie's argument that the judicial resources ought not to be involved with the resolution of true conflicts has been dismissed[2] as "ill advised" and "without foundation". Courts should not shift responsibility to another state institution which may be unwilling or unable to meet a particular challenge. "Courts and legislatures ought to pursue a policy of harmonious collaboration, not capricious evasion, in the joint enterprise of making good law."[3] To summarise then, we would observe that although the doctrine of governmental interests may appear attractive as justifying the application of the lex fori in guardianship cases, the doctrine's many defects militate against it as a viable choice of law proposition.

3 The Better Rule of Law

The application of the "better rule of law" was advanced by Professor Leflar[4] among his five choice-influencing considerations as a means of resolving choice of law problems. This method states simply that a court, in choosing between two conflicting rules of law, should consider, among other things, the rule which may be described as the "better" one. There appears to be some basic truth in the "better rule

1 Ibid

2 Shapira, The Interest Approach to Choice of Law p. 180.

3 Ibid.

4 Leflar, "Choice-Influencing Considerations in Conflicts Law" (1966) 41 N.Y.U.L. Rev. 267; "Conflicts Law: More on Choice-Influencing Considerations" (1966) 54 Cal. L. Rev. 1584.

of law" thesis since judges would be expected to have that consideration in their minds when appraising conflicting laws. For example, the rejection of a foreign rule of law on the basis of public policy or of incompatibility with natural justice, etc. appears to be rooted in the notion that the foreign rule of law is "worse" and the forum law "better" in their application to the case at bar. Professor Leflar in a 1968 article formulated the "better law" technique in these terms.[1]

> "Common law courts have always, when they had to choose between two competing rules of law proposed for application to a given case, tried to choose the sounder rule. They have done this openly when the competing rules were urged within a single jurisdiction. This was not a 'free law' jurisprudence, it is the common law tradition. The only new idea that is proposed is that it is permissible to do the same thing in choice of law cases, and that it is better to do it openly rather than covertly. Preference for what the court regards as the superior rule of law is a factor that may be relevant in choice of law cases - not always, but sometimes."

Such superiority of one rule of law over the other "in terms of socio-economic jurisprudential standards, is far from being the whole basis for choice of law, yet it is without question one of the relevant considerations."[2] Even Professor Cavers who is otherwise opposed[3] to the notion of a "better law", in formulating his "principles of preference" as a choice of law methodology seems to have subscribed to the "better law" thesis. He states that "one cannot expect judges in choice of law cases always to close their minds to a conviction that one of the competing domestic rules is intrinsically superior to the other ..."[4]

---

1 Leflar, "True 'False Conflicts' et alia" (1968) 48 Boston U.L. Rev. 164 at 168 - 169.

2 Leflar, supra note 4, at 296

3 Cavers views the "better law" approach as "an inevitable psychological reaction in marginal cases, a tendency not to be encouraged, but to be taken into account in explaining decisions." See his "The Value of Principled Preferences" (1971) 49 Tex L. Rev. 211, 215

4 Cavers, The Choice of Law Process p. 122.

Professor Leflar himself refers to his method as "most controversial"[1] and that "the search for the better rule of law may lead a court almost automatically to its own law books."[2] While recourse to "better rule of law" may tempt courts often to apply forum law because it is "better" - a course which is clearly antipathetic to the central idea for the existence of conflict of laws rules, viz. to show when a court should apply foreign law - Leflar's method has some considerable advantages. First, preference for the "better" rule of law simplifies the judicial task. Secondly, it facilitates the jettisoning of laws which are anachronistic, behind the times,[3] or, as Cheatham and Reese say, laws which are "a drag on the coat tails of civilisation."[4] Furthermore, the better rule of law has actually been adopted by some American courts such as those of New Hampshire,[5] and the United Kingdom[6] courts do not appear to be entirely oblivious to the "better law" rationale. And there can be no doubt that when courts in a guardianship case posing an ideal choice of law situation prefer, as Ehrenzweig says, the "trend to stay at home"[7] and thus to apply forum law, they are motivated by the consideration that the forum law on the child's "welfare" is "better law" than the foreign one. But how does the "better law"

---

1 Leflar, supra note 4 p.613 at 1587

2 Leflar, supra note 4 p.613 at 298

3 Dr. Morris has written that if a rule of law is ancient, "its original purpose may be lost in the mists of antiquity; and its continuance may simply be due to inertia or to lack of Parliamentary time to abolish it." The Conflict of Laws p. 534.

4 Cheatham and Reese, "Choice of the Applicable Law" (1952) 52 Col. L. Rev. 959, 980.

5 See Clark v Clark (1966) 107 N.H. 351 at 355, cited in Leflar, supra note 1 p.614 at 165 - 166.

6 See e.g. Starkowski v Attorney-General (1954) AC 155 at 170 per Lord Reid.

7 Ehrenzweig, Private International Law p. 104.

doctrine operate when the involved jurisdictions are within one nation, under the same legislature and judiciary, with a common legislation and a common cultural, social, political and legal background? Here begins the flaw in Leflar's "better law" thesis. Surely Professor Nygh[1] is right when he said that a preference for the better law is only workable where a rule is obviously archaic and has survived in a particular jurisdiction only through the inertia of its legislative institutions. In any case, Leflar himself admits that the "better rule" is not workable in law districts which adopt a jurisdiction-selecting rather than rule-selecting approach to choice of law. As he says, "If choice-of-law were purely a jurisdiction-selecting process, with courts first deciding which state's law should govern and checking afterwards to see what that state's law was, this consideration (of better rule) would not be present."[2] But the United Kingdom and Nigerian conflicts law is not forever bound to remain jurisdiction-selecting. Hence Leflar's suggestions cannot be ignored even for conflicts cases outside the guardianship field. Dr. Morris has nevertheless criticised the "better law" approach because "It is not the function of courts to reform the law of other countries (still less of their own country) by giving it the narrowest possible scope or refusing to apply it in a conflict of laws case. That is a task better left to legislatures or Law Commissions."[3]

[1] Nygh, Conflict of Laws in Australia p. 53.
[2] Leflar, supra note 4 p613, at 1587.
[3] Morris, The Conflict of Laws p. 542.

While we may concede that it would often be extremely difficult to assess which solution to an issue is "better" or "worse", the problem is not insurmountable. The advent of the science of comparative law may render the judicial task in this connection more susceptible of realisation.[1] As Dr. Zweigert states, "It is the daily task of comparative lawyers to compare and weigh the significant solutions we find in several legal systems",[2] and the comparative lawyer "has the ability to argue which solution is the superior answer to the given problem."[3] Nevertheless, one must admit that elements of subjective evaluation are bound to creep into the process of assessing the "better rule of law". Leflar's methods therefore appear to be closest to the actual practice of courts in guardianship cases involving foreign elements. The "better rule of law" furnishes ready justification for such a decision as J v C[4] where the House of Lords found that in custody cases Spanish law conceded primacy to the father's right and not the welfare of the child.

4 False Conflicts

We shall end our discussion of such choice of law methodologies as may be applied in guardianship-custody by examining the theory of false conflicts. It may often happen that in a conflicts case the laws of the

1 See Shapira, The Interest Approach to Choice of Law. p. 38.

2 K. Zweigert, "Some Reflections on the Sociological Dimensions of Private International Law or What is Justice in Conflict of Laws" (1973) 44 U. Colo. L. Rev. 283 at 289.

3 Ibid. at 290

4 (1969) 1 All E.R. 788 at 795 per Ungoed Thomas, J; (1970) A.C. 668.

implicated jurisdictions are the same. According to the traditional approach to conflict of laws, in such a situation an inquiry will still have to be made as to the proper choice of law even though no difference exists in the implicated laws. Today, however, with the interest or policy-oriented approach to choice of law, no problem would exist where the different contact laws are the same. It is the view of most American writers that by looking at the content of the laws a judge should be able to eliminate alleged conflict of laws problems by indicating that there is in fact no conflict as would warrant the exercise of judicial time and resources. So forum law is deemed to prevail in such cases where there is no difference in the involved laws. The great contribution of the policy or interest-oriented approach to choice of law is thus to help in easy identification of false conflicts. In the words of a writer who may be referred to as the "father" of the "false conflicts" theory, "The clearest contribution of governmental interest analysis to conflict of laws method is that it establishes the existence of ... false (conflicts) and provides a workable means of identifying them ..."[1]

The false conflicts phenomenon is still young in conflicts law. There is no agreement on the proper term to describe the phenomenon. "False conflicts", "false problems", "spurious conflicts", "avoidable conflicts", "pseudo-conflicts" are all among the several designations which have been suggested.[2] And as the "line separating false or avoidable conflicts from true ones is frequently unclear",[3] there is as

[1] Currie, "The Disinterested Third State" (1963) Law and Contemp Prob 754 at 756.

[2] A compendium of the different brand names is given by Westin, "False Conflicts" (1967) 55 Cal. L. Rev. 74 at 76.

[3] Shapira, The Interest Approach to Choice of Law p. 195

yet no agreement on exactly what should be included within the "false conflicts" category - a useful technique "not yet adequately developed"[1] and which is still largely confined to "the realm of scholarly writings."[2]

Professor Cavers[3] provides four instances of false conflicts, but the fullest account of the concept to date has been furnished by Mr. Westin[4] who lists some seven false conflicts situations. The more usual false conflicts situations are said to include these two (which are the only relevant categories for our present discussion). First, where two countries or law districts have different laws but one of them is clearly not intended to apply to the case at bar;[5] and secondly, where the laws of the involved jurisdictions are the same or where, upon a judicial study of the rules possibly applicable to the case, it is found that the end result of the application of such rules would be the same.[6] In such situations there would be no need for a court to choose between the different laws. "In that situation", writes Leflar, "there is no need to make a choice between the laws of different states. The result is the same under either law. At least it ordinarily ought to be."[7]

1 Leflar, "Choice-Influencing Considerations" (1966) 41 N.Y. U. L. Rev. 267, at 289.

2 Prebble, (1972 - 73) 58 Corn. L. Rev. 433 at 466.

3 Cavers, The Choice of Law Process pp. 63 - 64, 89 - 90.

4 Westin, supra note 2 p.618 esp at 76 - 78.

5 See e.g. Morris, The Conflict of Laws p. 542.

6 Morris, op. cit. p. 543; Westin, supra note 2 p.618 at 80.

7 Leflar, "True 'False Conflicts' et alia" (1968) 48 Boston U. L. Rev. 164 at 171.

It might be asked what is the relevance of the foregoing discussion in terms of guardianship law. It is our aim to show that just as was the case with the earlier methodologies surveyed, the "false conflicts" doctrine could be used to support a theory whereby English or Scots or Nigerian courts automatically prefer forum law in guardianship cases containing foreign elements. Now, according to the above definitions of "false conflicts", guardianship and custody would furnish obvious false conflicts situations in most instances since, because of the near-universality of the "welfare" principle, the laws of all or of most countries on guardianship-custody are either the same or would produce identical results in a given case. Indeed, in the leading case of McKee v McKee[1], Lord Simonds referred to the sameness of custody law in the Commonwealth or the common law when he said:[2]

> "It is the law of Ontario (as it is the law of England) that the welfare and happiness of the infant is the paramount consideration in questions of custody... So also, it is the law of Scotland ... and of most, if not all, of the States of the United States of America. To this paramount consideration all others yield."

A little later Lord Simonds added that the rule as to non-recognition of foreign custody orders again "has long been recognised in the courts of England and Scotland ... and in the courts of Ontario (Canada)."[3] These statements indicate that Commonwealth courts would be justified in applying the lex fori since under the false conflicts methodology there would be no need to deliberate on which of the involved or

[1] (1951) A.C. 352
[2] Ibid. at 365
[3] Ibid.

"conflicting" laws should prevail. So that in a typical conflicts case of custody, "To choose any particular law is to beg the question by assuming that choice of law has a material bearing on the outcome of the case ... (Once) the court has established that the relevant laws of each contact state are identical, it should refuse to entertain all choice of law arguments."[1]

Custody cases, therefore, appear to present a situation where choice of law is an irrelevant factor since all the available choices are the same. So that the disposition of a true custody conflicts case as in McKee would not be meaningfully affected by the application of traditional choice of law apparatus. As Westin states, "Allowing the court to indulge in gratuitous reasoning, besides wasting judicial effort, produces a body of misleading dicta parading as valid choice of law precedent."[2]

There is, however, a major fallacy in applying the false conflicts theory to custody law. Uniformity exists in custody law only as regards the rule of the paramountcy of the welfare of the child, and no more. For as we indicated earlier even as between England and Scotland there is no agreement as to the interpretation of the same section in the same guardianship legislation. Although the rule of the paramountcy of the child's welfare may be universal, different emphasis, as dictated by

---

1 Westin, supra note 2, p.618, at 106. Emphasis in original.

2 Westin, supra note 2, p.618 at 112. See also Ehrenzweig, Conflict of Laws 175 at 465 - 466. It should be added, however, that "precedent" has no place in child custody law. "I never heard of binding authority in an infant case before". per Harman L.J. Re H (Infants) (1966) WLR 381 at 402.

different social policies, is placed on the underlying principles in custody law by different jurisdictions. In other words, different stress is placed on the principles of parental equality and partnership, trustee-fiduciary relationship, considerations of justice, the place of "rules" etc. Therefore, the statement as to the "sameness" of custody laws may be misleading since the order of priority in the matter of the child's welfare in a custody case may differ. For example, in the matter of enforcement of foreign custody orders, in the older cases and in some jurisdictions the courts would enforce the foreign custody order subject to the judge's discretion in the overriding matter of the welfare of the child; on the other hand in later cases in England the courts would first decide on what the welfare of the child requires and then give due weight to the views of the foreign court on the matter.[1]

To say, therefore, that "false conflicts" problems are raised in all custody disputes and hence that choice of law is an irrelevant consideration to custody-guardianship would be to evade the real problem. It is our respectful submission that choice of law considerations should be decisive in custody no less than in other fields of conflicts law. Granted a situation of identity of guardianship laws the court would still be faced "with the unenviable task of determining which of the States involved has the greatest concern in the application of its rules."[2] And the problem of discovering the State of greatest concern in a custody case is made more acute "by the fact that either different policies or policies of different intensity may underlie the identically worded statutes or decisional rules of two or more States."[3]

---

1 See e.g. E. Liklovski, "Foreign Orders of Custody" (1951) 4 I.L.Q. 506

2 Reese, "Choice of Law: Rules or Approach" (1972) 57 Corn. L. Rev. 315 at 316.

3 Ibid.

C Is Choice of Law a Relevant Consideration in Guardianship?

The principal thesis in the preceding subsections of this chapter has been the appropriateness, as a matter of theory, of the prima facie applicability of the lex fori or the domestic law in guardianship or custody cases. And we examined how the prevailing choice of law methodologies would fit into the scheme of lex fori as the primary rule. In the present section we shall be focusing on the place of the lex fori in guardianship law as a matter of actual practice. What do the courts say? What support has choice of law in the juristic writings and in international practice? Is the case in favour of lex fori all that overwhelming?

I Current Attitudes

1 Not a Relevant Consideration (or the lex fori rule)

(a) Introduction. It might be legitimately argued that the first duty of a court in a conflicts case is to apply, as a starting point, the law of the jurisdiction in which the court sits. Although such an attitude might result in a clear bias of the choice of law process in favour of the law of the forum, the practical justification would be the judges' familiarity with local law and custom and a corresponding difficulty in the ascertainment of foreign law. Further, although a deliberate employment of forum preference may be suspect in that it leaves out-of-state concerns out of account, the approach might be justified on the ground that it is in the tradition of conflicts law in general. For traditionally the application of foreign law has been limited by two devices: the first is the widening of the scope of the doctrine of

public policy and the second is by concentrating disproportionately on questions of jurisdiction. In the area of custody in private international law both of these devices have been at their fullest operation. The statutory emphasis on the child's welfare has been interpreted as legislative charter for free play of judicial discretion. If a court has jurisdiction - and this was the only important proviso that mattered - then it must, in its discretion, apply forum law, the argument goes. By thus importing an overwhelming rule of discretion and public policy into the statutory provision on guardianship, the exclusion of foreign law was assured from the beginning.

(b) The Rule. What can be described as the traditional choice of law (or non-choice of law) rule in Anglo-Scottish conflicts law of guardianship is contained in Rule 50 (2) of Dicey-Morris, Conflict of Laws:

> "If the Court has jurisdiction to appoint a guardian for, or to make a custody order in respect of, an infant, the Court will apply English law."[1]

A host of writers support that view in maintaining that choice of law is an irrelevant consideration in conflicts cases involving custody. For example, Anthony Bland writes that[2] "English internal law is

[1] See also Hope v Hope (1854) 4 De G.M.&G 328, at 345

[2] Bland, "The Family and the Conflict of Laws" in Graveson ed. A Century of Family Law at p. 380. Again at p. 403 the author added: "In the conflict of laws the exercise of jurisdiction by the English court may involve consideration of a claim to custody advanced by a foreign guardian, appointed under the law of the domicile, and here the lex fori, based on the discretionary powers of the English judge, is paramount."

predominant . . . in those cases, traditionally within the discretion of an English judge, of which the most obvious example is the guardianship and custody of infants." In a similar vein, Professor Webb has stated that "The common law and statute law laying down the circumstances in which an English court will exercise jurisdiction to appoint a guardian for, or make a custody order in respect of, an infant constitute part of English law and, therefore, of the lex fori. There is no question of the choice of law. Once it is apparent that the court has jurisdiction, English law is applicable."[1] And as Professor O. Kahn-Freund sees it, "For an English court it is unthinkable to apply foreign law to . . . a question concerning guardianship or concerning the custody of a child."[2]

(c) Rationale After their categorical statement that whenever English courts have jurisdiction in guardianship matters they would apply English domestic law Dicey and Morris explain the reason in these terms:[3] "In matters of custody", they write, "the specifically English nature of the remedies at common law and in the Court of Chancery favoured the application of English law, the lex fori, to determine the extent of their exercise." In the opinion of another learned writer, "the ecclesiastical

1 P.R.H. Webb, "Some Thoughts on the Place of English law as the lex fori in English Private International Law" (1961) 10 I.C.L.Q. 818 at 834. Emphasis added; See also Nygh, Conflict of Laws in Australia 584-585.

2 O. Kahn-Freund, The Growth of Internationalism in English Private International Law p. 16.

3 Dicey-Morris, op. cit. p. 391.

tradition may have something to do with"[1] the predominance of the lex fori in guardianship. So there appears to be some dubious, inexplicable basis for applying forum law automatically in all custody cases. According to Dr. Erwin Spiro, the reason for applying forum law lies in the distinction between law and fact. As he said, "The inquiry into what is best in the interests of an infant deals with facts, but not with a question of law, and therefore calls for the application of the lex fori. It follows from the nature of the inquiry that it is the lex fori which governs."[2] The author's view is that if a court is competent to look after the interests of children within its jurisdiction, the law of the forum would be in the best position to determine whether any steps ought to be taken in the interests of the child. It would seem that the familiar doctrine of parens patriae has much to do with forum preference. The minimum factual contact of a custody case with the forum justifies the assumption and exercise of parens patriae jurisdiction. In the same manner, the interests of the sovereign, as parens patriae, in all children is such that it should not countenance choice of law considerations, so the arguments seem to go. But as Leflar has said, it is difficult to see how one could "seriously advocate a rule under which a forum would apply its own law in every case in which it is constitutionally permissible to do so."[3] Nonetheless, choice of law considerations seem ignored by judges no less than the scholars.

[1] O. Kahn-Freudn, supra note 2, p625 at 16.

[2] E. Spiro, "Foreign Custody Orders" (1950) 32 Jo Comp Leg 73 at 79. See also Spiro, Conflict of Laws (1973) p. 221.

[3] Leflar, "Choice-Influencing Considerations in Conflicts Law" (1966) 41 N.Y.U. L. Rev. 267 at 291 n. 85.

(d) Judicial attitude: The judicial attitude to the question of whether choice of law is a relevant consideration in custody law is one of overwhelming endorsement of the position stated in Dicey-Morris, Rule 50(2)[1], that is, it is not a relevant concern. The House of Lords, it has been said,[2] has now placed its seal on that Rule by its holding in J v C[3] that in custody proceedings in England concerning a child of Spanish nationality and domicile the determination should be made according to English domestic law. The dicta in support of this comes from the words of Lord Upjohn who said that ". . . our courts have an independent power and duty to investigate the facts and make an order based on English principles."[4] It is submitted, with respect, that this preference for forum law does not support conclusively the contention that choice of law is irrelevant. Indeed, Lord MacDermott, the other Law Lord who explicitly adverted to the choice of law issue, was not as categorical as Lord Upjohn. Whether there be a foreign custody order or not, Lord MacDermott stated that "the law of the foreign home may have to be examined if relevant to the welfare of the child should he be returned there."[5]

1 See e.g. McKee v McKee (1951) A.C. 352 (P.C.); Re B's Settlement (1940) Ch. 54. Johnstone v Beattie (1843) 10 Cl & Fin 42

2 P.E. Nygh, Conflict of Laws in Australia pp. 584-585.

3 (1970) A.C. 668

4 Ibid. at 720. Emphasis supplied.

5 Ibid. at 714.

2 A Relevant Consideration (or the true welfare rule)

(a) Introduction: "There are many situations in which, if the English court has jurisdiction, it will apply English domestic law. This is true, for example, in proceedings ..... for the guardianship, custody and adoption of children."[1] "(The) welfare principle which requires the application of the lex fori precludes the application of foreign law."[2] Both these statements are emphasising the same theme: that choice of law is not a relevant consideration in custody and guardianship cases. But how far are these statements a correct account of the practical attitude of the courts? What attitude has been adopted in international conventions? It will be the burden of the present section to show that choice of law is a necessary ingredient of custody determination just as it is in most of conflicts law. But two preliminary remarks will be made. First, the "welfare" principle cannot be said to "require", as the second quotation above asserts, the mechanical application of forum law in all cases. Rather, if foreign law can be shown to provide for the child's true welfare, then that is the law that ought to control. In the second place, the choice of jurisdiction usually carried with it the choice of the jurisdiction's own law of procedure, and procedure normally includes such diverse matters as onus of proof, limitation of actions, rules of evidence and statutory requirements of written evidence etc. Therefore, the rule that procedure is governed by the lex fori not only constitute a major exception to the view that choice of law is totally irrelevant to custody but shows the mutual interdependence of jurisdiction and choice of law.[3] In other words, the choice of jurisdiction is truly the first

[1] Morris, The Conflict of Laws p. 5

[2] O. Kahn-Freund, The Growth of Internationalism in English Private International Law, p. 66

[3] Graveson, "Choice of Law and Choice of Jurisdiction in the English Conflict of Laws" (1951) 28 BYBIL 273, 281.

choice of law in any conflicts case.

As we have indicated, our submission in this part of the discussion is that the automatic application of forum law in all guardianship conflicts cases is anachronistic and should be abandoned. It cannot be justified on the ground of the child's welfare. For when courts are objectively seeking to realise the true welfare of the child, foreign law ought not to be foreclosed without examination. The fundamental precept of even-handedness in doing justice in private international law cases is to be preferred to a forum-oriented approach in which forum law is invariably chosen when two or more laws are in conflict. The rationale behind that even-handed approach has been very well stated by a leading British jurist, Professor Anton, in these words:[1]

> "In a free society the court's duty is not wholly or even primarily to give effect to state interests but rather to balance those interests with such private interests as seek recognition. Its duty is conceived to be no different in the conflict of laws: here such interest as the state may have in giving effect to its legislative policies must be weighed against the need to give effect to the reasonable expectations of the parties. Hitherto our system of private international law has had no great difficulty in achieving this balance because it has assumed that its own rules of private law are designed less to effectuate state policies than to provide a workable framework of rules within which the interests of private persons may be adjusted. The relative disinterest of the state has enabled the courts to make a warrantable assumption that their own system has no monopoly of legal truth and to adopt an attitude of qualified neutrality towards the substantive laws pressed upon its attention. Much would be lost if we abandoned this system for one which, through a bias for the lex fori, gave primacy to the legislative policies of the state over the need to do justice in the individual case."

[1] Anton, Private International Law pp. 41-42.

Of course today's exceptions to this even-handed policy include the rule that matters of evidence and procedure belong to the law of the forum. Guardianship and custody have often been included in the exception and it is our concern here to indicate that such a position of bias for the lex fori cannot be justified in every case.

(b) Juristic opinion: Martin Wolff[1] stands unequivocally in favour of the relevance of choice of law consideration in guardianship. The applicable law, he says, should not be an automatic choice of forum law but the domiciliary law of the child should, instead, receive primary emphasis. This is how he formulated his opinion: "As under all legal systems the aim of guardianship is to shield persons in need of protection on account of their infancy . . . it is obvious that everywhere the personal law of the ward, i.e. in England the law of his domicile, governs all questions arising out of the ward's need for protection."[2] The learned author has placed his case too high since, as the discussion in the preceding section shows, the choice of law question is far from being "obvious". Martin Wolff however recognised exceptions[3] to his rule. And these exceptions would operate to favour the lex fori such as in cases where the law of the domicile conflicts with the child's welfare, or they may operate in favour of the lex situs in cases involving the ward's immovable property.

It may be admitted that not many significant choice of law issues arise or are likely to arise in guardianship and custody. But where

[1] M. Wolff, Private International Law 2nd ed pp. 409-412
[2] Ibid. at 409
[3] Ibid. at 410-412.

they do arise, these should not be dismissed as irrelevant. Suppose, for example, that one party seeks before a local forum modification of a foreign custody order on the ground of changed circumstances in that evidence of previous events not introduced in the first (i.e. foreign) proceedings is now discovered. And suppose further that the foreign court's rule of admissibility of evidence bars such new material. Should the forum reject the introduction of such evidence? Surely this would not be right. But suppose such a rule of non-admissibility of discovered evidence to be one in force in the forum state itself. Should the forum apply its own law just because it has assumed jurisdiction? Again surely not. "The welfare of the child suggests that a court with responsibility for adjudicating custody should not be foreclosed . . . from considering previously unevaluated evidence that is relevant to the decision."[1] In such situations, a choice of law has clearly been made. Ordinary citizens, as Professor Graveson has said,[2] are more interested in substantive law and fair hearing than in questions of jurisdiction. It would therefore be disappointing the expectations of the ordinary citizen if the law of the forum were to be invariably applied simply because the matter was entertained by the forum.

One of the fullest juristic statements on the relevance of choice of law to custody law has been given by Professor W. Muller-Freinfels.[3] He begins by stating that "Merely 'legalistic' methods, which ignore social change, cannot lead to a proper solution of the choice of law

[1] L. G. Ratner, "Legislative Resolution of the Interstate Child Custody Problem: A Reply to Professor Currie and a Proposed Uniform Act." (1965) 38 So. Cal. L. Rev. 183 at 196.

[2] R. H. Graveson, "Jurisdiction in Matters of Child Custody" (1952) 26 Conn. B. J. 44 at 47.

[3] W. Muller-Freinfels, "The Legal Equality of Husband and Wife and the Child's Welfare in Private International Law", in Essays in Jurisprudence in Honour of Roscoe Pound pp. 595 - 648.

problem regarding which law ought to be applied in any particular case. The choice of law cannot be made without value judgments, and it must take account of revolutionising changes and shifts in values."[1] In the guardianship-custody field in particular, such changes include the now dominant place accorded the child's welfare as well as the doctrine of parental equality now firmly embedded in United Kingdom guardianship legislation. Professor Muller-Freinfels sees the present one-sided approach to conflicts problems in custody as "leading to a determination of the scope of application of the rules according to political, economic and prestige considerations of the various States."[2] The prevailing lex-fori-favouring approach would seem to bear out this statement. Noting further that "So complex a structure as Conflict of Laws cannot be reduced to a single principle"[3] - such as a mechanical application of the law of the forum - Professor Muller-Freinfels advances the argument that "We must seek the most closely connected legal system according to factually appropriate contact criteria."[4] And he proceeds to illustrate the various approaches to choice of law in custody in different European countries. There is no doubt in Professor Muller-Freinfels' mind that choice of law considerations are as vital in guardianship as they are in other departments of law. As he says, " . . . the primary task of Conflict of Laws . . . is the correct choice of law, premised on the fundamental parity of all relevant legal systems, and not a decision for or against a definite substantive result. It is

[1] Ibid. at 596
[2] Ibid. at 597
[3] Ibid
[4] Ibid. at 598.

fundamental to the Conflict of Laws that we meet the foreigner with a spirit of due respect and readiness to apply his law when it is the most closely connected . . . Not the appropriateness of the content of the law but the appropriate application of the law is the fundamental consideration in the Conflict of Laws."[1]

In a normal conflicts case, the concern is to adjust the rival interests of two persons via the choice of law process which demand even-handedness and equality of treatment. In custody case on the other hand, the need to protect the child means that the primary emphasis is on the interest of one person - that of the child. This should be reflected in the choice of law process. The English rule of invariably applying the law of the forum seems to be based on the content of the local law which emphasises the child's welfare. But there is no logical requirement that the lex fori is fundamentally the only one which is competent to decide what represents the true interest and welfare of the child. This is one of the factors which should lead a court to have regard to choice of law in custody-guardianship no less than in other fields of law.

(c) Judicial Attitude: The judicial attitude to choice of law in guardianship may be described by the statement that the process "is accepted by the courts more by deed than by word."[2] There are not many cases in which judges explicitly formulate their conclusion in language that reflects choice of law thinking. But there can be no doubt that to some extent that factor is a relevant consideration and sometimes is

[1] Ibid. at 601

[2] R. Leflar, "Choice Influencing Considerations in Conflicts Law" (1966) 41 N Y U L Rev 267 at 295.

decisive in the determination of the dispute. The case of Re Kernot (An Infant)[1] comes readily to mind. In that case an Italian mother sought to recover custody of an infant from its English father. There was evidence before the court that in considering what should be done about the custody of the child an Italian court would apply the law of the nationality of the child, which is English law - the lex fori. The mother's contention was that the convenient forum before which the dispute should be litigated was the Italian court since the child and its parents once all resided in Italy where, moreover, most of the relevant evidence was located. To that contention Buckley J replied in these words: "In considering questions of forum conveniens the court has to take into consideration not only such matters as the physical convenience of the parties and the witnesses and matters attendant on the trial and things of that kind, but also the system of law which is to be applied, and must consider what court is really the appropriate tribunal to reach a proper answer in applying that system of law. That seems to me as much relevant for consideration as are considerations of personal convenience and expense."[2] In the opinion of Buckley J, it is "a far-reaching proposition that when the proper law to be applied to a particular subject matter is English law, an Italian court would be the most convenient forum in which to try the question."[3] The court accordingly took into account the fact that the foreign law and forum law are the same and it applied the law of the forum by a process akin to the "false conflicts" reasoning we examined earlier in this chapter.

1 (1964) 3 W L R 1210.
2 Ibid. at 1214 Emphasis added.
3 Ibid.

Even more distinctly centred on choice of law considerations was the earlier case of Monaco v Monaco.[1] In that case, the reigning Prince of Monaco brought a petition before the English court seeking to recover custody of his grandson, Prince Rainier, from the child's father (defendant) who had been divorced from the child's mother - the hereditary Princess Charlotte - who was the plaintiff's daughter. Plaintiff's claim was that he was the lawful guardian and custodier of the infant prince. The boy who was in England was not a ward of court, and the question of sovereign immunity was not in issue. The question before the court was whether the plaintiff is the guardian and as such entitled to the custody of the infant prince. In deciding that question, the court found it "necessary to consider and ascertain the position of the parties having regard to Monegasque law."[2] In the words of Luxmoore J, the answer to the question whether the plaintiff is the guardian and entitled to the custody he seeks "falls to be determined after considering . . . the law of Monaco."[3] Some evidence was led as to Monegasque law on the subject and the court found that in matters of personal status such as guardianship and custody of infants, the law administered in Monaco is the national law of the persons concerned. And under that law the plaintiff was entitled to the guardianship and custody of the child. On these facts it was held that the plaintiff was the lawful guardian and entitled to the custody of the infant prince. In the opinion of Luxmoore J, "the plaintiff has established that he is entitled under and by virtue of (Monegasque law) to the guardianship and custody of Prince Rainier."[4]

1 (1937) 157 L.T. 231 Ch.
2 Ibid. at 232 Emphasis added.
3 Ibid.
4 Ibid. at 234.

Another reason why courts might be inclined to accept the relevance of choice of law in custody by deed if not by word is that in cases involving the kidnapping of children, a party should not be allowed to benefit from forum law when that party does not come before the court with clean hands and when both foreign and forum law are not different - that is, both laying emphasis on the paramountcy of the welfare of the child.

Furthermore, we saw in Chapter Three that a bundle of concepts is involved in custody adjudication, such as the concept of "welfare" itself and the concept of "other considerations". Both of these, of course, cannot be sharply demarcated, and they are constantly interacting with one another. The "other considerations" are infinitely various and some of them pertain to the nature of parental rights, duties, claims, or to parental intentions, the child's wishes, and considerations of "clean hands" etc. It is our submission that however justifiable it may be to exclude choice of law when the child's "welfare" stricto sensu is the subject of judicial scrutiny, in adjudicating on the "other considerations" the normal rules of private international law should be observed. Otherwise one or the other of the parties is bound to have at the end of his or her day in court, that "rankling sense of injustice" when a decision is handed down.

Now, as is well-known, intention looms large in the determination of the proper law of e.g. tort or contract. In the same manner, custody might be awarded in order to give effect to some previous intention of the parties. This accords with the proper law doctrine.

The only case that illustrates this point well is Re O (Infants)[1] where a Sudanese father attempted to recover custody of two children (a boy and a girl) from their English mother. In giving his decision Lord Evershed said:[2]

> "It is, I think, vital to recall that when this marriage took place, the intention was that it should be what you would call a Sudanese marriage, that the man and wife should live together in the Sudan and make their home there, and that the children of the marriage should be brought up in the Sudan."

And this was what led the Master of the Rolls to award custody of the son to the father. Here the judge was acting in unmistakable choice of law tradition, in deed and in words. In many custody disputes involving mixed marriages this element of intention is bound to be present and so it ought to be segregated and given its proper emphasis as a choice of law criterion. It may be said, therefore, that the cases of Re Kernot (An Infant) and Re O (Infants) have rescued choice of law reasoning in custody law from the obscurity into which it had fallen before and since Monaco v Monaco.

(d) Practice in International Conventions: Instances can be cited of international conventions in which choice of law provisions have been laid down in the matter of guardianship in private international law. In the light of these it would be incongruous for nations to maintain that choice of law has no place in their conflicts law rules of guardianship.

1 (1962) 1 WLR 724 CA.

2 Ibid. at 727. The Master of the Rolls added: "The father is Sudanese and the mother is English. The two children born of the marriage are therefore half Sudanese and half English, and that is, of course, a not unimportant consideration." Ibid.

Bilaterial treaties and especially multilateral conventions have been used by nations of the world as vehicles for formulating choice of law rules not only in the field of custody butin other fields as well.[1] At the beginning of this century a series of conventions on personal status were agreed upon by the Hague Conference on Private International Law. The most important of these, for our present purposes, was the 1902 Convention governing the guardianship of infants between the Netherlands and Sweden. Out of this convention arose the significant International Court of Justice Judgment in the 1958 case which we discussed in Chapter Three. The preamble to that convention states that the members to the convention desired "to lay down common provisions to govern the guardianship of infants." And Article 1 goes on to provide that

> "The guardianship of an infant shall be governed by the national law of the infant."

The convention contemplated the contingency of a conflict arising between the guardianship laws of two or more states and it aimed at resolving such conflicts by laying down that the proper law to govern the guardianship should be the national law of the infant. In the opinion of the World Court:[2]

> "The 1902 Convention had to meet a problem of the conflict of private law rules. It presupposes the hesitation which was felt in the choice of the law applicable to a given legal relationship: the national law of an individual, the law of the place of residence, the lex fori, etc. It gave the

[1] See generally, Cavers, The Choice of Law Process, Chapter 10.

[2] (1958) I.C.J. Reports 54 at 70.

> preference to the national law of the infant and thereby prescribed to the courts of each contracting State that they should apply a foreign law when the infant involved was a foreigner. It is perfectly conceivable that the courts of a State should in certain cases apply a foreign law."

The 1902 Convention has, as we indicated in Chapter One, been superseded by the 1961 Convention Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Infants.[1] Article 2 of the 1961 Convention states that in respect of a child the authorities having the requisite power under the convention shall take the measures provided by their domestic law. And that law shall determine the conditions for the initiation, modification and termination of those measures. Where the interests of the infant require it, the authorities of the State of the infant's nationality may take measures "according to their own law for the protection of his person or property."[2] For certain situations, the Convention introduced the now-familiar concept of the application of the law of the place having the "most significant relationship" or having the "closest connection" with the infant. Article 4 reads in part as follows:

> "For the purposes of the present Convention, if the domestic law of the infant's nationality consists of a non-unified system, 'the domestic law of the State of the infant's nationality' and 'authority of the State of the infant's nationality', shall mean respectively the law and the authorities determined by the rules in force in that system and, failing any such rules, that law and those authorities within such system with which the infant has the closest connection."

[1] See Article 18. For the text of the Draft see (1960) 9 Am. J. Comp. L. 708-711.

[2] Article 4.

But these choice of law (and the other) provisions may be denied effect if their application is found to be "manifestly contrary to public policy"[1] of the forum.

Also very significant in this connection is the Hamburg Draft Convention on the Custody of Infants,[2] adopted by the 49th Conference of the International Law Association, 1960. Article 9 which deals with "choice of law" is in these words: "In proceedings concerning the custody of an infant under this Convention, the law of the country shall apply where the proceedings are brought." Here forum law has been expressly preserved, but this has been done by explicit choice of law clause or process. It is accordingly beyond doubt that choice of law is a relevant consideration in international conventions dealing with guardianship or custody.

II Evaluation

A distinct goal in international and national judicial and legislative efforts to resolve conflict of laws in guardianship is to secure the best interests and welfare of the child. In the realisation of this goal, international conventions, as has been noticed, have employed the tool of a proper choice of law, among other things. National courts, on the other hand, generally tend to assume that choice of law is an irrelevant factor in the resolution of conflicts law of guardianship. What is perhaps disturbing in this latter view is that without examination, forum law is preferred to foreign law in such a

[1] Article 16.
[2] For text, see (1960) 9 Am. J. Comp. L. 519-521.

matter as the child's welfare which ought to be governed by co-operation with other jurisdictions as well as by objective evaluation. Thus an English court once it has jurisdiction in custody cases will apply forum law without question either because it is assumed that jurisdiction automatically confers the right to automatic application of forum law or because forum law is the "better law", and so local forum chauvinism dominates the choice of law field. Not surprisingly, one European lawyer has written that "If in a Western country the question arises whether the law of an Eastern or a Western state should govern . . . some may consciously or subconsciously prefer the application of "Western" law".[1] This is countered by an American lawyer who writes that Eastern European jurists for their part are inclined to reason in terms of a wholesale inherent superiority of socialist laws and policies.[2]

In the field of guardianship and custody law with its dominating theme of "welfare", a choice of law process necessarily implies a candid exercise of judicial value judgment, "not a free wheeling pursuit of Khadi justice".[3]

In evaluating the relevance of choice of law in conflicts law of guardianship, one must necessarily consider what ought to be the appropriate choice of law rules. The "welfare" concept is at base antithetical to rigid rules, and so perhaps the pertinent question for

---

1 W. Wengler, "The Significance of the Principle of Equality in the Conflict of Laws" (1963) 28 Law and Contemp Prob. 822 at 829.

2 Ehrenzweig, Book Review, Szaszy, Private International Law in European People's Democracies (1964) 13 Am. J. Comp. L. 633 at 634.

3 Shapira, The Interest Approach to Choice of Law p. 190

consideration ought to be the approach to be followed in choice of law. According to Professor Willis L. M. Reese,

> "The principal question in choice of law today is whether we should have rules or an approach. By 'rule' is meant a phenomenon found in most areas of the law, namely a formula which once applied will lead a court to a conclusion. . . By 'approach' is meant a system which does not more than state what factor or factors should be considered in arriving at a conclusion . . .
> It should be added that there can be an approach, as opposed to a rule, in a situation where consideration is limited to a single factor. This is true, for example, of the principle so frequently voiced today by courts and writers that a court should apply the law of the state which has the greatest concern in the determination of the particular issue."[1]

Thus Professor Reese sees the "interest" and "policy" analysis in choice of law as an approach. An approach, furthermore, has to be progressively refined until it crystallises into discernible rules. Choice of law "rules" are not likely to be favoured in Anglo-Scots conflicts law of guardianship. But we should not baulk away from the adoption of choice of law approach to guardianship in conflicts law. Here, as elsewhere in law, there ought to be a rational or substantial connection between the child or its parents and the chosen or applicable rules of law.

The raison d'etre of conflict rules is to indicate to the courts when they should employ the laws of other jurisdictions, this being done in order to dispense justice in civil cases with foreign elements. It is by the operation of choice of law rules that the appropriate law is identified. Properly understood, choice of law seeks to

[1] W. L. M. Reese, "Choice of Law: Rules or Approach" (1972) 57 Corn. L. Rev 315 at 316-317.

accommodate out of state and local law policies, "including the question of which state has the greatest concern in the decision of the particular issue."[1] As Mr D. St. L. Kelly has well argued, a general choice of law rule operates not only to select the other states' law but also to exclude its own.[2] At the moment choice of law rules in United Kingdom guardianship law favours the lex fori but this has not come about as a result of careful formulation of the most appropriate rules or approach to adopt. This should not be so. As it has been said, "the formulation of rules should be as much an objective in choice of law as it is in other areas of the law."[3] Apart from the "choice" of the lex fori, we saw that international conventions have tended to favour either the national law of the child, or the law of his residence, or the law that has the closest contact with the child. The emerging rules of jurisdiction in custody law with their emphasis on the child's "home" state (as we saw in Chapter FIVE) is likely to have an effect on choice of law thinking. The child's "home state" expresses the idea of closest or rational connection. And the chosen law may in time come to rest on the factor of closest connection.

It is our submission that because of the special interest which every jurisdiction claims to have in children within the jurisdiction, the lex fori should remain the primary choice of law rule. But as an

1 Ibid. at 333.

2 Kelly, "Localising Rules and Differing Approaches to the Choice of Law Process" (1969) 18 I C L Q 249.

3 W. L. M. Reese, supra note 1 p.642, at 333.

exception, a choice of law rule or approach should be devised or fashioned on the law of the state which has the most rational connection[1] or the most significant relationship with the custody dispute. It must be conceded, however, that in the final analysis judicial interpretation of section 1 of the 1925 Guardianship of Infants Act (and equivalent enactments) in very broad terms requires that courts be guided primarily by the welfare and best interests of the infant irrespective of the provisions of any foreign law, or irrespective of technical considerations of choice of law.[2]

D Choice of Law Rules for the Child's Property

The choice of law rules for the guardianship of the property of the child is not a very settled area of the law. Considering movable property first, the English decisions provide little authority as to whether the child's movables should be governed by the domiciliary law or by the lex fori, either of which may also be the lex situs. What can be stated with some degree of certainty is that the earlier English practice reveals a tendency, in the words of Dicey and Morris, "to hold that the law of the father's domicile determines the right of a parent to enjoy the benefit of property belonging to his infant children and to receive or administer property to which they have become entitled."[3]

1 "Rational connection" is the phrase which Dr. Shapira prefers to use in place of significant contact or the other variations of it. In a number of places Dr. Shapira insists on "the principle of rational connection between parties and standards of law." See his The Interest Approach to Choice of Law. pp. 78, 152, 197.

2 Dicey and Morris, The Conflict of Laws p. 391.

3 Dicey and Morris, The Conflict of Laws p. 382. See also Re Brown's Trust (1865) 12 L.T. 488; but see Re Hellmann's Will (1866) L R 2 Eq 363.

But legal developments have overtaken this statement. The father's domicile is no longer always pre-eminent when it concerns the guardianship of a minor. Further, as Dicey and Morris admit, it is not clear whether the old law represented by the statement above applies both to situations where the foreign parent claims the movables situated in the forum jurisdiction in his position as guardian of the property and where he claims the property in his own beneficial right as a parent under the foreign lex domicili.[1] But it would seem to make no difference, in choice of law terms, under which of the two capacities the parent is claiming entitlement to the child's movable property. It would seem also that the guardian's power to dispose of the movable property of the ward would be regulated by the law of the country to which he owes his appointment as guardian.[2]

As regards the guardianship of immovable property of the infant situated in England, there are no English authorities on the proper choice of law rules. Both Dicey and Morris[3] and Martin Wolff[4] suggest that English law, as the lex situs, should govern the guardianship of immovable property. This is in accordance with the universal rule of the lex situs in these matters. The position under Scots law as regards both movable and immovable property is not very different from that under English law of guardianship. The pupil or minor's domiciliary law would appear to govern the movable property, while the lex situs controls the guardianship of the immovables.[5]

1 Dicey and Morris, op. cit. p. 382.

2 Ibid. at 396, citing Re Crichton's Trusts (1855) 24 LT(os) 267; Mackie v Darling (1871) LR 12 Eq 319.

3 Dicey-Morris op. cit. p. 383

4 Wolff, Private International Law p. 412.

5 See Anton, Private International Law p. 383.

E The Nigerian Position

The discussion in the preceding sections of this chapter pertaining to choice of law problems would seem to be broadly true for Nigeria as well, due to the reception of the English rules of private international law. Unlike England, however, there are statutory choice of law rules in Nigeria which are utilisable in the area of custody conflicts law at both the interlocal and international levels. But the Nigerian legislatures have not been very perceptive or specific in their choice of law enactments. There is no single Nigerian statute containing a carefully drafted provision on choice of law. Instead, each jurisdiction has enacted its own special rules and many of the provisions tend to be ambiguous, too general, over-ambitious and therefore amorphous. In the succeeding pages we shall be examining the choice of law provisions in the High Courts and the customary or area courts. We shall be omitting the provisions for the intermediate courts - the Magistrates and District courts - because these are similar to the provisions for the High Courts and it would at any rate be tedious to examine the enactments for each separate court in each of the several Nigerian jurisdictions. After examining the choice of law provisions, we shall turn to the problem of their possible application in custody conflicts law, always bearing in mind the rule of the paramountcy of the child's welfare. It should be noted that the statutory choice of law rules which we are about to consider have been extended to the new States created out of the former Regions by virtue of the States (Creation and Transitional Provisions) Decree of 1967.[1] It should further be noted that in terms of choice of law the

---

[1] Decree No. 14 of 1967, section 1(5).

"welfare" provision in Nigerian guardianship law has been used primarily as a tool for limiting the application of both customary law and foreign law. In the case of customary law the "repugnancy clause" has generally been invoked instead of the "welfare" principle as such, while as far as limiting foreign law is concerned the welfare rule has, in the present state of Nigerian law, a potential rather than an actual utility.

I The statutory choice of law rules

1 High Courts

(a) General: In the Northern States of Nigeria, the main choice of law provisions are contained in sections 28, 29 and 34 of the High Court Law.[1] Sections 28 and 29 provide for the application of English common law, the doctrines of equity and certain English statutes in specified situations. Section 34 provides for the application of native law and custom in certain circumstances. There are equivalent provisions in the Southern States to section 34, but as the latter is by far more extensive than the southern provisions, we have laid it out in full and it is in the following terms:

"S.34 (1) The High Court shall observe, and enforce the observance of, every native law and custom which is not repugnant to natural justice, equity and good conscience, nor incompatible either directly or by implication with any law for the time being in force, and nothing in this law shall deprive any person of the benefit of any such native law or custom.

[1] No. 8 of 1955.

(2) Such laws and customs shall be deemed applicable in causes and matters where the parties thereto are natives and also in causes and matters between natives and non-natives where it may appear to the court that substantial injustice would be done to either party by a strict adherence to the rules of English law.

(3) No party shall be entitled to claim the benefit of any native law or custom, if it shall appear either from express contract or from the nature of the transactions out of which any suit or question may have arisen, that such party agreed that his obligations in connection with such transactions should be regulated exclusively by English law or that such transactions are transactions unknown to native law or custom.

(4) 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."[1]

(b) Theoretical Considerations: To begin with, some differences between the northern and the southern States' provisions on choice of law should be briefly noted. In place of "native law and custom" in S.34, the Eastern States enactments use the term "local custom" and the Western and Mid-Western States employ the term "customary law". Instead of the reference in section 34 to "English law", the Lagos, Western and Mid-Western States enactments prefer to use the expression any law "which is applicable". The term "natives" (and "non-natives")

[1] The corresponding provisions for the other States' High Court Laws are cap 80, S. 27 (Lagos); cap 61, S. 20 (Eastern States); cap 44, S. 12 (Western); and High Court Law, No. 9 of 1964. (Mid-Western State).

which occur in S. 34 is replaced by the term "Nigerians" in the corresponding provisions for the Eastern, Western and Mid-Western States. Above all, subsection 4 of section 34 - popularly referred to as the "residual clause" - has no equivalent in the provisions for the southern States.

In the next place, the term "equity" or the full expression "justice, equity and good conscience" which appear in the choice of law provisions (sections 28, 29 and 34 North) are qualified by different adjectives - "doctrines of", "principles of" and "natural" - in different places in the Statute. It would not be necessary for us to go into the significance of these variations.

In the third place, looking at section 34, in order to determine what system of law to apply to a given case, one must first decide whether the parties are "natives" or "non-natives". The High Court law does not define these terms. However, a "native" has been defined in section 3 of the Interpretation Act[1] as including a native of Nigeria and a native foreigner. "Native of Nigeria" itself means a person either or both of whose parents are members of any tribe or community indigenous to Nigeria. And a "native foreigner" means any person who is not a native of Nigeria and either or both of whose parents are members of a tribe or trives indigenous to some part of Africa and the descendants of such persons. Having given these definitions and explanations, the choice of the applicable law is made according to the following rules - bearing in mind that corresponding

[1] Cap 89. Laws of the Federation of Nigeria (1958 ed) S. 3. The definitions given here apply also to the law of the Northern States.

substitutions of terms would have to be made to take account of the position in the southern states according to the differences indicated above:

(a) If it is a case between "natives", then customary law is to be applied unless -

(i) it is repugnant to natural justice, equity and good conscience;

(ii) it is incompatible either directly or by implication with any law[1] for the time being in force;

(iii) there is an agreement within the terms of section 34 (3);

(iv) the transaction is unknown to native law or custom; or

(v) there is no express rule of customary law which is applicable, in which case the "residual clause" in section 34 (4) comes into operation.[2]

(b) If it is a case between "natives" and "non-natives" then English law is to be applied unless if to do so would cause "substantial injustice" to either party, in which case customary law is to be applied. But customary law may again be ousted and English law restored if any of the conditions listed under (a) occurs.

(c) If it is a case between "non-natives", there appears to be no clear authority for the application of customary law. Mr. Park argues erroneously in our view, that "English law always applies in cases when neither party is a native."[3]

[1] The Western Nigeria provision speaks of incompatibility with "written law" - and not with "any law" in general.

[2] See Cole v Cole (1898) 1 N L R 15.

[3] Park, The Sources of Nigerian Law p. 115.

Finally, it should be observed that although the statutory choice of law rules are not aimed specifically at guardianship or custody (because these, for instance, may not be correctly regarded as "transactions"), the provisions, as we shall see, have in fact been used to determine guardianship or custody controversies. Thus the two main clauses in section 34 (1) (i.e. the "repugnancy" and the "incompatibility with any law" clauses) can be and have been used to strike down a rule of customary law on guardianship. Likewise, since until the recent Matrimonial Causes Decree there were no specific Nigerian guardianship provisions which the High Courts had to observe, a guardianship case could arise in the High Court to which case it could be said there are no "express rule . . . applicable" and for the resolution of which the Court would be justified in turning to the residual clause - i.e. the principles of justice, equity and good conscience.

2 Customary and Area Courts

(a) General: There are today no customary courts in the East Central State[1] of Nigeria, while the future of customary courts in Lagos and Rivers States seems to be under review.[2] Customary courts are functioning in the Western and Mid-Western States but it is in the six Northern States that these lower courts (i.e. area courts) seem to have a more assured future. Hundreds of area courts are in operation in the six northern States.[3] We shall therefore be illustrating the

[1] See e.g. Magistrates Courts Law (Amendment) Edict, 1971 (No. 23 of 1971) S. 16 (1).

[2] See generally A. Obilade, "Jurisdiction in Customary Law Matters in Nigeria: A Critical Examination" (1973) 17 J.A.L. 227.

[3] See generally E. A. Keay and S. S. Richardson, The Native and Customary Courts in Nigeria. (1966).

the statutory choice of law rules for the lower courts by looking at the Area Courts Edicts.

Section 20 (1) of the Area Courts Edict, in force in the North Central State[1] provides in part that subject to the provisions of section 21, an area court shall in Civil causes and matters administer -

(a) the native law and custom prevailing in the area of the jurisdiction of the court or binding between the parties;

(b) the provisions of any written law which the court may be authorised to enforce by the Military Governor under section 24.

In section 21 (1) it is provided that "in mixed civil causes" other than land causes, the native law and custom to be applied shall be

(a) the particular native law and custom which the parties agreed or intended or may be presumed to have agreed or intended should regulate the matter in controversy;

(b) any combination of such native laws or customs which the parties may have agreed or intended or which may be presumed to have been agreed upon or intended should regulate the transaction in dispute, or

(c) failing such agreement or intention or presumption then such native laws and or customs which it appears to the court "ought, having regard to the nature of the transaction and to all the circumstances of the case", to regulate the obligations of the parties in the matter in controversy.

While the provisions of section 20 (1) (b) is capable of importing the application of the law of guardianship, the more important choice of law provisions for our present purposes are contained in

[1] No 2 of 1967. The provisions in all the six Northern States are identical.

sections 20 (2) and (3) and in the proviso to section 21 (1). Subsections (2) and (3) of section 20 are couched in these terms:

"20 (2) Nothing contained in this section shall be deemed to authorise the application by an area court of any native law or custom or part thereof in so far as it is repugnant to natural justice, equity and good conscience or incompatible either directly or by necessary implication with any written law for the time being in force.

(3) Nothing contained in this section shall be deemed to preclude the application by an area court of any principle of English law which the parties to any civil cause agreed or intended or may be presumed to have agreed or intended should regulate their obligations in connection with the transaction which are in controversy before the Court."

The proviso in section 21 (1) states that if, in the opinion of the court, none of the paragraphs of subsection (1) is applicable to any particular matter in controversy, "The court shall be governed by the principles of natural justice, equity and good conscience."

(b) Theoretical Considerations: The equivalent choice of law provisions in the Western State are contained in sections 17, 19 and 20 of that State's Customary Courts Law.[1]

Some of the terms used in the Area Courts Edicts are not defined. For example, "native" is not defined although in order to gain an idea of persons who are subject to the jurisdiction of area courts one would

[1] Cap 31, Laws of Western Nigeria 1959.

have to turn to sections 14 and 15 of the Edict. Under section 15 (1) such persons include any person who "consents" to the exercise of jurisdiction by the area court as well as "any person whose parents were members of any tribe or tribes indigenous to some part of Africa and the descendants of any such person." This provision corresponds clearly with the definition of "native" given by the Interpretation Act as we noted previously. Again, "native law and custom" is not defined although under the 1956 Native Courts Law[1] which the Area Courts Edicts replaced, the term was defined as including "moslem law". Section 2 of the Area Courts Edict defines a "mixed civil cause" as "a cause in which two or more of the parties are normally subject to different systems of native law and custom." Suppose a controversy arises between an English woman and a Nigerian man over the guardianship of a child; what would be the former's "native law and custom" in such a situation? In the absence of a definition of that expression, the answer to that question could, in our view, be the woman's English common law.

The drafting of the Area Courts choice of law provisions is even less satisfactory than the High Court provisions examined earlier. For example, section 20 (1) (b) of the Area Courts Edicts authorises the application of "any written law" as the Military Governor may direct, while section 21 (1) to which section 20 (1) is subordinated lays down the "native law and custom to be applied by an area court." How can it be said in such a situation as these that section 20 (1) is "subject to the provisions, . . . in particular of section 21."[2]

[1] No. 6 of 1956.

[2] See section 20 (1).

The general trend is to subject customary laws to written law, not the other way round. Again, section 21 (1) seems to contain a proviso within a proviso. In other words, in light of the proviso to section 21 (1) (c), the last sentence to section 21 (i.e. the residual clause) appears tautologous. This has been rightly criticised by Mr. Park.[1] For clearly if from the parties' conduct and statements the court cannot discover any agreement or intention as to governing law, then section 21 (1) (c) allows the court to apply any particular customary law or laws which "it appears to the court ought", having regard to all the relevant circumstances, to regulate the matter in controversy. This proviso should enable the courts to dispose of all cases which are not covered by any other part of section 21. If so, it is difficult to see the purpose of the last sentence - the "residual clause" - which states that "if, in the opinion of the court, none of the paragraphs (of the subsections to section 21 (1)) is applicable to any particular matter in controversy, the court shall be governed by the principles of natural justice, equity and good conscience." As Mr. Park states, "Section 21 (1) (c) is surely sufficiently comprehensive to make it certain that the situation will not arise where 'none of the paragraphs of this subsection is applicable to any particular matter in controversy'. That being so, the final part of the subsection may probably be treated as superfluous."[2]

[1] Park, The Sources of Nigerian Law pp. 121-122 n. 18; and 124-125.
[2] Ibid. at 125.

In the next place, it might be asked whether on appeal from these lower courts the High Courts are to be governed by the choice of law rules for the customary and area courts or by the choice of law rules for the High Courts. In the Northern States there is no clear answer to this question but it seems that the High Courts in those States may follow the ruling in the Ghanaian case of Ghamson v Wobill[1] in which the defunct West African Court of Appeal stated that in the kind of situation we posed in this paragraph the higher courts are to be guided by the rules laid down for the native or customary courts. However, in the Western and Mid-Western States, a clear answer is provided in the High Court Law. Section 12 (4) of the High Court Law (West) states that "Where the Court determines that customary law is applicable in any cause or matter, it shall apply the particular customary law which is appropriate in that cause or matter having regard to the provisions of section 20 of the Customary Courts Law". But it is not clear whether this means that the choice of law provisions of the customary courts law are absolutely binding on the High Court or are only of highly persuasive force.

Finally, it should be noted that all the area and customary courts laws, unlike the High Courts laws, contain specific provisions on guardianship of children.[2] It is expressly enacted that in any matter

[1] (1947) 12 W.A.C.A. 181.

[2] See e.g. S. 23 Area Courts Edict (Northern States); S. 23 Customary Courts Law (Western State); S. 25 Customary Courts Edict (Mid-Western State).

relating to the guardianship of children, the interest and welfare of the child shall be the first and paramount consideration. In the light of this it may be asked whether separate choice of law rules applicable in guardianship cases are at all necessary, and why these have not been made expressly subject to the guardianship provision in the adjoining section of the same statute. In considering the adequacy of these enactments as guardianship choice of law provisions, one would have to see how they would operate in actual practice. This we shall proceed to do in most of the next few sections of this chapter.

II The Result of the Invocation of the Guardianship (or "welfare") Provision

There are a number of sources of law from which a Nigerian court can draw assistance in order to arrive at a decision in a custody case which would ensure that the welfare of the child receives the first and paramount consideration. The choice of law rules in the High Court laws are capable of facilitating such a result. And the same could be said of the customary and area courts provisions which, although apparently designed to lay down choice of customary law rules actually go further in providing for choice of law rules in the context of a true private international law case. From this point of view commentators[1] have expressed preference for the more general choice of law directives in the area courts edicts as opposed to the provisions contained in the customary courts laws in the South.

[1] See e.g. AKanle, Some Aspects of Nigerian Private International Law of Family Relations: A Comparative Study (unpublished) Ph.D. Thesis, University of London (1970) pp. 251-252.

1 Justification for applying English law.

In general terms, the High Courts provisions on the "repugnancy clause" together with the rule that customary laws which are incompatible either directly or by implication with any (written) law for the time being in force in Nigeria are not to be enforced constitute the principal vehicles which have been utilised to bring about the application of principles of English law in guardianship cases. The guardianship provisions in the customary and area courts edicts are "written laws" against which must be judged any customary law rule of guardianship. For, the provision that in cases concerning the guardianship of children the welfare of the child is to be the paramount consideration would mean that if resorting to principles of English law would best promote the legislative policy, then that would be the right course of action to follow. Moreover, the area courts edicts lets in English law at various points. For example, section 20 (3) states expressly that nothing in the Edict "shall be deemed to preclude the application by an area court of any principle of English law". It is true that this is not an explicit authorisation that English law shall apply. But the effect of the section is unambiguous. It may be the intention of the parties that English law be applied, and hence the English law of guardianship can be applied by area courts. As Dr. Akanle has stated, "Now that a customary (i.e. area) court in the Northern Nigerian states has power to apply principles of English law, the most likely result of this new power will be that if there is already in existence a decision of the High Court on interstate (or international) conflicts, such a decision would be used, by analogy,

by the customary courts to determine a similar point of interlocal or intercommunal conflicts."[1] The "repugnancy" and "incompatibility" with written law clauses in section 20 (2) of the Area Courts Edict, the law or combination of laws which the court thinks "ought" to be applied, together with the "residual" clause contained at the end of section 21 (1), are all adequate and capable to justify the application of English law in a guardianship case.

2 Deviations from English Law

A choice of law approach in guardianship and custody could lead a Nigerian court to the application of a number of non-English laws. We shall now consider the different possibilities in turn.

(a) Choice of rules of Islamic law: There are no reported Nigerian cases in which recourse was had to the principles of islamic law as the best means of promoting the interest and welfare of the child. It would seem, nonetheless, that there is authority for equating islamic legal principles with the rule of the paramountcy of the welfare of the child.

The Sharia Court of Appeal has jurisdiction to decide any question of Moslem law (or any question involving Moslems) relating to the guardianship of an infant.[2] The choice of law provisions for that Court appear in section 15 of the Sharia Court of Appeal Law where it is laid down that in the exercise of its jurisdiction the Court shall observe and enforce the principles of

[1] Akanle, op. cit. at 252. The author felt that the provision in section 20 (3) has the effect of nullifying the rule in Ghamson v Wobill (1947) 12 W.A.C.A. 181 that the statutory rules, not the rules of private international law, should be applied by the High Courts in an interlocal conflicts case. Ibid, n. 40.

[2] See Sharia Court of Appeal Law, no. 16 of 1960, S. 12.

(a) Moslem law of the Maliki school as customarily interpreted at the place where the trial at first instance took place;

(b) the Sharia Court of Appeal Law;

(c) the Area Courts Edict; and

(d) natural justice, equity and good conscience.

Although no express reference is made to the observance of the principle of the paramountcy of the child's welfare, that principle must necessarily be read into the "guardianship of an infant" jurisdiction of the Sharia Court of Appeal. It would be inelegant not to do so, since that principle is plainly observed by, and firmly enshrined in the jurisprudence of, all courts in Nigeria. And when one looks at item (c) above it is clear that applying the provisions of the Area Courts Edict would allow in not only "any principle of English law"[1] but also the "welfare" rule embedded in the guardianship provision in section 23 of the Area Courts Edict. Our concern here, however, is with the specific application of islamic law as the answer to the injunction that the child's welfare shall be paramount in guardianship cases. If two Nigerian moslems, one from Kano State and the other from Kwara State are disputing the custody of a child, there would seem to be no reason why one of the parties should not be able to rely on the sharia or islamic law rule of "tender years" as conforming best to the welfare of the child. Under sharia rules, custody of a boy above seven years goes to the father and that of a girl under nine years goes to the mother.

[1] Section 20 (3), Area Courts Edict.

It will be illuminating to compare the Northern Nigerian position in this connection with that in the Republic of the Sudan whose law has had much influence on the course of development of the law in Northern Nigeria.[1] In N.S. Stergiou v A. N. Stergiou[2], the Sudan High Court was faced with a choice of law problem in a custody case. The father was Sudanese and the mother Greek and at the time of the marriage both were members of the Greek Orthodox Church. The father had changed his religion to islam at the time of the action. The question before the court was whether English law, Greek orthodox canon law, or islamic law could be applied to this custody dispute by virtue of section 9 of the Civil Justice Ordinance of the Sudan which, as the equivalent of the residual clause in Northern Nigeria's section 34 (4), High Court Law, permitted the court to decide a case according to "equity, justice and good conscience." The learned Judge, Mudawi, J, ruled out English law on two grounds: first, that English law should not regulate the family lives of parties who intended to remain in the Sudan. In the words of Mudawi J, "neither of them could be presumed to have at any time contemplated that English law might be applied to matters incidental to their domestic relations, e.g. custody."[3] Moreover, in the Middle East (the judge impliedly includes the Sudan in that region) "domestic relations are closely interconnected with religion, while in the West they are, at least today, secularised."[4] Greek orthodox canon law was ruled out because

1 e.g. The Penal Code and Criminal Procedure Code of the six northern States of Nigeria were modelled on the Sudanese Penal and Criminal Procedure Codes.

2 (1963) SLJR 182

3 Ibid. at 185

4 Ibid.

the father of the child had at the material time left that religion for islam whose rules accord a father in matters of custody "a position only excelled by the position of the Roman pater familias."[1] And that law has become the accepted law of domestic relations of the community in which the children of the marriage are going to be brought up. In order to determine "the real interest of the children"[2] the judge personally visited the respective homes of the parties and ascertained the wishes of the children who, it turned out, wanted to stay with the mother. The judge found that either party was a suitable custodier and so he made a split custody order by which the girl stayed with the mother while the boy went to the father in accordance with strict islamic legal rules under which "the age limit (is the) final test."[3]

The decision has been described by a leading Sudanese author as "reasonable", "welcome and just"[4] even though it was against the express wishes of the children. The islamic "pater familias" might shock the Western observer, but not the Sudanese. The child's welfare, then, is to be seen against the background of a particular socio-cultural way of life.

(b) Choice of rules of customary law

The leading Nigerian case in which the decision of the High Court in a custody suit turned on customary law is that of Oruboruma Amachree v Chief Inko Taria alias Goodhead.[5] The facts of this case were as

1 Ibid.
2 Ibid. at 185-186
3 Ibid. at 186
4 Zaki Mustafa, The Common Law in the Sudan (1971) p. 198.
5 (1923) 4 N L R 101.

follows. A female child was born to a woman in concubinage after the death of her husband. In 1907 the native court awarded the custody of the child to the chief and head of the deceased's husband's family who was the respondent in the present proceedings. In 1916, the respondent allowed the child and its mother to visit the child's maternal grandmother and stay with the latter for some while. But before allowing them to go the respondent had obtained a written and signed declaration from the grandmother who acknowledged the rights of the respondent's family in respect of the guardianship or custody of the child. The child stayed with the grandmother for six years at the end of which the latter refused to return the child to the respondent who then sued again in the Native Court claiming the recovery of the child. The Native Court in its judgment in 1922 restored custody of the child to the respondent. An application for an order for a writ of habeas corpus in respect of the child who was in the custody of the respondent was made by the sister of the child's mother to the Divisional Court of the Supreme Court. The question for decision was whether a child born after the death of her mother's husband to a non-member of the husband's family belonged to the mother's maiden family or to the family into which the mother had married but to which the child bore no blood relation. The natural father advanced no claim of his own.

Counsel for the applicant contended that the judgment of the native court was wrong in law since it amounted to giving judicial effect to a slave dealing transaction and also that the document signed by the child's grandmother was worthless as being an attempt to place two persons in a state of servitude. And finally it was argued that

respondent's claim based on native law and custom was repugnant to natural justice. Berkeley J at the Divisional Court of the Supreme Court at Degema rejected these contentions and dismissed the application. Commenting on the slave-dealing and repugnancy contentions, Berkeley J said:

"The Native Court was dealing with the question of the custody of a minor. They had to give the custody to one party or the other, and the fact that they gave it to the Respondent is another indication of what the native law and custom is in this matter . . . I just as certainly cannot uphold the contention that the existing arrangement is repugnant to natural law or humanity. On the other hand the native law and custom on the subject is clearly indicated by the two Native Court decisions and the written admission of the maternal grandmother."[1]

The involved Ijaw customary law allows the type of claim advanced by Chief Inko Taria. The Supreme Court decision may thus have been influenced by the two decisions of the native court, the existence of the written declaration acknowledging the respondent's right to custody of the child, and the absence of any claim to custody advanced by the child's natural father.

Perhaps it would be in order to mention in this connection the Kenya case of Re G. M. (An Infant)[2] and the Malawi case of Kamcaca v Nkhota and Another.[3] Re G. M. (An Infant) involved a dispute over the

[1] Ibid. at 102.
[2] (1957) E. A. 714.
[3] Commented on and reported in (1968) 12 J.A.L. 173.

custody of a four year old female Kikuyu orphan between a well-to-do Nanndi woman (who had had the child in a state of de facto adoption since the death of the child's parents in the Mau Mau risings) and the girl's Kikuyu uncle who was the lawful guardian under Kikuyu customary law. After "the most careful inquiries" the child had come into the respondent's care and control through the instrumentality of officials who, the judge said, "could hardly have found a better home for the child."[1] The child's uncle applied for a writ of habeas corpus claiming that according to native law and custom he was entitled to the lawful custody as against all strangers. The case for the respondent was that under the English law received into Kenya, the welfare of the child was the paramount consideration and that this requires that the child should remain where she was. The question before Miles J was what law to apply to the dispute - Kikuyu law or English law - and how to apply that law to the circumstances of the case. The judge applied customary law because it conformed with the uncle's customary law "rights", even though the decision went against the child's welfare. In Miles J's own words, "the scales (of advantages) would come down heavily on the side of the respondent."[2] The judge reached his decision on the strained reasoning that a guardian's position in Kikuyu law was the same as that of a parent under English law and since English law, before the decision in J v C[3],

[1] (1957) E.A. 714 at 715.
[2] Ibid.
[3] (1970) A.C. 668.

gave preference to a parent as against strangers, the uncle prevailed.

The decision has been rightly criticised as "most unsatisfactory"[1] since, besides its contravention of the welfare rule, the case was one "where it would be repugnant to apply strict customary law."[2] The decision clearly ignored the child's material and psychological welfare. However, what is perhaps more important for our present purposes is the court's view that even if English law applied, in determining what was the welfare of the child, regard should be had to native custom and habits, a proposition laid down in the earlier Kenya case of Hassan v Mzee.[3]

Kamcaca v Nkota and Another raised the issue of the guardianship of four children whose parents had married under the Malawi Marriage Ordinance. The wife was an Ndebele in Southern Rhodesia and the husband a Chewa in Malawi. The wife was alleged to have been responsible for the murder of her husband but she was acquitted of this murder charge. It was while she was in police custody for this criminal charge that the second respondent, Ramsay Kamcaca as the brother of the deceased and lawful guardian under customary law, removed the children into his care and control. The wife then brought a habeas corpus petition to recover custody of the children.

The case raised many issues including the question of whether the Malawi High Court had jurisdiction to entertain the case. This was answered in the affirmative. The basic question, however, was

[1] Allott, New Essays in African Law. p. 167.
[2] Ibid. at 168; See also Allott, (1959) 3 J.A.L. 72.
[3] (1944) 11 E.A.C.A. 4.

whether customary law or English law of guardianship applied. Bolt J. held that customary law of guardianship applied because it was not repugnant to natural justice or morality and that any hypothetical change in the legal status of Africans who contract an Ordinance marriage does not extend to the law of guardianship. Bolt J. held that as the eldest child was illegitimate the onus was on the respondents to show cause for keeping that child. The custody of the last three children was also denied to the respondents first because customary bride price (or lobolo) had not been fully paid - a curable defect but one which until cured had the effect of making the wife's parents entitled to the custody of the children as a kind of "pledge" for the payment of lobolo;[1] and secondly because the customary law rule of "tender years" (as formulated in the Southern Rhodesian case of Chiduku v Chidano[2]) required that the three children who were all under six years of age should remain with the mother until they are "of fit age" or until they no longer required proper "maternal care."[3]

The decision has been incisively criticised by Benda-Beckmann who felt that the Rhodesian authorities relied upon were inapplicable and that in any case "the English law of guardianship ought to have been applied."[4] But Professor A. N. Allott does not think that the judge's conclusions were "so shocking to our susceptibilities that they must be declared repugnant."[5] The decision has in fact commended

1 (1968) 12 J.A.L. 173 at 190.
2 (1922) S.R. 55.
3 (1968) 12 J.A.L. 173 at 190.
4 Franz von Benda-Beckmann, "Conflict of Marriage Laws in Malawi" (1968) 12 J.A.L. 173 at 178.
5 A.N. Allott, New Essays in African Law p. 171.

itself to a Nigerian author who said:

"There is little doubt that the decision of Bolt J in this case is an attempt to strike a mean between the welfare principle with regard to the custody of children and the lawful guardian's absolute right to custody under customary law. This indeed is a progressive move which ought to be followed in Nigeria." [1]

Obviously the distinction which Bolt J. drew between guardianship and custody - that custody would normally arise between two living spouses whilst guardianship matters will normally arise where the lawful guardian has died or for some reason was unable to act - is not a tenable distinction. But what is more important for our present purposes is that the decision shows that customary law is to be taken into account in making a choice of law decision in guardianship, and the judge took cognisance of the welfare principle - in the form of "tender years" doctrine - in the application of the implicated customary law.

It should be added, however, that today it would be rare to find a Nigerian High Court making explicit reference to customary law as a basis for custody decision. This is not because customary law fixes the badge of slavery on the children but rather because the training and backgrounds of the High Court judges (Nigerian and British) are against customary law philosophy in custody matters. It is still

[1] Oloyede, The Law Relating to Children and Young Persons under the Customary and Statutory Laws of Nigeria, with Special Reference to Law and Western States (Unpublished) Ph.D. Thesis, Univ. of London (1970) p. 419.

true that some customary and area courts decisions continue to pay regard to strict customary law in custody matters. Indeed the written Native (or Local) Authority declarations on customary law in parts of Northern Nigeria provide that the custody of children is to be awarded to any person "in whose custody their interest and welfare would be cared for" "having due regard to local custom".[1] It would be realistic to say that in practice the customary law prescriptions on child custody live on in the attitudes of the older members of Nigerian traditional communities. But any decision in guardianship-custody matters in any court which does not proceed overtly on the basis of the paramountcy of the welfare of the child would most likely be overturned on appeal.

(c) Resort to natural justice, equity and good conscience

Many Nigerian custody cases have been decided by simply declaring the implicated rules of customary law as repugnant to natural justice, equity and good conscience, or by simply disregarding the otherwise applicable rule of customary law without invalidating, in express terms, such customary rules of law. In either case the decisions have generally been in accordance with the requirements of the interest and welfare of the child. It will be necessary to discuss the Nigerian cases in turn.

In the celebrated case of Edet v Essien[2], the plaintiff-respondent, Essien, had paid marriage dowry on one Inyang while she

[1] The Native Authority (Declaration of Idoma Native Marriage Law and Custom) Order, N.A.L.N. 63 of 1959, section 15 (2).

[2] (1932) 11 N.L.R. 47.

(Inyang) was still a child. Some years later, the defendant-appellant, Edet, also paid dowry on the same girl, having obtained the consent of the girl's parents for the marriage which was celebrated. There were two children of this marriage, whose custody the plaintiff is now claiming on the ground that since his dowry had not been refunded, he was the lawful husband of the woman and therefore entitled to the custody of her children by another man. The plaintiff's claim was probably correct according to the relevant customary law, but the Supreme Court held that to enforce such a rule would be contrary to natural justice, equity and good conscience. The "welfare" principle was not invoked, but if it had the result would have been the same.

In Re Whyte[1], the deceased, a Fanti from the Gold Coast (Ghana) died in Nigeria leaving a widow and an infant girl. The widow was an Urhobo, a tribe in the Mid-Western state of Nigeria. According to the Fanti customary law under which the marriage was celebrated, the deceased's sister, the plaintiff, who lived in Ghana was the lawful successor to the deceased's estate. The Administrator-General had proposed that one-third of the residue of the estate be distributed equally between mother and daughter, and that the mother be made the lawful guardian of the child. And he further proposed that two-thirds of the estate should go to the deceased's sister who opposed the whole scheme on the ground that it contravened Fanti customary law under which the customary successor becomes responsible for the welfare of the deceased intestate's children. The sister undertook

[1] (1946) 18 N.L.R. 70.

to fulfil this obligation only if the child lived with her, which in effect would overturn the scheme proposed by the Administrator-General. The Supreme Court held that as the condition upon which the sister, the successor to the estate under Fanti customary law, undertook to fulfil the family obligations was that the daughter should be separated from her mother and compelled to return to the deceased's family, a hardship would be caused by the application in toto of the Fanti customary law. And the scheme proposed by the Administrator-General was sanctioned.

In Loromeke v Nekegho[1], an Urhobo woman refused levirate marriage to her dead husband's brother, also an Urhobo. Both parties were living in Accra, Ghana. The man contended that according to Urhobo customary law, a woman who refuses levirate marriage must hand over the deceased's children to the deceased's brother and family as well as refund the dowry. The Divisional Court in Ghana ruled that a custom which requires a woman to deliver the custody of her children to a man she declines to marry must be regarded as repugnant to natural justice, equity and good conscience within the meaning of the relevant statutory provision.

In Mariyama v Sadiku Ejo[2], Mariyama was divorced from her husband Ejo. Ten months after the divorce and fifteen months after the parties last had intercourse, Mariyama had a baby by another man. The relevant Igbirra customary law was that a child born within ten months of a divorce belongs to the former husband. Islamic law was also introduced into the features of this case since the parties were Moslems. The

[1] (1957) 3 W.A.L.R. 306.
[2] (1961) N.R.N.L.R. 81.

Igbirra Central Court at Okene awarded custody to the former husband. But the High Court of Northern Nigeria, on grounds of repugnancy to natural justice, equity and good conscience, declined to enforce the Igbirra customary law in this case.

We may also mention in passing the Sudanese case of Moneb Constantine v Zakie Elias Tifaya[1]. The case involved a claim by separated spouses for the custody of children, a girl of nine and a boy of six years of age. The parties were members of the Greek Orthodox Church whose canon law awarded custody of a boy under seven years and a girl under nine years to their mother. After those dates custody is transferred to the father. The court found that both parents were suitable custodiers, but refused to follow their personal law. The court's concern was for the welfare and interests of the children, and conformity with this formed an essential ingredient of the need to satisfy "justice, equity and good conscience". In the words of Cummings C. J., "It will be seen that in the Court below each party relied on his or her own rights against the other and paid little regard to the rights and interests of the children. This is to invert what the Sudan Civil Courts will do, for they, in reaching a decision consonant with justice, equity and good conscience have regard primarily to the interest of the children whatever the custom applicable may have to say on the matter."[2] Accordingly, the children were awarded to the custody of the mother, since it would not

[1] (Unreported) A.C. - App - 13 - 1946. See also, N.O. Akolawin, "Personal Law in the Sudan: Trends and Developments" (1973) 13 J.A.L. 149 at 157-158.

[2] Ibid. See also Maria C. Cambouris v C. Procos (Unreported) A.C. - App - 5 - 1944. I am grateful to the Attorney-General's office, Khartoum (and to my friend Abdul El Naiem) for supplying me with copies of the three Sudanese cases mentioned in this chapter.

be in their interest to be separated.

Appraisal We shall now attempt an appraisal of the preceding discussion under "natural justice, equity and good conscience". The decisions in some of the Nigerian cases surveyed in this section have been severely criticised by some authors. It is our view, however, that from the point of view of choice of law approach, very little can be said against those decisions. We shall start with the criticisms of Mr. Park. In his view, the "repugnancy" test is "an absolute one"[1], so that when it is applied to a particular rule of customary law that rule must either be wholly upheld or wholly rejected because the courts have no power "to eliminate the objectionable features and then apply the watered down version that remains."[2] For Mr. Park, the basic task for the courts is to evaluate a customary law rule "in abstracto", and to "declare valid or invalid in general terms the said customary law, so that the decision confirms or nullifies the rule for all purposes and not merely for those of the particular case."[3] Judged by this test, Mr. Park condemns the decisions in Mariyamo v Sadiku Ejo and Re Whyte. The judges in those cases, Mr. Park points out[4]

"appear to be misconstruing the statutory provisions they purport to apply, and to be exercising a power they do not possess. In all the enactments the phrase 'repugnant to natural justice, equity and good conscience' applies only to 'native law and custom' . . .

[1] Park, The Sources of Nigerian Law, p. 74.
[2] Ibid.
[3] Ibid. at 72
[4] Ibid. at 73

There is no provision which authorises the courts to look beyond the rule to the results of its application in specific situations. It is therefore clear that the courts should in all cases come to a general conclusion about the rule, and if they find that it is not generally invalid it is their duty to apply it whatever the result may be. This view may seem harsh, but it represents a position which it is extremely difficult for any legal system to avoid. For no such system can prevent its rules working hardship in certain isolated cases. These should as far as possible be minimised and avoided, but when that cannot be done it is probably better for the occasional injustice to be accepted in order not to sacrifice the greater interest of having a reasonably predictable and ascertainable set of rules, instead of leaving everything to the individual notions of fairness of particular judges."

Keay and Richardson[1] agree with Mr. Park that the repugnancy clause is to be applied to the rule of customary law itself and not to its application in particular circumstances. Therefore the decisions in cases of Re Whyte and Mariyama v Sadiku Ejo in which a rule of customary law was approved in abstracto but the particular application of which was struck down as repugnant were condemned by Keay and Richardson as "heresy".[2]

Against these authors must be set the views of Dr. Agbede[3]

[1] E. A. Keay and S. S. Richardson, The Native and Customary Courts in Nigeria pp. 237-238.

[2] Ibid. at 237.

[3] I. O. Agbede, Conflict of Laws in Nigeria (Unpublished) Ph.D. Thesis, Univ. of London on 1970 pp. 139-140.

who stoutly and correctly defended the basic propositions involved in applying the repugnancy clause in custody cases. "What is it", Dr. Agbede asked in connection with Mr. Park's emphasis on the need for certainty, "that is uncertain in the proposition that in the matter of custody of an infant the court will give primary consideration to the welfare of the child?"[1] Re Whyte, in our view, may be criticised on the ground that structurally, the rules laid down in the relevant choice of law enactments are couched in terms of disputes between "natives" and "non-natives", and clearly it is difficult to fit in the Administrator-General into that scheme. Is the Administrato-General (an office) to be categorised as "native" or "non-native"? If it is neither, then there would seem to be no basis for the application of the choice of law enactment to the case. Apart from this minor observation, the criticisms of the above authors do not stand up to close scrutiny.

The statement by Park that we must accept "occasional injustice" and "hardship in certain isolated cases" should have no place in private international law, and certainly not in guardianship law. Private international law grew out of the need to do justice and to ensure basic fairness. The application of any rule of custody law which produces a "harsh" result has generally been abandoned in most legal systems of the world and it should have no place in modern Nigerian law. Custody law everywhere now enjoys the refreshing air of equitable principles unpunctuated by "harsh" results. It is particularly unfortunate that Mr. Park should launch his dynamite using custody cases as his base. The concept of the welfare of the child

[1] Ibid. at 134.

itself involves value-judgments which in turn involve a choice between just and unjust legal prescriptions as well as looking basically at the social consequences associated with any course of action pertaining to the guardianship of a child, whether the implicated prescriptions be in the domestic or foreign legal arenas. Eclecticism is of the very essence of guardianship law. A rule of law may be approved in general or particular terms in one case but be condemned in another. There is simply never a binding authority in infant cases, so that "predictability and ascertainable set of rules" which Mr. Park emphasises has low premium in custody law. And in any case as it has been well said, "settled rules are precisely what customary law lacks."[1] We have repeatedly stressed that discretion looms large in section 1 of the 1925 Guardianship of Infants Act (and equivalent enactments) so that arriving at a decision on "welfare" rests largely on the "individual notions of fairness (or welfare) of particular judges" - a point which Mr. Park probably did not realise. The statement that"courts are not to look beyond the rule to the results"[2] is astonishing. Let us take the case of Loromeke v Nekegho[3] once again. Levirate system (or widow inheritance) is unquestionably a universal practice throughout Nigeria. Indeed it was judicially approved as fair and equitable in the leading case of Re Agboruja[4] where Ames Ag. Sp J said that "there can be nothing intrinsically unfair or inequitable even in the inheritance of widows, where those who follow the custom are pagans and not Mohammedans or Christians.

[1] Ibid. at 135
[2] Park, op. cit. p. 73.
[3] (1957) 3 W.A.L.R. 306.
[4] (1949) 19 N.L.R. 38 at 39.

The custom is based on what might be called the economics of one kind of African social system, in which the family is regarded as a composite unit." In other words, levirate system is a kind of African social insurance in the interests of widows and orphans who might otherwise fall on evil times; and it is not even certain that the system would be condemned by the practice, as distinct from the theory, of islam or Christianity in Nigeria as Ames J's statement implies. But to say all this is not to say we shut our eyes to the results of its application in every case. A well-to-do widow who is not interested in remarriage should not be deprived of her children merely because she refuses to marry the brother of her deceased husband. The painful loss of a husband may harden a widow's resolve not to wish for marriage again, and the children who may constitute the only source of cushioning the widow's pain should not be taken from her. This is neither in the interest of mother nor of the children. The whole thesis of Mr. Park was condemned by Dr. Agbede who said: "To say the least this view (of not looking beyond rules to results) is definitely out of place in the context of legal development in Nigeria. It is indeed a strange theory which demands that the court should not only reject the application of rules of customary law for purposes of the determination of the issues before it but should also go further to say that the particular rule should be rejected in all conceivable circumstances. As soon as a court does that, so soon does it become a legislative as opposed to an adjudicative body."[1] And finally, can there be any doubt that the court in Re Whyte sanctioned the Administrator-General's 1/6, 1/6 and 2/3 distribution to deceased's child, wife and sister respectively

[1] Agbede, op. cit. p. 136.

mainly because that scheme best secures the interest and welfare of the child? We have no doubt that this would promote the child's welfare better than the application in toto of Fanti customary law which would have meant the removal of the child out of the jurisdiction of the Nigerian courts into Ghana where enforcement of the proper customary law might prove difficult.

(d) Resort to common sense

Custody decisions may also be reached without specific reference to any set of recognised legal rules. All that is required is that the decision conform to the child's best interests and welfare. And common sense solutions may occasionally facilitate such a result. The Area Courts Edict, section 21 (1), provides, inter alia, that in mixed civil causes the court is to apply a particular native law and custom or a combination of such laws and customs. But since such a formula may still leave certain situations unprovided for, the legislature has filled any possible gap by requiring that the court can apply any form of native law and custom "which it appears to the court, ought, having regard to the nature of the transaction and to all the circumstances of the case, to regulate the obligations of the parties . . ."[1] This provision would enable customary or area courts to arrive at common sense solutions to such a problem as the following which was posed by one writer.[2] In patrilineal societies a child belongs to the father and in his absence to his family. On the other hand in matrilineal societies (which are few in Nigeria) a child belongs irrevocably to its mother or her family. A conflict of laws

[1] Section 21 (1) (c) proviso. Emphasis added.

[2] Agbede, op. cit. at 330.

problem may arise over the status of a child whose father is from a matrilineal society but who is married to a woman (the child's mother) from a patrilineal society and vice versa. The question that would be posed is: to which family does the child of the marriage belong? Now under the customary law of the father the child belongs to the mother whilst under the mother's customary law the child's custody belongs to the father. This, then presents the classical game of ping-pong with each legal system at opposite ends of the table returning the ball eternally. Such a problem was posed in the Malawi case of Kamcaca v Nkhota and Anor[1] discussed previously in this chapter. Customary law and customary courts have not developed sophisticated means of resolving such a classical problem of renvoi which, although quite a familiar problem in private international law, still remains a bane of that subject. Without the tool of renvoi, therefore, customary courts would be justified in relying on commonsense solutions.

In a way the decision of the High Court of Northern Nigeria in the case of Mariyama v Sadiku Ejo discussed above could be seen basically as one grounded on common sense. The involved rule of Igbirra customary law was declared repugnant to natural justice, equity and good conscience in that particular case but the court added that in other situations, the involved customary legal rule would offer a sound, common sense solution. In the words of Holden J:[2]

"We feel that to make such an order (to hand over the child to total strangers) would be contrary to natural justice and good conscience, and we are therefore not prepared to do so. We must not

[1] (1968) 12 J.A.L. 173; See also Allott, New Essays in African Law pp. 168-171 esp. at 170.

[2] (1961) N R N L R 81 at 83.

be understood to condemn this native law and custom in its general application. We appreciate that it is basically sound and would in almost every case be fair and just in its results. There is a similar provision in Muslim law, and also in English law, where there is a presumption in similar cases that the former husband is the father. That presumption must be rebuttable if natural justice is to be done. In this case it has been clearly and absolutely rebutted."

Such reasoning by analogy is, after all, nothing other than a common sense device.

(e) Resort to foreign systems (or rules) other than English law

We are here to discuss the choice of legal systems or rules which do not fall into any of the categories in the preceding sections. English law rules are not the only storehouse from which Nigerian private international law could borrow useful ideas. Nigerian domestic law does not claim exclusive wisdom in the matter of regulating guardianship controversies. An objective approach to the question of the child's welfare warrants looking at other systems of law. This, as we have noted already, is not the attitude adopted in English and Scots law which overwhelmingly take the view that in matters relating to the guardianship of children English or Scots law as the lex fori would best promote the welfare of the child.

It is arguable that the statutory choice of law rules in Nigeria do leave the door open to borrowing from systems other than English law. We saw that section 34 (3) of the Northern States High Court Law and equivalents in the southern states contain two main clauses - the "agreement" clause and the "transactions unknown to customary law"

clause. First, on the "agreement" clause we noted that the Northern Nigerian provisions have tied such agreements specifically to "English law". This is a retrograde step. The preferable wording in the southern states enactments is to the effect that no party shall be entitled to claim the benefit of native law or custom (i.e. customary law) if it shall appear that such party agreed that his obligations in connection with the transaction should be exclusively regulated "otherwise than by native law and custom."[1]

Many Nigerians today have, for example, Russian or French or other non-English spouses. Such spouses ought not to be tied to English law with which they have no connection. A statutory provision which enables the choice of non-English law to be made is therefore to be greatly welcomed. Secondly, many transactions or legal situations are still unknown to customary law. The renvoi doctrine, as already noted, is unknown to customary law, and the list could be multiplied.[2] The doctrine of renvoi itself takes different forms[3] in different legal systems. Therefore, if a custody case throws up a problem of renvoi, a Nigerian court would, for example, be free to opt for the "simple" renvoi adopted in France, and not slavishly follow the "double renvoi" or the "foreign court theory" of renvoi practised in English private international law.

1 High Court Law, Lagos cap 80 S. 27 (3); The provision is similar to the ones in force in the Western, Eastern and Mid-Western States.

2 See e.g. Rotibi v Savage (1944) 17 NLR 77 (period of limitations in actions to recover debt); Kodieh v Affram (1930) 1 W.A.C.A. 12 (grant of letters of administration); Kwesi-Johnston v Effie (1953) 14 W.A.C.A. 254 (English conveyancing forms); Okolie v Ibo (1958) NRNLR 89 (petroleum and commercial transportation by lorries or juggernauts); Okoh v Olotu (1953) 20 N.L.R. 123 (existence of plantations in the modern sense unknown to customary law)

3 The literature on renvoi is vast. For a bird's eye view of the terrain, see Cheshire's Private International Law (9th-North ed) pp. 60-76.

Finally, the grounding of a guardianship decision on public policy considerations or on any principle of public international law should also be noted in this connection as being further examples of choice of a non-English law.

F Practice, Procedure and Evidence[1]

It will be pertinent to say a few words on practice, procedure and evidence in guardianship law - viewing these as an aspect of the choice of law problem in conflicts law. Every system of conflict of laws agrees that all matters concerning practice, procedure and evidence are governed exclusively by the lex fori, whether the matter contains foreign elements or not. The reason for this rule is based on practical considerations. The forum is more concerned with the functioning of its judicial machinery than is any other state, and that machinery may not be suited to the administration of the local law rules of another state. Enormous burdens are avoided when a court applies its own rules rather than the rules of a foreign state to matters pertaining to the administration of justice. Moreover, parties to litigation often do not give thought to matters of judicial administration before entering into legal transactions, and they do not usually place reliance on the applicability of the rules of a particular state to issues that might possibly arise if litigation becomes inevitable. Accordingly, "the parties have no expectations as to such eventualities, and there is no danger of unfairly

[1] See generally, Morris, The Conflict of Laws, chap. 28; Anton, Private International Law, chap. 25; Cheshire's Private International Law (9th ed) chap. 20.

disappointing their hopes by applying the forum's rules in such matters."[1]

As far as evidence proper is concerned, the lex fori again governs exclusively, and every system of law determines for itself how the truth of facts, acts and documents shall be ascertained. This is again grounded on the practical considerations of convenience and efficiency. In the words of Lord Brougham,[2] "The law of evidence is the lex fori which governs the courts. Whether a witness is competent or not; whether a certain matter requires to be proved by writing or not; whether certain evidence proves a certain fact or not; that is to be determined by the law of the country where the question arises, and where the court sits to enforce it." It is therefore axiomatic that a litigant must take the law of the court on practice, procedure and evidence as he or she finds it.

The relevance of practice, procedure and evidence as choice of law considerations can be seen by looking at a few cases on custody. It is well-known that in a custody case the practice of the Scottish courts is to use the names of the parties or of the child and to allow press publication of the names of the parties. The opposite is the case under English law. In the leading case of Babington v Babington[3] it was pressed upon the Court of Session that that court should decline the exercise of its jurisdiction since the press publicity which would accompany the case would be harmful to the interests of the child. The

1 Restatement, Second, Conflict of Laws, S.122, Comment (a) at p. 351.
2 Bain v Whitehaven and Furness Railway Co. (1850) 3 H.L.C. 1 at 19.
3 1955 S.C. 115.

Court refused to hold that the risk of press publicity in Scotland constituted sufficient grounds for not exercising its jurisdiction which, it had been urged, belonged more properly to the English Court of Chancery. In refusing to depart from "the age-long methods of our Courts", for the ascertainment of facts in any matter relating to custody of a child, Lord Carmont said:[1]

"I am not satisfied that the methods of the Court of Chancery to determine such questions are necessarily superior to ours for the ascertainment of the truth. It may well be that the privacy of a Chancery Judge sitting in Chambers shelters the child as it shelters the mutually recriminating parents from the fierce glare that beats upon the witness box of an open Court; but it may also be that the views expressed by deponents in affidavits are not found to be as clear or as worthy of being accepted as those which have come through the fire of cross-examination in the open."

But his Lordship probably went too far when he said that no authority exists for withholding from newspaper publication matters put in custody litigation and that he was not satisfied, even if such power existed, that the Court "ought to exercise it <u>even in the interest of a child</u>."[2] In fact there are several sets of restrictions on press reporting of custody disputes.[3] First, section 46 of the Children and Young Persons (Scotland) Act, 1937 as amended by section 57 (1) of the Children and Young Persons Act, 1963 prohibits, in any proceeding

[1] Ibid. at 122.

[2] Ibid. Emphasis supplied.

[3] See Clive and Watt, <u>Scots Law for Journalists</u> (2nd ed) pp. 54, 107, 108-109.

in any court, newspaper publication of particulars "calculated to lead to the identification of any child or young person concerned in the proceedings."[1] This embraces newspaper reporting of custody proceedings; it may also cover the disclosure of the identity of the parents of a child in a custody case. Furthermore, where the press is likely to give sensational treatment to custody disputes which are still sub judice, publication may be circumscribed. Therefore, in what amounts to a doubt on Lord Carmont's statement that the English practice in this matter is not "necessarily superior" to the Scottish practice, Clive and Watt stated that press publicity of custody cases "is one of the few instances where Scottish practitioners generally would agree that Scottish practice should follow English"[2] practice. It is submitted that the child's interest and welfare is the paramount consideration to which every other thing should yield, including "the age-long" procedural methods of the Scottish courts. In the Babington case only Lord Sorn acknowledged the harm that publicity might possibly cause to the child. "I sympathise with the desire for publicity", Lord Sorn said,[3] "and am far from under-rating the lasting harm that may result from publicity . . . If the concomitant publicity is a bad thing, and I for one think it is, the remedy lies in an alteration of our procedure and not in a refusal to exercise our jurisdiction."

1 punctuation omitted.
2 See note 3 p684 supra, para 432, p. 108.
3 1955 S.C. 115 at 125. Emphasis added.

The place of evidence in custody cases was the subject of the House of Lords debate in Re K (Infants)[1]. In that case, mother and father were disputing the custody of a child who was made a ward of court. The Official Solicitor who had ordered a specialist medical examination of the child filed confidential reports which were not disclosed to the parties. The mother contended that she had a right to see, among other things, the confidential reports, and that failure to disclose these to her was contrary to the rules of natural justice and further that the reports amounted to hearsay evidence which should not be admitted. The House of Lords rejected these contentions. In their Lordship's view, there was no unqualified right on the part of a parent or any other proper party to disclosure of information supplied to the judge in custody matters. The special nature of parens patriae jurisdiction in custody matters implies that the rules of procedure and evidence were merely means which must not be more important than the ends of protecting the child's interests and welfare. The rules of procedure and evidence, therefore, should serve and not thwart that purpose. The rules of natural justice should be a servant of justice, not master of it. There are, it was said, some principles of judicial inquiry which are not observed in guardianship or custody cases. A ward of court case is not an ordinary lis between the parties but pertains of an administrative character in which the paramount purpose is the interest and welfare of the child. In such

[1] (1965) A.C. 201.

a case "the procedure and rules of evidence should serve and certainly not thwart that purpose."[1] In an ordinary case where the judge acts as an arbiter between two parties he needs to consider only what the parties put before him. Because of this each party endeavours to present his case as best he or she could. But this is not the case in custody. In the words of Lord Devlin,

"Where the judge is not sitting purely, or even primarily, as an arbiter but is charged with the paramount duty of protecting the interests of one outside the conflict, a rule that is designed for just arbitrament cannot in all circumstances prevail."[2]

Commenting specifically on the hearsay argument, Lord Devlin said:

"An inflexible rule against hearsay is quite unsuited to the exercise of a paternal and administrative jurisdiction. The jurisdiction itself is more ancient than the rule against hearsay and I see no reason why that rule should now be introduced into it."[3]

Therefore, in ascertaining what is best for the interest and welfare of the child, the courts will not be bound by technical rules of practice, procedure and evidence. The courts will exercise their broad equitable powers in all cases. Of course the parties must receive notice of the proceedings; but such things as the reports of social welfare or medical officers, or statements made by the child itself during court investigations, even though all these be hearsay, are not

1 Re K (Infants) (1963) Ch 381 at 387, per Ungoed Thomas J. But compare the statutory regulation of evidence in the Matrimonial Proceedings (Children) Act, 1958, section 11. Subsection (4) of the section gives the Courts power to order a person who provides any report concerning a child to appear before the court and be examined on oath regarding any matter dealt with in the report. He may also be cross-examined.

2 (1965) A.C. 201 at 241.

3 Ibid. at 242.

necessarily excluded. Custody proceedings might partake of an administrative character, yet, they are civil actions and are guided by the Rules of Civil Procedure existing in each forum jurisdiction.

G CONCLUSION

Professor Ehrenzweig has written that ". . . the sole function of conflicts doctrine is to systematise true rules of choice, i.e. rules which require application of foreign laws as 'governing' ..."[1] Choice of law, then, can be seen as the heart of conflicts law and it ought to have an assured place in guardianship in private international law. The canons and needs of the system of private international law demand that choice of law must be a significant consideration in guardianship cases with foreign elements. It may often be in the interest of justice and of the child that the forum give some regard to the law of some implicated jurisdiction with which a child has substantial and rational connections.

It is true that choice of law provisions may be mechanical devices serving only the administrative purpose of enabling a court to decide a case easily. But there should be little fear that choice of law rules would degenerate into "mechanical devices" in the custody field because it is well-known that easy decisions are lacking in custody cases. Again, it is true that the loose nature of the Nigerian choice of law provisions is capable of leading to a

[1] Ehrenzweig, "A Proper Law in a Proper Forum: A 'Restatement' of the 'Lex Fori Approach'" (1965) 18 Okla L. Rev. 340 at 344, cited in Shapira, The Interest Approach to Choice of Law p. 207.

contrariety of interpretations. The fact, for example, that the "repugnancy" and the "welfare" and "residual" provisions are capable of being used to justify the application of English law at one time and of islamic, customary and/or other non-English law at another time is a warning that it may not be safe to leave these provisions at large, and that care must be taken in their invocation in a field of law loaded with so much emotions and sensitivities as is custody, and in which settled "rules" are not essential. Yet, the Nigerian courts cannot do without turning to these provisions. As Professor Leflar has said:[1] "When statutes deal expressly with choice of law, the function of the court is an interpretative one, whether the statutory rule be clear or ambiguous, mechanical or policy-oriented, wise or unwise. Reference to the statute is not only proper but necessary." And so, until such a time as Nigeria would have a specific guardianship-custody legislation containing clear choice of law provisions, the choice of law enactments in the High Court and Customary-Area Courts laws will continue to be relevant.

It may be regretted that the statutory choice of law rules in the lower courts in Nigeria were not expressly made subject to the guardianship or "welfare" provision in the adjoining section of the statute. But there need be no conflict between the two. A "restrained and enlightened interpretation"[2] of the choice of law

[1] Leflar, "Choice-Influencing Considerations in Conflicts Law" (1966) 41 NYUL Rev 267 at 276.

[2] The phrase is Professor Currie's. See Currie, Selected Essays on the Conflict of Laws p. 186.

provisions would often lead to the attainment of the same goal of maximal welfare of the child as the specific guardianship provision itself pursues.

It may also be regretted that the "repugnancy" clause which has been used so extensively in Nigerian custody law was not made expressly applicable to English (and other) law, in addition to customary law. Nigeria has a written constitution which guarantees equality of treatment to any "citizen of Nigeria".[1] Every citizen of Nigeria is not subject to customary law. So that the effect of the application of the "repugnancy" clause to customary law is to discriminate against persons who are subject to customary law and to leave untouched persons who are subject to English (or non-customary) law. Such a situation is, as Wilheim Wengler has stated "unconstitutional in a State whose constitution postulates equality between the various groups of the population and their respective laws."[2]

It is submitted that section 1 of the United Kingdom Guardianship of Infants Act, 1925 (and its Nigerian equivalents) is not just a rule of public policy or a rule of jurisdiction; it is also a rule of choice of law since its extra-territorial ambit is indicated in so far as it enacts the rule of the paramountcy of the welfare of the child in "any proceedings before any court". Professor Cavers has said that "for many years to come, there will continue to be many

[1] See Constitution of Nigeria, No. 20 of 1963, section 28 (1).

[2] W. Wengler, "The Significance of the Principle of Equality in the Conflict of Laws" (1963) 28 Law and Contemp Prob. 822 at 826.

difficult choice of law questions lacking plain, clear-cut answers."[1] With respect, this is an unavoidably correct statement as far as guardianship conflicts law is concerned.

[1] Cavers, The Choice of Law Process, p. 272.

CHAPTER SEVEN

RECOGNITION AND ENFORCEMENT OF FOREIGN GUARDIANSHIP AND CUSTODY DECREES

A. General

The problems of recognition and enforcement of foreign guardianship, custody and other status decrees have not yet begun to trouble the Nigerian courts. That fact notwithstanding, we shall make an attempt to review the approach which the Nigerian courts are likely to adopt as evidenced by the developing English rules in this field.

There are good reasons for our adopting a more than merely theoretical approach to this problem. The commercial boom which Nigeria is currently experiencing, growing international trade and international travel, as well as employment opportunities open in various sectors of the country's developmental life have meant that many foreigners have settled as residents in the country and still many more have acquired a domicile of choice in Nigeria. And these people may have entered (either abroad or in Nigeria) into matrimonial or other legal relations out of which may arise ancillary proceedings such as those involving custody orders granted in the courts of foreign countries. Besides, in an open federation such as Nigeria insterstate or inter-tribal marriages have become commonplace and a custody decree of the High Court of say, Lagos State may be called into question in the High Court of Kano State. Moreover, the revolution in modern means of transportation in terms of quick, easy and fairly cheap travel by air, rail or road across state or international boundaries could lead to an increase in custody cases concerning the interstate or international child. The many miles of international borders shared by Nigeria with her neighbouring

former French territories are hardly patrolable in many stretches, so that a poor but determined kidnapper could easily traverse the semi-arid regions of Nigeria's northern borders in or out of Nigeria, or the kidnapper could beat his way through familiar footpaths in the belt of tropical forests separating Nigeria from Dahoney in the West and the Cameroons in the East. Again, many Nigerians are long-term residents abroad and an estranged spouse could very easily remove the child of the spouses out of the jurisdiction of the foreign court into Nigeria. International treaties do not as yet exist to prevent this, and an early and effective execution of the design to kidnap a child could easily defeat preventive measures of immigration authorities. This kind of situation arose, as we saw earlier, in the case of Oludimu v Oludimu[1] which came before the Scottish courts. But whether it be Nigerians or foreigners who are involved the losing party would often have the interest of the child sufficiently at heart to warrant chasing the kidnapping party to Nigeria where the child has been brought into that jurisdiction. In such circumstances the question of recognition of foreign custody decrees could arise before the Nigerian courts. The same pattern of child-abduction could even more easily be repeated at the inter-state level where Nigerians have demonstrated how shifting and mobile they have become these days.

It may be asked at this juncture what would be the sources of the private international law rules of recognition to be followed by the Nigerian courts when and if the postulated problems arise. Here

---

1. 1967 S.L.T. 105.

one would first of all have to turn to the reception statutes which we considered in Chapter two of this work. As we noted in that chapter, until recently the Nigerian courts had to exercise their jurisdiction in matrimonial and other causes according to the rules of jurisdiction for the time being followed by Her Majesty's High Court of Justice in England.[2] But there is no comparable Nigerian Statute authorising the court to follow the current English rules of recognition of foreign judicial decrees. But this is not to say that English rules of recognition should not be studied closely by Nigerian courts. There are good reasons for giving close attention to such English rules especially because of the very close relationship between the English domestic rules of jurisdiction and the English principles of recognition of foreign decrees.[3] And if Nigerian courts have regard for the former, they cannot ignore the rules of the latter for "the definition of jurisdiction should be closely related to that of recognition."[4]

In the second place there is the reception into Nigeria of the English commonlaw rules of private international law provided that these rules were established in England before 1st January, 1900.[5] The English rules of recognition would thus have been received in Nigeria through this formula. Such received commonlaw rules of conflicts law can be modified in the interest of local circumstances.

---

2. See, e.g. High Court of Lagos Act, S.16 (Cap 80 of the Laws of the Federation and Lagos, 1958 ed).
3. See Indyka v Indyka (1969) 1 A.C. 33 at 103 per Lord Wilberforce; also at 77 per Lord Pearce.
4. Ibid at 78 per Lord Pearce.
5. See, e.g. Benson v Ashiru (1967) N.M.L.R. 363 at 365.

This is done under express statutory mandate.[6] However, a major difference between the received English rules of recognition and the rules of jurisdiction in status matters is that whilst the former can be modified with regard to their instrinsic substance to conform with local circumstances,[7] the latter cannot. This creates the curious result that it would be "impossible for the Nigerian courts to relate their jurisdictional rules with their rules of recognition"[8] - quite unlike England where an intimate link between these two branches of our subject is fundamental to the English rules of private international law which the Nigerian courts are supposed to follow. This possible divergence between the Nigerian rules of jurisdiction and recognition is likely to grow wider because the English rules of recognition are predominantly a product of judicial legislation. Recognition of foreign status decrees has traditionally been dominated by judge-made law. In general Parliament has rarely intervened in the matter of recognition of foreign matrimonial decrees, her role being confined pre-eminently to interstitial legislation. Thus, with the exception of the recent Recognition of Divorces and Legal Separations Act[9] (and a few other Acts) the United Kingdom legislature has not deemed it necessary to legislate extensively in the field of recognition. The House of Lords, the

---

6. See e.g. Law (Miscellaneous Provisions) Act, 1964 formerly Interpretation Act, cap 89, Laws, of Nigeria 1958 ed, Section 45 (2) and (3); and High Court Law, Northern Nigeria, Cap 49, Laws of Nigeria (1963 ed) Section 28A (1) and (2).
7. See Note 6 Supra
8. Akanle, Some Aspects of Nigerian Private International Law of Family Relations: A Comparative Study (Unpublished) Ph.D. Thesis London University (1970) p.350.
9. Cap. 53. 1971

Court of Session and the Court of Appeal have been responsible for formulating the rules of recognition, and in so doing have taken into account the changes in the domestic legal scene on jurisdiction as well as current fermentations in the development of conflicts rules in other legal systems.

Finally, it should be added that since the Nigerian Matrimonial Causes Decree[10] was enacted in 1970 Nigeria has made some break from the English commonlaw rules of recognition in the field of matrimonial causes. Nigerian courts are now authorised to recognise foreign divorces that would be valid "under the rules of private international law."[11] The omission from this provision of the qualifying words "commonlaw" or "English" has been described as "problematic"[12] and as "not only vague but meaningless"[13]. The further charge that the recognition provisions in the Matrimonial Causes Decree are "not up to date"[14] is more difficult to sustain. It is true that the recognition provisions in the Decree expressly stopped with the 1958 principle established in Robinson-Scott v Robinson-Scott[15]. But it cannot be said categorically that the provisions in the Decree exclude the Indyka and post-Indyka[16] rules of recognition based on the test of "substantial relationship". Surely these later English developments fall within the category of judicial decrees which, as the Nigerian enactment says, are "recognised as valid under the rules of private international law."[17]

---

10. No 18 of 1970.
11. e.g. Section 81 (5), Matrimonial Causes Decree 1970.
12. Akanle, op.cit. at 720.
13. Ibid cit 724.
14. Ibid at 723.
15. (1958) P 71.
16. See e.g. Mather v Mahoney (1968) 3 All E.R. 223; Messina v Smith (1971) P 322.
17. S. 81 (5) Matrimonial Causes Decree, 1970.

B. Recognition of Guardianship and Custody Orders

(1) 1. Introduction - The Nature of the Problem

The position of guardianship decrees in the conflict of laws is still largely unsettled, mainly because of the human or emotional factors involved. For several years now the problem of recognition of guardianship, custody or other status decrees has given rise to "many combinations and permutations of difficulty"[1]. A typical problem of recognition of custody decree may arise soon after the making of the decree. For instance, the decree of divorce may award custody to the mother who, in search of a new life for herself and her child (with or without a new husband) moves to another state of a federal union or even to another country. The father who sees his rights of access to the child as being jeopardised pleads the mothers removal in the original court which, disapproving of the mother's wrong-doing, awards custody to the father. Should a judge in the mother's new home heed this change? What should be done if the father, disappointed by the original court, eventually succeeds in removing the child to yet another jurisdiction? What is any judge to do when confronted with the plight of a child caught up in a dispute where each parent meets strategem with strategem? Is the judge to give "full faith and credit" or comity to the foreign court's decree and refuse to re-examine the merits of the first custody award or should he follow his own discretion in caring for the interest and welfare of the child now

---

1. Indyka v Indyka (1969) 1 A.C. 33, at 84 per Lord Pearce

physically within the court's jurisdiction?[2]

Different answers have been returned by courts to these questions. And commentators have given conflicting interpretations to these judicial answers. Thus, while Dr. Morris states that Nugent v Vetzera[3] and Di Savini v Lousada[4] are decisions "in which the welfare of the child was lost sight of"[5] Berriedale-Keith on the other hand wrote that these same cases represented "a more civilised attitude"[6] and he depreciated any tendency "to accentuate the national exclusiveness of English law"[7]. These conflicting views will be examined more fully later in this chapter.

Finally, we would add a word on the effect of giving recognition to a foreign custody or guardianship decree. As was shown in Kelly v Marks[8], the affect of according recognition to a foreign custody order is that the order becomes valid within the jurisdiction and therefore it would be unnecessary to pronounce afresh that the party founding his or her action on the foreign decree is entitled to custody. Such a sweeping outcome in a field where the child's welfare is of paramount importance not unnaturally leads courts to prefer giving only "grave consideration" to foreign custody orders instead of outright recognition.

---

2. See A. Ehrenzweig, "Interstate Recognition of Custody Decrees" (1953) 51 Mich L. Rev. 345.
3. (1866) L R Eq 704.
4. (1870) 18 W.R. 425.
5. Morris, The Conflict of Laws p. 185.
6. A. Berriedale-Keith, "Foreign Guardianship and English Control of Wards" (1940) 22 Jo Comp Leg (3rd Se) 234.
7. Ibid at 234 - 235.
8. 1974 S.L.T. 118 at 124.

2. Should Recognition Rules for Custody and Guardianship be Distinguished?

It may be asked whether it is desirable to have the same rules of recognition for guardianship and custody orders. Opinions differ on this as they do on most questions concerning guardianship-custody. Dicey and Morris write that "Separate rules apply according as the recognition of foreign guardianship or of foreign custody orders is concerned."[1] Professor Anton[2] likewise gives different treatment to the two kinds of status decrees. But Paulsen and Best are of the opinion[3] that "The out-of-state effects of a custody decree are the same as those of a guardianship appointment", and the authors go on to discuss the problem of recognition without making any distinction. In our view, a rigid or an inflexible dichotomy between the two would not be justifiable. Clearly in a number of situations no realistic distinctions can be maintained between recognition of custody and guardianship orders. For example, where there is no rival guardian in the local jurisdiction or where the rights of the foreign custodier are not challenged in the local jurisdiction, the powers possessed by the guardian or custodier over the child can be exercised in the local jurisdiction "without hinderance."[4] Also, in both the cases of custody and guardianship it would be irrelevant on what grounds the foreign court

---

1. Dicey and Morris, The Conflict of Laws p. 393.
2. Anton, Private International Law pp 378-384.
3. M. G. Paulsen and J. Best "Appointment of a Guardian in the Conflict of Laws," (1960) 45 Iowa L. Rev. 212 at 223.
4. Dicey and Morris, op.cit. p. 394, 397.

exercised its jurisdiction in view of the rule of the paramountcy of the welfare of the child.[5] Furthermore, without distinction foreign custody or guardianship orders may be recognised if it involved what has come to be known as the kidnapping cases. And at any rate, cases have been cited in the two areas without distinction.[6]

On the other hand, a distinction between the rules of recognition in guardianship and custody may be proper in certain situations. For example, mere entitlement to custody will rarely be important except in a dispute concerning care and control of the child. This is not the case with guardianship where, even in the absence of court proceedings, mere appointment of a guardian under a foreign law affects not only the local ward but also third parties in whose care the infant happens to be or third parties who have to deal with the guardian when he administers the infant's property.[7]

Therefore, while in the succeeding discussion we have maintained a distinction between the recognition of foreign custody and guardianship orders, it should not be thought that these are water-tight compartmentalisations. And as our discussion of recognition of custody orders will show, we shall be drawing upon guardianship cases to illustrate some of our points.

---

5. Contrast Dicey and Morris, op.cit. pp 394, 397.
6. As was the case in McKee v McKee (1951) A.C. 352 in which guardianship cases including Re B's Settlement (1940) Ch 54; Nugent v Vetzera (1866) L.R 2 Eq 704, Stuart v Bute (1861) 4 Ml were cited.
7. Dicey and Morris, op.cit. p. 393.

(II) Recognition of custody orders

1. The problem and the philosophy: Our basic concern here is to discuss the law on the status of the orders of a foreign court granting custody of a child to one of the parents. What is the local court in Scotland, England or Nigeria to do when faced with such a foreign custody order? Should it recognise and enforce the order of the foreign court in all or in some circumstances in a field of law where the welfare of the child is always the overriding consideration? At the inter local or interstate level, should a rule, the equivalent of the American "full faith and credit", prevail? If there is going to be recognition, should there be some qualifications and what limits ought there to be to such recognition?

There is a clear need to avoid multiplicity of custody proceedings (concurrent or successive) in different jurisdictions. Such proceedings would be unsettling to the child's background and would not necessarily be advancing the child's welfare. Too rigid opposition to any form of recognition may encourage forum shopping. And at the same time if courts are too willing to give recognition without minimum safeguards the child's welfare may be sacrificed. Therefore as much as possible the one or the other danger should be avoided.

It might have been thought that the underlying policy of ensuring stability and continuity of environmental and familial relationships for the child should be controlling in this field, so that a custody determination by a foreign tribunal which had entered fully into all the relevant family background of the

child ought not to be dissented from without very good reasons. But this has generally not been regarded as a persuasive argument since the very fact of the parents' separation means that the child's stability of life has been disturbed. The philosophy of recognition of foreign custody orders, therefore, is overwhelmingly that of treating each case on its own facts and merits without regard to previous foreign adjudication of the issues. We shall first consider the state of the law before 1900 and then review the law after that date.

2. The position before 1900: The commonlaw rules of recognition of foreign judgments are, as we observed earlier, predominently judge-made. Such recognition rules established in England before 1st January 1900 have been received into Nigeria as part of the commonlaw rules of private international law. It is, accordingly, significant to examine what these pre-1900 rules were and whether they need to be changed in their adoption or application in Nigeria. We may, however, make these preliminary observations. First, in general the right to custody of a ward as decreed by the foreign court will be recognised where such rights are not challenged in the local jurisdiction. Secondly, the prerequisites for the recognition of foreign status decrees, such as jurisdictional competence of the foreign court at the material time, or the inpersonam jurisdiction of the foreign court over the parents - all these are not relevant to the question of recognition of foreign custody orders in English law. It is immaterial on what basis

the foreign court exercised its custody jurisdiction.[1] Thirdly, the 19th century cases considered below all pertain to guardianship, not strict custody. But because the cases illustrate nicely the principle of recognition which is valid for both guardianship and custody, we have considered them here so that the treatment will not be repeated in our subsequent discussion of guardianship.

The general opinion is that during the 19th century the English courts displayed two different attitudes towards the problem of recognition and enforcement of foreign judgments and decrees with regard to the guardianship and custody of infants. The earlier of these views is said to be represented by Johnston v Beattie[2] where it was held that guardianship was determined exclusively by the law of the child's residence and that under English law a foreign appointment of a guardian would not be allowed to have any extra-territorial effect with regard to children in England. Thus, unless an English court in its discretion confirmed the authority of the foreign guardian or custodier, such authority would be ineffective in England. This decision, it has been said,[3] "denied effect to the appointment of a guardian abroad in regard to an infant residing in England." But does this statement correctly represent the decision in that case? It is submitted that the decision did not deny any effect to foreign orders of appointment of a guardian.

---

1. Dicey and Morris, The Conflict of Laws p. 397, comment to Rule 52.
2. (1843) 10 Cl and F 42.
3. Dicey and Morris, op.cit. pp 393 - 394.

Lord Brougham[4] in Johnstone v Beattie said that

> "Most of the authorities in the general law of Europe seem agreed that the guardian validly appointed in any given country has an authority for the protection of the ward and the administration of his personal estate everywhere, ex comitate."

His Lordship added a pertinent qualification that if the foreign law had "local peculiarities" or if the appointment resulted from considerations of some "peculiar local policy", the appointment of the foreign guardian would not be recognised.[5] However, in the case before their Lordships which involved Scots guardians, there was no reason why such foreign guardians should not be recognised because

> "We are not dealing with the natives of some barbarous country which has no regular tribunals and no system of jurisprudence, we have to do with the law and the customs and the courts of a people as civilised as ourselves."[6]

His Lordship saw no reason "why the court of a foreign country, in which the ward might chance to be temporarily resident, should refuse to recognise the tutorial relation, and the powers which it bestows, less than the parental relation and the patria petestas belonging to it."[7]

In Stuart v Bute[8] decided shortly after the middle of the last century, the House of Lords held that a foreign guardian is not to be entirely ignored particularly where the child had been kidnapped from the guardian. But what is more important for our

---

4. (1843) 10 Cl and F 42 at 94 (8 E.R. at 678).
5. Ibid at 95.
6. Ibid at 104 - 105.
7. Ibid at 94 - 95.
8. (1861) 4 M 1 ; (1861) 9 H.L.C. 440.

present discussion is that the Bute case explained the true ratio in Johnstone v Beattie. Lord Chancellor Campbell giving the leading opinion first expressed his "regret (for) that decision"[9]. He then went on to state that all that was judicially decided by the House of Lords in Johnstone v Beattie was that if there be a foreign child in England, with guardians duly appointed in the child's own country, the English courts (as the local courts) may, without any previous inquiry whether the appointment of other guardians in England is or is not necessary and would or would not be beneficial for the child, make an order for the appointment of English guardians.[10] The Lord Chancellor then added:[11]

> "But the House did not decide, and no members of the House said, that foreign guardians are to be entirely ignored, or laid down anything to countenance the notion that a guardian who has been duly appointed in a foreign country ... is to be treated as a stranger and an intruder (to his ward)".

It is difficult to disagree with this view of the ratio in Johnstone v Beattie especially when it is recalled that the Scottish guardians in that case had been duly appointed, had shown no misconduct or incompetence, and that the child had "no property whatever in England" and was in England only for a very temporary purpose. In other words, both Johnstone v Beattie and Stuart v Bute held that foreign guardians cannot be ignored. It is therefore incorrect to say[12] that there was

---

9. Ibid at 60.
10. Ibid at 62.
11. Ibid.
12. O. Kahn - Freund, "Guardianship in Private International Law" (1940) 4 M.L.R. 64 at 65.

"a change of attitude on the part of the Courts towards the recognition and enforcement of" foreign guardianship or custody decrees during the period so far reviewed.

Two other 19th century cases which are said to represent the "high-water mark"[13] of the rule that foreign appointed guardians are entitled to international recognition are Nugent v Vetzera[14] and Di Savini v Lousada.[15] In Nugent v Vetzera, Page Wood V.C. had to deal with a case concerning infant wards of the Court of Chancery. The children were of Austrian nationality and guardians had been duly appointed for them by the appropriate Austrian courts. The last of those appointments was on 24 July 1865, when by a decree of the Austrian Consular Court of the same date, one Vetzera was appointed sole guardian of the children with a direction that the children should be brought up in the religion of their father, and sent as soon as possible to Vienna "in order to receive their education in that city, the only mode of awakening and consolidating the sentiments of faithful Austrian subjects." The mother of the children was an Englishwoman who had been anxious that the children receive English education, and with the consent of her husband who died in 1860, the children were brought up as members of the Church of England. Two of the ten children involved were sent to school in England during the father's life time and the eldest of these girls later married one Mr. Nugent living in London. Three

---

13. P. E. Nygh, Conflict of Laws in Australia p 585.
14. (1866) L R 2 Eq 704.
15. (1870) 18 W.R. 425.

boys and two girls were later sent to England for their education. The latter usually spent their holidays with Mrs. Nugent (their eldest sister) who together with one Countess Gifford were appointed guardians of the infants in December 1865. The defendant Vetzera then filed a motion asking that the said English appointment of guardians should be discharged. The issue before the court was whether to grant this motion or, on the other hand, to set aside the guardianship order of the Austrian court and so to refuse recognition to the duly appointed Austrian guardians.

In the opinion of Sir W. Page-Wood, V.C. it would be impossible entirely "to disregard the appointment of a guardian by an Austrian court"[16] over the children who were Austrian subjects. To set aside the order of a foreign court "would be frought with consequences of very serious difficulty."[17] For it would be contrary to right and justice to hold that once a foreign parent or guardian sends his children to England for purposes of education, such parent or guardian must do so at the risk of never being able to recall the children simply because it is the opinion of English courts that "an English course of education is better than that adopted in the country to which they belong."[18] Sir Page-Wood V.C. then decided in favour of recognising the authority of the foreign-appointed guardian,

---

16. (1866) L.R. 2 Eq 704 at 712.
17. Ibid.
18. Ibid. This was the same type of objection felt by Lord Campbell in Johnstone v Beattie concerning the English rule of non-recognition of foreign guardians. See (1843) 10 Cl and Fin 42 at 141.

and he added that the guardian could exercise "all such power and control as might have been exercised over these children in their own country if they were there."[19]

The decision has been generally criticised and condemned. It is said, for instance, that the decision is among those where "domiciliary guardians had their authority confirmed by English courts without inquiry into their fitness as guardians or the welfare of the children concerned."[20] Another writer states that in Nugent v Vetzera, "The question of the'welfare of the children' was not taken into account."[21] It is respectfully submitted that these opinions are erroneous. It was argued for the plaintiffs, relying on Stuart v Bute, that the court was bound to "look at what is most for the benefit of the infants"[22] whose guardianship the court had to settle in Nugent v Vetzera. And Sir Page-Wood V.C. replied, correctly, that the Bute Guardianship case did not decide that foreign guardians are to be disregarded in determining what was best in the children's interests. There was ample evidence that the judge in Nugent v Vetzera had in mind the welfare of the children. He said, for instance, that if the case had been one in which a Roman Catholic father gave up his child to be brought up as a Protestant but later changed his mind after some years, "the

> Court would not allow the child's religious principles to be disturbed by changing the course of instruction under which it has so long been allowed to remain"[23]

---

19. (1866) L R 2 Eq 704 at 714.
20. P. E. Nygh, Conflict of Laws in Australia. p. 585. Our emphasis See also Morris, The Conflict of Laws p 185.
21. O. Kahn-Freund, "Guardianship in Private International Law" (1940) 4 M.L.R. 64 at 65.
22. (1866) L.R. 2 Eq 704 at 713.
23. Ibid at 714.

because to allow such disturbance would be detrimental to the child's emotional, psychological and spiritual welfare.

"The case may well happen", the judge further noted, of a situation arising where foreign children in England had no body to look after or care for them, or where such children require the protection of the court "to save them from being robbed and despoiled by those who ought to protect them."[24] But in the instant case, the children "have met with nothing but kindness ... on all sides."[25] It is against this background that the judge, while recognising the foreign guardians, nevertheless guarded himself "against anything like an abdication of the jurisdiction of this Court to appoint guardians."[26] It is therefore nearer the truth to say, in the words of Dicey and Morris, that the welfare of the child principle "was applied very cautiously in Nugent v Vetzera"[27].

The headnote to Di Savini v Lousada[28] read:

> "When an infant, a citizen of a foreign country, is sent to England, the Court of Chancery in England will carry out in all respects the orders of the courts of the foreign country in regard to the infant, so far as consistent with the laws of England."

In that case an Italian council of guardians of an infant appointed by the competent Italian court, had arranged for the infant to be brought up in the custody of an English couple as the infant's deceased adoptive mother had wished. Dissatisfied with the

---

24. Ibid.
25. Ibid.
26. Ibid.
27. Dicey-Morris, The Conflict of Laws p 395.
28. (1870) 18 W R 425.

religious upbringing of the infant who was being instructed in the Protestant instead of Roman Catholic doctrines, the Italian guardians asked for an order appointing two other English residents as guardians of the infant in England. The order was so made. In the words of James, V.C., since a council of guardians had been competently appointed according to Italian laws and were under judicial supervision, his Lordship felt "bound to respect that Court and council"[29] just as he would expect an Italian court to respect his own orders.

This decision again has been criticised as a case in which the guardianship or custody order of a foreign court was recognised in England with the exercise of "no discretion by the English courts"[30]. It is our submission that this criticism is not justified. James V.C. made it abundantly clear that the foreign guardians were recognised because of the special circumstances of the case - This is what his Lordship said:

> "But very soon after the arrival of the child here, a question was raised between the Italian and the English guardians. The Italian guardians did not intend to abdicate in any way their power. Nothing has arisen to lead this court to say, 'We ought not to recognise the authority of the Italian Court'. That Court has directed Dr. Nobili to apply to this court to alter the circumstances in which the child is placed. The dissatisfaction has been expressed so early that I cannot say there has been any laches. I think that I am bound without exercising any judgment of my own to recognise their authority."[31]

This last statement in the above passage about recognising "their" authority has caused difficulty in subsequent cases,[32]

---

29. Ibid at 426.
30. Cheshire's Private International Law (9th North ed.) p 477. See also Nygh, Conflict of Laws in Australia p. 585.
31. (1870) 18 W.R. 425 at 426.
32. See e.g. McKee v McKee (1951) A.C. 352.

and we would admit that it is ambiguous since "their authority" is capable of referring either to the authority of the foreign court or the authority of the foreign guardians. And the passage has been cited by critics of the decision as amounting to abdication of authority by the court. However, it seems clear, as it has rightly been pointed out, that in Di Savini v Lousada just as in Nugent v Vetzera, "there was no abdication of authority."[33] In the first place the foreign guardians in Di Savini had acted timeously in protesting against what they considered inimical to the child's welfare, viz. the change of religious education. After all, it has been conceded in a leading judicial authority that if a problem concerning a foreign custody order arises "within a very short time of the foreign judgment" the local court asked to give recognition would be justified in according such recognition without inquiry.[34] In other words, time is of the essence in forming an opinion whether or not to recognise foreign orders of guardianship or custody. Secondly, the judge made it clear that no new circumstance had arisen since the making of the foreign order. Change of circumstances is a recognised ground for not paying heed to foreign custody or guardianship orders where such a change affects the child's welfare. The implication from the statement that there had been no change of circumstances is that had such change arisen, the judge in Di Savini would have said it and would have

---

33. See Note, "McKee v McKee : Custody of Infant - Duty of Court in face of foreign order" (1951) 4 I.L.Q. 384 at 386.
34. McKee v McKee (1951) A.C. 352 at 364.

refused to recognise the foreign guardians.[35] Thirdly, the English guardians had broken a stipulation that the child's religion would be respected. The stipulation was a "positive engagement" which was "absolutely binding".[36] The implication then is that not to recognise the foreign guardians would be conferring a benefit on the English guardians who were wrong doers. True, the child's welfare should not be sacrificed in the name of punishing an erring guardian, but at the same time the equitable doctrine of "clean hands" has become well-accepted in guardianship law.[37]

Summary: What conclusions can one draw from a review of the above four leading cases in so far as concerns the applicability in Nigeria of the commonlaw principles of recognition laid down in the nineteenth century, that is, before 1st January 1900? And have these authorities been correctly interpreted in English law? Cheshire and North dismiss both Nugent and Di Savini cases "as of little value"[1]. And Dr. Morris states that the same two cases "in which the welfare of the child was lost sight of would not now be followed."[2] With utmost respect we cannot agree with these opinions. Berriedale Keith has stated, rightly in our view, that both Nugent and Di Savini cases represented "a more civilised attitude"[3] to the problem

---

35. See Dicey-Morris, op.cit. p. 395.
36. (1870) 18 W.R. 425 at 426.
37. See e.g. Ehrenzweig, "Interstate Recognition of Custody Decrees" (1953) 51 Mich L. Rev. 345. Ehrenzweig has consistently campaigned for the recognition of a "clean hands" doctrine as a salient feature of custody and guardianship law.

1. Cheshire's Private International Law (9th North ed) p. 477.
2. J. H. C. Morris, The Conflict of Laws p.185.
3. A. Berriedale Keith "Foreign Guardianship and English Control of Wards" (1940) 22 Jo Comp Leg. (3rd Ser) 234.

of recognition of foreign custody orders although the learned author himself erred in his thinking that there ever was "a period in which (English Courts) failed to show respect for the rights of foreign guardians"[4] - this being an obvious reference to the decision in Johnstone v Beattie[5] noted above. And certainly Cross J disagreed with Cheshire and North. In Re H (Infants)[6] he said that "Nugent v Vetzera ..... I consider to have still very great weight, notwithstanding what was said about that case in Re B's Settlement and in McKee v McKee". Professor Otto Kahn-Freund's own conclusion is that in these 19th century cases we were "faced with a conflict between the policy of internationalism and that of 'internal welfare' and, in the nineteenth century, the former carried the day."[7] With respect the welfare principle did not lose the day in the nineteenth century. Both before and after 1900 the welfare rule prevailed as far as recognition was concerned. What may represent the difference between the two periods is the order of approach to recognition. In the nineteenth century the rule was to enforce the foreign order subject to the court's discretion in the interest of the child's welfare. In the twentieth century, on the other hand, the approach is to attend primarily to the child's welfare and then give due weight to the views of the foreign court. As it was said in McKee v McKee the order of a foreign court only demands and receives grave consideration.[8]

---

4. Ibid.
5. (1843) 10 Cl and F 42.
6. (1966) 1 W.L.R. 381 at 393. Emphasis added.
7. O. Kahn-Freund, "Guardianship in Private International Law" (1940) 4 M.L.R. 64 at 65.
8. (1951) A.C. 352 at 365.

The place of the welfare 'rule' in recognition of foreign guardianship or custody orders during the two periods may thus be one that displays a difference without a distinction. It is realisation of this essential continuity in the application of the welfare principle that led the Privy Council to say that "too much stress should not be laid" on the provisions of section 1 of the Guardianship of Inflants Act, 1925, since that Act and similar ones in both the United Kingdom and Nigeria "merely enacted the rule which had long been acted on in the Chancery Division of the High Court of Justice."[9]. The pre-1900 English commonlaw rules of recognition of foreign custody or guardianship orders would thus appear still to be good law for Nigeria since the decisions centred essentially on the child's welfare. Rules of law are not discarded merely because they are ancient.

We shall now have to examine the developments in English law of recognition after 1900 and their possible applicability in Nigeria.

3. The Rule in McKee v McKee

Our concern here is to examine the attitude of the courts to the problem of recognition of foreign custody orders since the enactment of section 1 of the Guardianship of Infants Act, 1925. The current position under English law is contained in Rule 52 of Dicey and Morris, Conflict of Laws:

---

9. Ibid at 366. See also Re Thain (1926) Ch 67b.

> "A custody order made by a foreign court does not prevent the court from making such custody orders in England in respect of the infant as, having regard to its welfare, it thinks fit."

At this point one immediately notices a distinction between the English and Scots rules of recognition. The Scottish approach characterises custody orders as decrees in rem since it affects status. Therefore competence in the matter of making custody awards belongs generally to the lex domicili. The result is that foreign custody orders made by the courts of the child's domicile would, until very recently, be recognised without much questioning.[1]

The rule stated by Dicey-Morris is itself derived from the leading post-1900 commonlaw cases in this field and, although English juristic writings on private international law serve as authority in Nigeria, we shall go behind Rule 52 and analyse the cases themselves because of the additional relevance of the doctrine of judicial precedent as it is applied in Nigeria.

It has been said that the rule in McKee v McKee that the custody orders of a foreign court must yield to the paramountcy of the welfare of the child "was initiated in 1940"[2] with the decision of Morton J. in Re B's Settlement, B v B[3]. The starting point, therefore, must be Re B's Settlement.

The salient facts in Re B's Settlement were as follows: An Englishwoman married a Belgian and went to live in Belgium.

---

1. See Anton, Private International Law pp 378-379; See also Westergaard v Westergaard 1914 S.C.977; Radoyevitch v Radoyevitch 1930 S.C. 619; But see for the current position Kelly v Marks, 1974 SLT 118.
2. Dicey and Morris, op.cit. p.397.
3. (1940) Ch 54.

The spouses later separated and by the law of Belgium the father became the guardian of the only child of the marriage. In August, 1937, the mother, who had returned to England but had gone over to Belgium to see the child, brought the child to England without the father's consent - thus making the case one of kidnapping. The father started divorce proceedings in Belgium and in October 1937, the Belgian court gave him custody during the proceedings and ordered the mother to return the child. The mother was not represented in the Belgian proceedings and was not served with the order until December 1938. In January 1939, the father started wardship proceedings in England asking for the return of the child. The hearing before Morton J. was in July 1939. The Belgian divorce proceedings were not yet heard, and the mother indicated she was going to contest the issue of custody. Counsel for the father argued that the Belgian custody order ought to be followed because "it would not be proper to allow the mother, as a litigant, to gain an advantage, for she does not come to the court with clean hands."[4] Morton J rejected that submission and made no reference at all to the factor of kidnapping. The court held that in the post-1925 era, the court is always bound to exercise a judgment of its own when dealing with the custody of a ward. It further emphasised that the court is bound in all cases to treat the welfare of the child as being the first and paramount consideration "whatever orders may have been made by the courts of any other country"[5] and that if there be any observations in the

4. Ibid at 55.
5. Ibid 63 - 64.

Nugent and Di Savini cases which state or imply a contrary view, such observations "ought not ... to be followed at the present time."[6]

The case has usually been cited as overruling Nugent v Vetzera[7]. But in fact nothing was said in Nugent that contradicts Re B's Settlement. The distinction[8] which Morton J. tried to draw between Nugent and Re B's Settlement cannot stand. Morton J. said that we do not know what would have been the effect of the welfare consideration on Sir Page-Wood V.C. if that matter had crossed the Vice-Chancellor's mind when giving recognition to the Austrian custody decree. But as we indicated earlier, Page-Wood V.C. in fact bore in mind the welfare of the children. Even if we assumed that he did not, such a charge would not distinguish the two cases. Morton J. himself admitted ignorance of whether the Belgian court proceeded along the principles of the paramountcy of the welfare of the child in awarding custody. He said he did not know how far the Belgian court proceeded "on the footing of what was best for the children at that time".[9] This seems to imply that the decision might be different if the foreign court had borne the child's welfare in mind. It was because of this doubt plus the fact that the Belgian order was an old one and the boy had now lived for two years in England and formed roots there that led Morton J. to say

---

6. Ibid at 64.
7. (1866) L.R. 2 Eq 704.
8. (1940) Ch. 54 at 62.
9. Ibid at 62.

that there is nothing contrary to the comity of nations in the order he was about to make if, in the interests of the child, he refuses "blindly to follow the order made in Belgium."[10] In other words, the important qualifications injected into Re B's Settlement enabled Morton J, like Page-Wood V.C. and James V.C. before him, to be on his guard against anything like the abdication of the control of the court over its wards. All the three cases (Nugent, Di Savini and Re B) agree that if the judge thought the welfare of the child required the appointment of guardians by an English court, or the non recognition of a foreign custody order, the judges would make their own appointment and would refuse the recognition notwithstanding the foreign order.[11]

The greatest merit of the decision in Re B's Settlement is said to lie in its view of the court's freedom to conduct a full inquiry in the interest of the child. But it has been doubted whether this was in fact what Re B's Settlement did. Thus Wilmer L. J. in Re H (Infants)[12] said that "there is some obscurity" as to whether the decision in Re B's Settlement was arrived at "after a full investigation" or whether it was arrived at "after only a partial investigation". Finally, the fact that Morton J. ignored the mother's act of kidnapping the child - an act which may not have been conducive to the child's best interests and welfare - may be fatal to the entire opinion.

---

10. Ibid.
11. This is the view of Nugent and Di Savini which was adopted by the Privy Council in McKee v McKee (1951) A.C. 352 at 365.
12. (1966) 1 W.L.R. 387 at 399 C.A.

The facts in McKee v McKee[13] were as follows:

A husband and wife who were both United States residents and citizens and had entered into a separation agreement providing, inter alia, that without the written permission of the other party neither of them should remove their infant son from or out of the United States of America, eventually obtained a divorce in the State of California. This divorce decree obtained in 1941 awarded the boy's custody to the father. In subsequent (1945) proceedings in the same matrimonial court in California the custody order was varied and full custody was awarded to the mother with the rights of reasonable access allowed to the father; the latter was also permitted to have the child in Port Austin, Michigan, until 1 September 1945 on which date it was ordered that the child be delivered to the mother in Los Angeles, California. At the time of this subsequent order the child was living with the father under the terms of the earlier custody order. The father pursued unsuccessfully successive appeals in the Californian courts, and these appeals had the effect that the order of August 1, 1945 in favour of the mother would not commence to operate until January 13, 1947 according to California law. On Christmas Eve 1946, a few weeks before that 1945 order was to start operating, when he heard that his last appeal against the custody order had failed, the husband, in breach of his agreement and without the knowledge or consent of the wife, left for Ontario, Canada, with the child to settle there. As soon as this came to the notice of the boy's mother,

---

13. (1951) A.C. 352.

she instituted habeas corpus proceedings in Canada seeking to have the child delivered to her, but the sole custody of the boy was again given to the father by the Ontario trial judge after a hearing lasting eleven days. That custody order was confirmed by the Ontario Court of Appeal and, notwithstanding a reversal of these lower courts' orders by the Supreme Court of Canada, the Privy Council also confirmed and restored the decision of the Ontario trial judge and Court of Appeal.

The main questions before the Privy Council included first, whether a local court in whose jurisdiction a minor child currently resided could refuse recognition to the custody decree of the foreign court of the matrimonial cause in whose jurisdiction the minor child resided at the time of rendition of the decree; and secondly if the local court had the right to refuse recognition, were there sufficient grounds for such refusal in the present case? After a brief discussion of these issues we shall consider the authority of Privy Council decisions in Nigeria.

The decision of the Privy Council in McKee was that a foreign custody order even though made in the foreign country where the child is a domiciliary and resident or national is not binding on the forum. The reasoning of the Privy Council was that in common with the law of England, Scotland, the United States and many other countries, it is the law of Ontario that the welfare and happiness of the infant is the paramount consideration in all matters of custody.[14] "To this paramount consideration all others yield. The order of a foreign court

---

14. (1951) A.C. 352 at 365.

of competent jurisdiction is no exception."[15] So that once the court assumes jurisdiction it can make its own investigation of the facts and arrive at its own conclusion giving proper weight - or "grave consideration" - to the foreign judgment.[16] The explanation for such a rule "rests on the peculiar character of the jurisdiction and on the fact that an order providing for the custody of an infant cannot in its nature be final."[17]

The decision can be justified on a number of grounds which conform well with the best interests of the child. One of the prerequisites for the recognition and enforcement of foreign judgments is that the judgments must be final. And finality is what custody judgments lack since they are subject to variation in the interests of the child. In the next place, the Ontario trial judge had fully investigated the merits of the case and custody was granted to the father because of his uprightness and the corresponding lack of personal integrity in the mother. Furthermore, the child's educational and domestic facilities in Ontario were well provided for. Finally, there had been a conspicuous change of circumstances which fully justified the conclusion of their Lordships. There was a considerable delay between the making of the California custody order and the institution of the Ontario proceedings. The boy was now older and would be better looked after by the father now than before. "No longer was the choice between California and 'a place not accessible, snowbound in winter', no longer was the child under

---

15. Ibid.
16. Ibid.
17. Ibid. See also Re H (Infants) (1966) 1 W.L.R. 381 at 402.

the care and supervision for most of the time of aged employees hired by the father, nor was he many miles from adequate transportation and adequate school facilities."[18] These considerations were so significant that everything, including a foreign custody order, must be made to yield. But it would seem from Lord Simond's pronouncements that the court in considering the welfare of the child as its paramount concern may, where there is no new circumstance since the making of the foreign order, exercise its jurisdiction in the direction of recognising and enforcing the foreign order - doing this as a matter of the exercise of independent judgment.

But the Privy Council decision can also be criticised.[19] Their Lordships did not seem to have laid sufficient emphasis on the charge levelled against the husband, first that he had broken the agreement with the wife that none of the parties should unilaterally remove the child out of the United States of America[20] and secondly that the husband had flouted the order of the California court. The effect of not stressing both these points was that the father had been allowed to benefit from his own wrong. Not surprisingly, E. Likhovski has labelled McKee as a decision which "opens the door to abduction of children."[21] In the next place, the Privy Council seemed to have assumed that

---

18. Ibid at 364.
19. See generally, E. Spiro, "Foreign Custody Orders" (1950) 32 Jo. Comp. Leg. 73; Conflict of Laws (1973) pp 215-222.
20. Their Lordships dismissed this as "only one of many elements in the case" (1951) A.C. 352 at 362.
21. E. Likhovski, "Foreign Orders of Custody" (1951) 4 I.L.Q. 506 at 507.

a custody order is not in the nature of a foreign judgment. Lord Simonds said[22] "such an order has not the force of a foreign judgment" although his Lordship had earlier[23] repeatedly referred to foreign custody orders as "judgment". It ought not to make any difference whether custody orders are described "judgments", "decrees" or "orders". As Dr. Spiro says,

> "the concept of foreign judgment does not imply more than the exercise by a court of the power of investigation and decision in a manner akin to judicial proceedings of the country called upon to enforce it."[24]

Furthermore, the first canon of recognition of foreign judgments is that the judgment be made by a court of competent jurisdiction. In McKee the validity of the order of the California Court had been challenged on the grounds that it had no jurisdiction to make it. But the Privy Council was content to assume, "as it has throughout been assumed, that the order was validly made."[25] Finally, when we discussed choice of law problems in chapter six we observed that the lex fori tends to prevail and we suggested that a proper choice of law approach should lead to the applicability of other laws with which the case has significant and rational relationship. In McKee v McKee the legal systems of California, Michigan and Ontario were implicated. In the determination of what was best in the interests of the child the Privy Council, like the Canadian judges, applied solely the law of Canada. The lex fori has no monopoly in answering or determining what is the true welfare of the child.

---

22. (1951) A.C. 352 at 365.
23. Ibid at 363.
24. E. Spiro, Supra note 19, at 76; and at 217.
25. (1951) A.C. 352 at 362.

The Authority of Privy Council Decisions in Nigeria

We may now ask whether the rule laid down in McKee v McKee applies in Nigeria. It certainly cannot apply as part of the commonlaw rules received into Nigeria before 1st January 1900. If it applies one must seek for an explanation primarily in the doctrine of judicial precedent as applied in Nigeria.

Before October 1963, the Judicial Committee of the Privy Council was at the apex of the Nigerian system of courts, and its decisions on a point of commonlaw whether arising from Nigeria or not was thought generally to have a binding effect on all Nigerian courts.[26] The Privy Council itself has not pronounced on whether its judgments automatically applied in all the territories over which it once constituted the final court of appeal. What the Board has said on the issue is that its decisions given on an appeal from one territory will be binding on the courts of another territory where the subject matter is governed by the same principles of law.[27]

To return specifically to Nigeria's position, after 1st October 1963 when Nigeria became a Republic, the Supreme Court of Nigeria replaced the Privy Council as the highest court in Nigeria.[28] Before this transformation the authority of Privy Council decisions in Nigeria was not subject to critical

---

26. The point was never expressly decided, but Mr. Park supports the view. See his The Sources of Nigerian Law p 56. But Professor Allott maintains what we consider as the better view, that the point is arguable. "There are good arguments on either side", he writes. See Allott, New Essays in African Law p.84.
27. See T. O. Elias, British Colonial Law (1962) p.26. See also Fatuma Bin v Mohammed Bin (1952) A.C.1. This decision is criticised by G. W. Bartholomew (1952) I.C.L.Q. 392, 394.
28. See Nigerian Republican Constitution, 1963 (No 20 of 1963) S.120.

scrutiny as it was generally assumed that those decisions had force of law in Nigeria. But such assumption is now open to serious challenge up to the point of denying the binding force of Privy Council decisions even on the lower Nigerian courts. In the words of one writer,[29] it will be "unreasonable to assume that a decision by the Judicial Committee on an appeal from one country will automaticallybe binding on another country." The objection to the Privy Council authority in Nigeria may be sustained on political, though perhaps not strict precedential legal grounds. It is not consistent with a country's political sovereignty that the most significant part of its case law should have been laid down by an external court "constituted under the laws of another country, composed almost entirely by judges appointed by an outside government and functioning entirely from outside,"[30] and with judges hardly expected to be masters of indigenous local law and custom. There is no satisfactory answer to this political objection. But too much should not be made of the objection. Because after all Nigeria's legal independence will never be a realistic assertion so long as, among other things, the "commonlaw of England" forms the core of the general law in Nigeria.

On the basis of "extra-judicial information",[31] Professor Allott has stated that the Supreme Court of Nigeria does not consider itself strictly bound by decisions of the Privy Council

---

29. D. A. Ijalaiye, Comment: "Chime v Elikwu - Judicial Precedent" (1971) 9 Nig. B.J. 63 at 68.
30. Nwabueze, Machinery of Justice in Nigeria p.204.
31. Allott, New Essays in African Law p.84.

even if given an appeal from Nigeria, but would treat them as of the greatest persuasive authority, and would only depart from them for good reasons.[32] But it would seem that all inferior courts in Nigeria, that is all courts below the Supreme Court (state or federal), will be bound by decisions of the Privy Council when it acted as the final court of appeal from Nigeria until the Supreme Court of Nigeria has expressly overruled such decisions.[33] There is one curious result in denying binding effect to former Privy Council appeals from Nigeria which, after all, is bound by decisions of English courts on the commonlaw given before 1st January 1900, as we showed[34] with the cases of Johnstone v Beattie, Nugent v Vetzera, Stuart v Bute. It would be "perverse", states Professor Allott, to hold that on the one hand a Nigerian court "is bound by an old decision of a court in a different judicial hierarchy, but is not on the other hand bound by a court which was recently in the same judicial hierarchy as itself."[35]

As far as the Privy Council decision in McKee v McKee is concerned, although it emanates from a different jurisdiction, it is our submission that that decision would have a highly persuasive authority in Nigeria. The decision in McKee has in fact been visibly applied in Olayemi v Adeyemi[36] which came before the Northern Nigeria High Court in Jos. In most of the other Nigerian jurisdictions McKee v McKee would also be

---

32. Ibid, at 84-85.
33. Ibid at 86.
34. See Supra, pp.
35. Allott, New Essays in African Law p.86.
36. Noted in (1963) 1 Nig. L. J. 125.

recognised as good law. However, in the Western and Mid-Western States of Nigeria the position would appear to be slightly different. The Infants Law[37] of Western Nigeria (also in force in the Mid-Western state) provides that in custody cases the High Court may make such orders as it may think fit "having regard to the welfare of the child, and to the conduct of the parents ...." This provision may therefore deprive McKee v McKee of its persuasive authority in the Western and Mid-Western states of Nigeria in so far as that case ignored the conduct of the father in breaking "an agreement solemnly entered into" and his further conduct of "deliberate evasion" of the order of a competent foreign court.[38]

4. Recent Trends or Developments since McKee v McKee

(a) Introduction

The significant development in the custody law of recognition has arisen mostly in connection with what has come to be known as the kidnapping cases. Such situations have not been comprehensively defined, but they include cases where a child being a ward of a foreign court is taken out of that country in defiance of the orders of the foreign court and the child is then made a ward of court in the second country by the person who has improperly taken the child there. Such cases may involve a unilateral act by a third person against the wishes of the child's parents or by one parent against the wishes of the other parent;

---

37. Chapter 49. Laws of Western Nigeria (1959 ed) Section 12(1).
38. See McKee v McKee (1951) A.C. 352 at 362.

and even if it does not involve the flouting of the orders of a foreign court, kidnapping normally involves some element of force, stealth or secrecy, deception or fraud.

Although modern means of transport and travel has greatly facilitated the kidnapping of children across state or international boundaries, it is by no means an exclusively twentieth century phenomenon. It would be recalled that the Bute Guardianship case of 1860 involved the kidnapping by one testamentary guardian from the home of another of the infant Marquis of Bute. As Lord Campbell there said of the kidnapper, Lady Elizabeth Moore:

> "She clandestinely, and furtively, and fraudulently removed the infant from the jurisdiction of the Court of Chancery, and was prepared to set the Court of Chancery at defiance. She carried the infant with her to the railway station at King's Cross, and conducted him by rail, under the cloud of night, from London across the border between England and Scotland, and next morning deposited him at the Granton Hotel near Edinburgh."[1]

The incidence of child kidnapping between England and Scotland or internationally has, in the experience of the United Kingdom courts, attained the proportions of a local epidemic problem. It is equally a problem that one would expect to grow at the interstate level in the Nigerian federation. There are as yet no mutual enforcement "conventions" between the United Kingdom jurisdictions or even between sovereign states, as is the case between New Zealand and Australia.[2] It is not

---

1. Stuart v Moore (1861) 4 M I at 56; (1861) 9 H.L.C. 44o at 459.
2. See D. J. S. Laing, "The Status of Foreign Custody Orders in New Zealand" (1974) 7 Victoria University of Wellington L. Rev. 351, at 371-372.

surprising therefore that the kidnapping problem has alarmed at least one writer[3] who asked whether something should not be done now about the kidnapping cases by the international community.

What, it may be asked, ought the courts to do when confronted with actual (or potential) kidnapping cases? Should the approach to recognition in kidnapping cases be different from that involving ordinary cases?[4] One basic philosophy seems to underlie the judicial approach in this field. This is how Cross J. puts it in a passage approved by the English Court of Appeal:[5]

> "In the Western World there are thousands upon thousands of children of broken homes in respect of whom courts of different countries have made custody and access orders - children who are 'wards' of the courts in question. In modern conditions it is often easy and tempting for a parent who has been deprived of custody by the court of country A to remove the child suddenly to country B and set up home there. The courts in all countries ought, as I see it, to be careful not to do anything to encourage this tendency. The substitution of self-help for due process of law in this field can only harm the interests of wards generally, and a judge should, as I see it, pay regard to the orders of the proper foreign court, unless he is satisfied beyond reasonable doubt that to do so would inflict serious harm on the child. I think that a useful test is ... to ask oneself, if I were the foreign judge, what would I think of the decision which I am going to give?"

Of course there is nothing uniquely "Western" about the breakdown of thousands of marriages. Under the especial impact of social and economic developments in Africa the stability of marriage has been seriously diminished in African (Nigerian)

---

3. See R. S. Geddes, "Should Something Be Done About Kidnapping Cases"? (1972) 21 I.C.L.Q. 774.
4. The trial judge in Re L (Minors) (1974) 1 W.L.R. 250 at 256 seems to suggest the existence of a distinction in the approach to the two types of situations.
5. Re E (D) (An Infant) (1967) Ch 287 at 289.

customary societies no less than in "Western" countries. Again, the removal of a child to another jurisdiction by one parent without the consent of the other need not necessarily stem from "tactical reasons" but may "involve a genuine change of residence"[6] such as where a separated spouse leaves the matrimonial jurisdiction to return to her own parents' home jurisdiction with the intention of remaining there. However, our main concern here is to discover what principles of recognition the courts have evolved in kidnapping cases.

(b) Rules of recognition in kidnapping cases

The old commonlaw rule of the paramountcy of the rights of the father in infancy cases has long been abandoned and replaced by a rule which looks primarily to the interests and welfare of the child. So that whenever courts are faced with the problem of custody-whether in terms of the appropriate criteria to be applied in the determination of the case or in terms of jurisdiction and choice of law considerations, - the courts have had generally to inquire into what would be best in the interest of the child. When it comes to the field of recognition of foreign custody orders, however, the full or further inquiry rule remains the basic option. But in cases involving kidnapping the courts tend to annex to the primary approach to recognition a "no further inquiry rule" based on the admittedly justifiable equitable premise that a party who has done the kidnapping should

---

6. See Report of the Committee on Conflicts of Jurisdiction Affecting Children (The Hodson Committee Report) Cmnd 842 para 48.

not be allowed to reap the advantages of his or her wrong doing. Still a third approach discernible in the cases centres round the contraversy whether there is or is not a via media between the "further inquiry" and the "no further inquiry" rules. We shall accordingly discuss the principles of recognition under the three heads of (i) further inquiry rule; (ii) no further inquiry rule, and (iii) the rule of via media. These three approaches figured prominently in the pronouncements of Lord Simonds in the Privy Council case of McKee v McKee[1].

A main question debated before the Privy Council in McKee was whether a trial judge who had in fact thought fit to conduct a full inquiry and investigation of all the disputed facts in a kidnapping case and to reach a conclusion thereon could be said to have been wrong to do so on the basis that he was bound, without further inquiry, to send the infant concerned back to its own country. In a passage which should be quoted in full as it has been cited in many subsequent cases and by most jurists, Lord Simonds began by disagreeing with Cartwright J. of the majority in the Canadian Supreme Court, saying:[2]

> "Cartwright J. appears to their Lordships to adopt a line of reasoning which cannot be supported. For, after re-affirming 'the well-established general rule that in all questions relating to the custody of an infant the paramount consideration is the welfare of the infant', he observed that no case had been referred to which established the proposition that, where the facts were such as he found them exist in the case, the salient features of which have been stated, a parent by the simple expedient of taking the child with him across the border into Ontario for the sole purpose of avoiding obedience to the judgment of the court, whose jurisdiction he himself

---

1. (1951) A.C. 352.
2. Ibid at 363.

> invoked becomes 'entitled as of right to have the whole question retried in our courts and to have them reach a new and independent judgment as to what is best for the infant'. And it is, in effect, because he held that the father had no such right that the judge allowed the appeal of the mother, and that the Supreme Court made the order already referred to."

Lord Simonds added that "this was not the question which had to be determined."[3] After thus disagreeing with Cartwright J. over the essential question before the court, His Lordship continued:[4]

> "It is possible that a case might arise in which it appeared to a court, before which the custody of an infant came, that it was in the best interests of that infant that it should not look beyond the circumstances in which its jurisdiction was invoked and for that reason give effect to the foreign judgment without further inquiry. But it is the negation of the proposition, from which every judgment in this case has proceeded, namely, that the infant's welfare is the paramount consideration, to say that where the trial judge has in his discretion thought fit not to take the drastic course above indicated, but to examine all the circumstances and form an independent judgment, his decision ought for that reason to be overruled. Once it is conceded that the court of Ontario had jurisdiction to entertain the question of custody and that it need not blindly follow an order made by a foreign court, the consequence cannot be escaped that it must form an independent judgment on the question, though in doing so it will give proper weight to the foreign judgment. What is the proper weight will depend on the circumstances of each case. It may be that, if the matter comes before the court of Ontario within a very short time of the foreign judgment and there is no new circumstance to be considered, the weight may be so great that such an order as the Supreme Court made in this case could be justified. But if so, it would be not because the court of Ontario, having assumed jurisdiction, then abdicated it, but because in the exercise of its jurisdiction it determined what was for the benefit of the infant."

Having further commented on the "ample reason" that justified the trial judge's decision in Ontario court and after a review of

---

3. Ibid
4. Ibid at 363-364.

the authorities which point to the rule of the paramountcy of the child's welfare in various legal systems (e.g. Canada, England, Scotland, the U.S.A.) Lord Simonds went on to say[5]

> "There is in fact no via media between the abdication of jurisdiction, which he (i.e. Page-Wood V.C. in Nugent v Vetzera) rejected, and the consideration of the case on its merits, in which the respect payable to a foreign order must always be in the foregound."

It should be noted in the first place that the three major quotations above represent or furnish the central material for, respectively, the no further inquiry rule, the further inquiry rule and the via media rule which we mentioned above. In other words, the thread of one rule dominates each of the above statements even though Lord Simonds may have mentioned another rule at the same time by way of disagreement with, qualification to, or amplification of, the rule which is the primary purpose of any one of the statements. In the second place the above-quoted passages from McKee have caused some difficulty in subsequent cases. For example, Lord Simond's second major statement above was taken by Cross J. to mean that "it is a question for the discretion of the judge whether or not to go into the merits of the case."[6] But commentators have disagreed[7] with this interpretation. These writers are of opinion, correctly, that in the controversy whether to have further or no further inquiry in kidnapping cases the emphasis, according to quotation two above, should be placed not on the discretion which the judge

---

5. Ibid at 365-366.
6. Re H (Infants) (1966) 1 W.L.R. 381 at 391.
7. See e.g. Laing, supra (P.728) at 362; Geddes, supra (P.728) at 775-776.

has in such a case but on the rule of the paramountcy of the welfare of the child. Having regard to Lord Simond's statement that judges in some of the leading 19th century cases guarded themselves against abdication of their jurisdiction and his Lordship's further statement that there is no via media between the rejected course of abdicating jurisdiction and conducting full inquiry into the merits, Lord Simond's ambiguous second statement would seem to mean this: that if a court does not order the return of the child to the country from which he was brought, to have the issues determined there, "it must conduct a full inquiry, and must not merely give effect to an existing foreign custody order."[8] But even if the foreign order is given such effect, it would be because in the exercise of its jurisdiction the court "determined what was for the benefit of the infant."[9]

(i) The rule of further (or full) inquiry: This is what may be described as the primary rule of recognition of foreign custody orders, whether or not a kidnapping dimension is involved in the case. The rule is illustrated well by the case of Re E (D) (An Infant)[1]. That case concerns a female child of American parents resident in New Mexico, United States of America. The parents had been divorced, and in March 1962 in contested proceedings the father was awarded custody of the child. The father who had the child in his custody at the time of his death

---

8. Geddes, Ibid at 728. at 776.
9. McKee v McKee (1951) A.C. 352 at 364.

1. (1967) Ch. 287; (1967) Ch. 761 C.A.

had expressed the wish that if he died the child should be brought up by his sister who lived in England with her English husband. The child's father was killed in a motor accident in December 1965 and thereupon his sister immediately travelled to the United States to bring the child back with her to England. On January 3, 1966 an American court in New Mexico ordered that the custody of the girl be delivered to her maternal grandmother. But three days later the girl's aunt succeeded in removing the girl from the United States to England before the New Mexico court order could be served on the aunt and the paternal grandfather. The aunt, although innocent of the American proceedings before she left England, probably knew of the order of the American court as evidenced by the re-routing of her return journey to England, travelling via Montreal, Canada, to escape being caught by the United States authorities and the maternal grandparents who had started the chase. On January 10, 1966, the American court made an order granting temporary custody to the child's mother who, armed with that order, went to England seeking her daughter who, in the meantime, had settled down well with the aunt and into English life. On discovering that the child's mother was in England, the child's aunt had the child made a ward of court. The case came before Cross J. who conducted a full inquiry into the merits of the case. The mother was asked to produce any further evidence she might deem relevant. The judge found that the mother

"plainly lacked moral ballast" in times past[2] and he came to the conclusion that there were special circumstances in the case which obliged him to order that the child should remain in England and be brought up in the care of the aunt. Cross J. distinguished the case from the earlier one of Re H (Infants)[3] - to be considered shortly - on the ground first, that while the aunt in Re E (D) (An Infant) was relatively blameless, the same could not be said of the mother who was a flagrant kidnapper in Re H (Infants). And secondly that the child in Re E (D) no longer had a home waiting for her in the United States. To return the child to the United States in compliance with the New Mexico court order would be "utterly disastrous"[4] for the child. The only home which the child had ever known in the United States was effectively destroyed after her father's death. Therefore, as Willmer L. J. said[5] (in affirming Cross J.) in the Court of Appeal "To take the child away from the plaintiff would involve removing her from the only home which she now knows, and setting her adrift in wholy strange surroundings." The "strange surroundings" would be Portland in Oregon, the mother's new matrimonial home which was 3000 miles from the child's former home and friends in New Mexico. We may observe of this point that while it is true that even if the child had not been kidnapped out of the United States the mother

---

2. Ibid at 298.
3. (1966) 1 W.L.R. 381.
4. (1967) Ch. 287 at 301.
5. Ibid at 770.

in distant Oregon "was very unlikely to see much more of the ward as she grew up"[6], their Lordships in the Court of Appeal (as well as Cross J.) may just have over-stressed the factor of 3000 miles separating New Mexico from Oregon. Communication and travel in the United States is quick, and interstate travels are not inhibited by passport and visa requirements which featured in this case. We may further mote in passing that the cases of Re T (Infants)[7] and Re L (Minors)[8] illustrate very well the rule of full or further inquiry in kidnapping cases. Both were kidnapping cases in that the removal of the children involved by their English mothers to England from Canada and Germany respectively was without the consent of the children's respective fathers. But neither of the two cases involved the flouting or evasion of the custody orders of a foreign court. Hence the two cases are not directly relevant to our present discussion of recognition of foreign custody orders.

The objections to the full or further inquiry rule, are the very ones advanced in support of the "no further inquiry rule" which is the subject of discussion in the next sub-section. In other words, the question of time factor is involved. For by the time the merits of the case have been fully inquired into and the required foreign evidence arrives and is sifted by the court, the child would have formed roots in the new jurisdiction and it would then be

---

6. Ibid at 294 per Cross J.
7. (1968) Ch. 704 C.A.
8. (1974) 1 W.L.R. 250.

detrimental to tear the child from its new home and despatch him to the foreign country. The consequence would be that the kidnapper would benefit from his or her wrongdoing and potential kidnappers may not be deterred. Clearly, then, if the foreign order is recent and there are no new circumstances since the foreign order was made, it would be undesirable to conduct a full inquiry into all the merits of a kidnapping case.

(ii) No further inquiry rule: The case of Di Savini v Lousada[1] is frequently cited as illustrating the no further inquiry rule. It is said that James V.C. in that case took the view that the foreign (Italian) court's order should be given effect without further inquiry and that the court should not look beyond the circumstances of mere invocation of its jurisdiction. That decision, however, did not involve a kidnapping case.

The usual rationale for the "no further inquiry rule" is that in kidnapping cases, although the child's welfare remains the paramount consideration, it is not the sole consideration, and that the interests of justice demand that anyone engaging in the sudden and unauthorised removal of children across state boundaries should not be allowed to gain an advantage by his or her wrongdoing.[2] So it is thought that such a rule would discourage belief in the position that "possession.. is not merely nine points of

---

1. (1870) 18 W.R. 425.
2. Re H (Infants) (1966) 1 W.L.R. 381 at 389.

the law but all of them..."[3] Further practical considerations would appear to justify the no further inquiry rule. The relevant mass of evidence pertaining to the child's welfare would be mostly .. broad and may not arrive before the inquiring court until many months after the child had arrived at the jurisdiction and by which time the child had developed roots in new friends, interests, and tastes within the new jurisdiction. So that "apart from authority"[4] and as a matter of "commonsense", courts incline to sustain the foreign custody decree in kidnapping cases without further inquiry. Cartwright J in the Supreme Court of Canada in McKee v McKee supported the rule, being of the view that the trial judge in the Ontario court to which jurisdiction the infant had been improperly removed from the United States had no right to inquire into the merits of the case. Indeed Lord Simonds in McKee v McKee conceded that it is conceivable - "It is possible",[5] as he puts it - to apply a "no further inquiry rule" in a kidnapping case. We may point out, however, that such an exceptional situation envisaged by Lord Simonds would be difficult to visualise since His Lordship did not spell it out. No doubt if such a situation arose the courts would justify the application of the rule as conforming to the flexible formula of the child's welfare. But even in such a case Lord Simonds stated that the adoption of such an exceptional action would be a

---

3. May v Anderson (1953) 345 U.S. 528 at 539, per Jackson J, dissenting. See Bodenheimer, "The Uniform Child Custody Jurisdiction Act", (1969) 3 Fem L.Q. 304 at 306.
4. Re H (Infants) (1966) 1 W.L.R. 381 at 389.
5. (1951) A.C. 352 at 363.

"drastic course"[6]. Having said this, we would add that Re L (Minors)[6a] is additional authority for the view that a "no further inquiry rule" may not be such a "drastic course" after all. In this recent Court of Appeal case, it is clearly implied in Buckley L. J.'s judgment that summary orders for the return of a child or the application of the "no further inquiry rule" may be justified where failure to return the child to his home country would be disturbing to him psychologically. His Lordship said:

> "To take a child from his native land, to remove him to another country where, may be, his native tongue is not spoken, to divorce him from his social customs and contacts to which he has been accustomed, to interrupt his education in his native land and subject him to a foreign system of education, are all acts (offered here as examples and of course not as a complete catalogue of possible relevant factors) which are likely to be psychologically disturbing to the child, particularly at a time when his family life is also disrupted. If such a case is promptly brought to the attention of a court in this country, the judge may feel that it is in the best interests of the infant that these disturbing factors should be eliminated from his life as speedily as possible. A full investigation of the merits of the case in an English court may be incompatible with ahieving this. The judge may well be persuaded that it would be better for the child that those merits should be investigated in a court in his native country than that he should spend in this country the period which must necessarily elapse before all the evidence can be assembled for adjudication here. Anyone who has had experience of the exercise of this delicate jurisdiction knows what complications can result from a child developing roots in a new soil, and what conflicts this can occasion in the child's own life. Such roots can grow rapidly. An order that the child should be returned forthwith to the country from which he has been removed in the expectation that any dispute about his custody will be satisfactorily resolved in the courts of that country may well be regarded as being in the best interests of the child."[6b]

---

6. Ibid, at 364.
6a (1974) 1 W.L.R. 250.
6b Ibid, at 264-265.

We would emphasise, however, that the "no further inquiry rule" would seem to be the negation of the true welfare of the child. The rule patently makes nonsense of the clear statutory injunction that in all custody cases the welfare of the child shall be the paramount concern. It is true that the rule of no further inquiry is qualified by the statement that while the foreign custody order would be recognised and the child sent back to the foreign country, this would only be done if the child would "come to no harm"[7] or if the children's return would not be "fraught with danger for them."[8] It is precisely at this point that a further defect in the rule begins to emerge. How can a court discover whether the return of a child to a foreign jurisdiction would cause serious "harm" or "danger" to the child without engaging in some form of inquiry? Surely in order to ascertain these some form of hearing into the merits of the case would be necessary. A commentator has therefore criticised the "no further inq-iry rule" for this reason. For if some form of hearing is engaged in then "there is little left of the original rule unless we start distinguishing between degrees of completeness of investigation on the merits."[9]

---

7. Re H (Infants) (1966) 1 W.L.R. 381 at 393.
8. Ibid at 389.
9. D. J. S. Laing, "The Status of Foreign Custody Orders in New Zealand" (1974) 7 Vict U. W. L. Rev. 351 at 363.

(iii) The Rule of Via Media: It is probably best to adopt a via media approach to the recognition of foreign custody orders which involve the element of kidnapping. Despite Lord Simond's [1] denial of the approach, its existence is one that enjoys overwhelming favour in judicial opinions and juristic writings[2] today. Lord Justice Willmer[3], for example, regards Lord Simonds remarks that there was no via media between the abdication of jurisdiction and the consideration of the case on its merits as obiter dicta and inconsistent with what his Lordship in the Privy Council had said earlier in his judgment (which we reproduced fully above in the second main quotation).

It would be useful to review one or two cases to see how the via media rule has been applied. To begin with, we would point out that Re B's Settlement[4] - a kidnapping case - is not helpful since it is not clear from Morton J's opinion whether he had conducted a full investigation or only made a partial inquiry. Re H (Infants)[5] and Re Kernot (An Infant)[6] represent strong authority for the view that in kidnapping cases a court may conduct a limited inquiry into the facts or merits of the case to see whether the child should be returned to the foreign country from which he was abducted, or whether a full inquiry ought to be

---

1. McKee v McKee (1951) A.C. 352 at 365.
2. See e.g. Morris, The Conflict of Laws p 187; Geddes, "Should Something Be Done About Kidnapping Cases?" (1972) 21 ICLQ 774.
3. Re H (Infants) (1966) 1 W.L.R. 381 at 399.
4. (1940) Ch. 54.
5. (1966) 1 W.L.R. 381.
6. (1964) 3 W.L.R. 1210.

conducted. The case of Re H relates to two male children of American parents, though the mother had been born in Scotland. The parents were divorced in Mexico and the mother was awarded custody, with access rights to the father. The mother, ostensibly embarking on a short holiday in England, removed the children to England without the approval of the Supreme Court of New York State as provided for in the custody order and without the consent of the boys' father. The father then obtained an order which stipulated that unless the mother returned the children within twenty days the father would be awarded custody. The mother failed to comply with this order and the father was awarded the custody by the New York courts. The mother meanwhile had made the children wards of court and the father sought the discharge of the wardship order and for permission to take the children back to the United States. The question before the court was the reverse of that presented in McKee v McKee. In McKee the question was whether the trial judge could conduct a full inquiry; in Re H it was whether the judge could conduct only a limited inquiry. Cross J. expressed the view that the sudden and unauthorised removal of children from one country to another was becoming too frequent and that it seemed to him to be the duty of all courts in all countries to do all that they could to ensure that the wrongdoer did not gain an advantage by his wrongdoing.[7] He conducted a limited inquiry and he considered that the American court was the

---

7. (1966) 1 W.L.R. 381 at 389.

proper forum to decide the merits of the case, and he accordingly ordered the return of the children to New York, being satisfied that the children would come to no harm by so returning. It was argued on appeal on behalf of the mother that Cross J. was precluded by the authority of McKee and Re B's Settlement - both of whose position on the via media rule we have already seen - from making the order he did make, since he ought not to permit the children's removal from the jurisdiction unless and until he had himself conducted a full inquiry into the merits of the case and had thereby formed the opinion that it was best for the children so to return. The Court of Appeal rejected this contention. The Appeal Court held that though Cross J. had authority to conduct a full inquiry, he was not bound to do so. The Court of Appeal said that Cross J. did not blindly follow the order of the foreign court; at the same time, the trial judge had deemed it not necessary to go into all the disputed questions between the parties. Cross J.'s approach, the Appeal Court said, "did fall short of" a full inquiry,[8] which would have necessitated considerable lapse of time (and expense) before all the evidence reached the court. This would mean the children might have taken roots in England and this would be to the avoidable disadvantage of the father. In Cross J.'s own words, he had dealt with the case "in the way which justice seems to demand."[9]

---

8. Ibid at 397.
9. Ibid at 392.

(c) Summary: There is not one consistent approach to kidnapping cases and their recognition. In some cases, such as Re T (Infants)[1] the trial judge made a "full deployment of all the facts and evidence", of which the Court of Appeal did not disapprove; while in Re H (Infants) a limited inquiry was conducted by the court. In yet some other "possible" situations, peremptory recognition and enforcement without further inquiry may be the approach adopted. There are no hard and fast rules about recognition of custody decrees involving kidnapping. The permutations of possible judicial action are bewildering. For example, after a full inquiry, a court may send back the child or it may refuse to do so. Or, without any inquiry at all, a court may send back a child or it may refuse to do so; yet again, after only a limited inquiry a judge's conclusion may lead to returning the child to the foreign country or a refusal to do so. Mr. Justice Cross, writing in the Law Quarterly Review[2] has said:

> "Plainly it is in the interest of wards as a class that the court should give no encouragement to self help by allowing persons who act in defiance of the orders of the proper court to benefit by their wrongdoing. On the other hand, if one directs one's mind exclusively to the welfare of the particular child it may be difficult to say that on balance he or she would be better off if sent back to the foreign country than if allowed to stay here with the wrong doer."

Although the English approach to kidnapping cases is designed to give flexibility in the law and to ensure justice between the waring parties, "it does have the fundamental objection of sometimes producing quite the opposite effect (in that) even though there is a plain kidnapping situation, there

---

1. (1968) Ch 704 at 716. C.A. per Harman L. J.
2. G. Cross, "Wards of Court" (1967) 83 L.Q.R. 200 at 207.

maybe a change of circumstances the result of which is that the child's welfare is best served by remaining with the kidnapping parent."[3] This may be expressed in another way. As the law now stands, the "welfare" of the child rule does not appear very appropriate in kidnapping cases in that if kidnapping cases are in fact approached on the basis that the child's welfare is paramount, many kidnappers will profit from their actions and potential kidnappers may not be deterred."[4] This has prompted one commentator[5] to suggest that in kidnapping cases the "welfare" consideration should be treated as of great importance but not as paramount.

It is generally agreed[6] that in kidnapping cases all that is necessary is for the court to make such investigation as satisfies it that the child will come to no harm if he is sent to the country whence he came "without necessarily going into the last dregs of the dispute between the parents."[7] However, the probabilities and uncertainties which are involved in the evaluation of long-term "harm" in these cases constitute a limitation to this consensus. It may well be that it would be better if we all reconciled ourselves to the fact that while kidnapping cases may be controlled, for example through the machinery of judicial cooperation or international conventions, they cannot be totally eliminated from the emotive scene of custody in private international law.

---

3. Laing, "The Status of Foreign Custody Orders in New Zealand" (1974) 7 Vict U.W.L. Rev. 357 at 363.
4. R. Geddes, "Should Anything Be Done About Kidnapping Cases?" (1972) 21 ICLQ 774, 778.
5. R. Geddes, supra note 4 at 781.
6. See e.g. Morris, The Conflict of Laws p.187; Cheshire's Private International Law (9th ed) p.478; R. Geddes supra note 4 at 778.
7. Re T (Infants) (1968) Ch. 704 at 716.

III. Recognition of Guardianship orders

1. Introduction : The policy considerations underlying the rules of recognition of foreign guardianship orders are essentially the same as those for custody orders, viz, avoidance of multiplicity of proceedings and forum shopping, advancement of the child's welfare by securing fair stability and continuity of environment. Furthermore, the nineteenth century judicial attitude towards the recognition of custody decrees as we saw in our preceding discussion applies equally to guardianship. Indeed, the cases we relied on for the previous discussion are guardianship cases in the strict sense of that term. In the present discussion we shall therefore not be adding anything to our earlier views on these cases which, it should be noted, represent pre-1900 commonlaw rules of guardianship which have been received into Nigeria.

2. The Status of Guardian: We shall discuss the recognition of the status of guardian under the two heads of appointment and powers or rights of foreign guardians.

(a) Appointment: The problem of the appointment of the guardian of the person or of the property of the child takes two forms. The first is who can be appointed a guardian? Must it be someone who is within the jurisdiction of the foreign court or could it be some other person who is outside the jurisdiction of the appointing court? Clearly, in United Kingdom and Nigerian law a parent qualifies as the (natural) guardian of his or her child, and a non-parent may also be appointed guardian. In the next place, it is usual to argue that it would be

inconvenient to appoint a non-resident or a non-domiciliary as guardian. But if the interest of the child is the paramount consideration, there should be no reason why a non-resident or a person outside the jurisdiction cannot be appointed. And such appointment ought to be recognised. Often the most suitable person to act as guardian for a child will be a close relative living in another state other than the ward's present home. In such a case the appointment of strangers as guardians of (orphan) children who possess concerned and loving grandparents in another state merely because the law insists on resident-domiciliary guardians may not be promoting the child's welfare.[1]

The other problem concerning appointment is which foreign court has jurisdiction to make the appointment. It appears that Scots law concedes jurisdiction to the courts of the ward's domicile or to the courts of the jurisdiction recognised as competent by the ward's domiciliary law.[2] As for the position under English law, "It has never been decided expressly which foreign court has jurisdiction to appoint a foreign guardian."[3] But it would seem unlikely that English courts would recognise exclusive domiciliary jurisdiction in appointment of guardians, following the Court of Appeal decision in Re P (GE) (An Infant).[4] Dicey and Morris incline to the view that English courts, "by way of reciprocity, will recognise the appointment of guardians made by the courts of a foreign country in respect of an infant

---

1. Paulsen and Best, "Appointment of a Guardian in the Conflict of Laws" (1960) 45 Iowa L.Rev. 212 at 229.
2. See Anton, Private International Law p.382.
3. Dicey and Morris, Conflict of Laws p. 394; Morris, Conflict of Laws p. 185.
4. (1965) Ch. 568.

who was a national or, ... who owed local allegiance in virtue of ordinary residence or presence at the time when the proceedings were begun abroad."[5] Three points should be noticed from this statement.

First, that the use of the term "reciprocity" is different from the normal meaning of that term. The usual connotation of reciprocity would be that English courts would recognise the foreign orders of guardianship if the foreign jurisdiction would recognise English orders given in corresponding circumstances. This, however, is not the principle on which the English courts act. The principle on which the courts act is derived from Travers v Holley[6] and it involves the recognition of guardianship orders given by foreign courts exercising jurisdiction in the kinds of circumstances in which English courts exercise jurisdiction, such as we examined fully in chapter five.

Secondly, it is clear from Dicey-Morris[7] as well as Scottish authorities[8] that the rules of recognition in divorce have furnished a pattern for recognition in guardianship-custody even though the rules of recognition in the two fields differ concerning the role of domicile. As Lord Dunpark has observed, for instance, a custody decree is not the equivalent of a judgment in rem demanding immediate enforcement because the protective jurisdiction of the courts may sometimes prevail over

---

5. Dicey and Morris, op. cit. p.394.
6. (1953) P. 246 C.A.
7. Dicey and Morris, op. cit. p. 394.
8. In Kelly v Marks 1974 S.L.T. 118 at 122 Lord Dunpark observed: "Since the decision in Le Mesurier v Le Mesurier (1895) A.C. 517 Scots law has recognised that the courts of that country in which the husband is domiciled at the time when the action is raised have preeminent jurisdiction in consistorial matters and, although a petition for custody is not a consistorial action, the same rule has been applied thereto."

matters of enforcement, and in any case "a custody decree differs from a decree in rem in respect that it is not final, circumstances may change."[9] In spite of these differences, the divorce recognition rules have provided the lead for guardianship-custody rules of recognition.

Traditionally, divorce decrees of the domiciliary jurisdiction have been recognised, but in guardianship-custody not only is there no unanimity as to the proper basis of jurisdiction but guardianship-custody decrees of the domiciliary court are not recognised in English law[10] where the courts maintain what may be termed a rule of full discretion in such matters.

Now, the expanding jurisdictional rules of divorce have been matched by developments in the field of recognition.[11] Before 1971, under the commonlaw rules, a foreign divorce would be recognised if -

(a) the decree is granted by the courts of the husband's domicile;[12]

(b) the decree is recognised by the courts of the husband's domicile;[13]

(c) the decree satisfies the special rule of reciprocity;[14]

(d) the petitioner or respondent has a real and substantial connection with the court of the jurisdiction where the decree is made;[15]

---

9. Kelly v Marks 1974 SLT 118 at 124.
10. Scots law adopts a contrary view.
11. See generally, Clive and Wilson, The Law of Husband and Wife in Scotland pp 670-680.
12. Le Mesurier v Le Mesuirier (1895) A.C. 517; Warden v Warden 1951 SC 508.
13. Armitage v Attorney General (1906) P.135; McKay v Walls 1951 SLT 6; Perin v Perin 1950 SLT 51.
14. Travers v Holley (1953) P. 246 C.A.
15. Indyka v Indyka (1969) 1 A.C. 33.

(e) the petitioner or respondent has a real and substantial connection with the territory where such a decree would be recognised.[16]

However, a new legal regime for the recognition of divorces and legal separations was introduced in 1971 by an Act of Parliament which was passed to give effect to the Hague draft Convention of 1968 on the Recognition of Divorces and Legal Separations,[17] which formed the subject of a report[18] by the English and Scottish Law Commissions. The Recognition of Divorces and Legal Separations Act, 1971,[19] as amended by the Domicile and Matrimonial Proceedings Act, 1973[20] has now abolished most of the commonlaw rules of recognition set out above. Divorce decrees can now be recognised only under the provisions of the 1971 Act. The only exception to this relates to rules (a) and (b) above plus divorces recognisable under any other statute.[21] Thus, the effect of the Domicile and Matrimonial Proceedings Act, 1973 on the preserved commonlaw rules of recognition is that since the wife now has a separate domicile, the decree granted by the courts of the domicile of either spouse, or a decree obtained in a country where neither spouse is domiciled but recognised as valid under the law of domicile of either spouse, will be recognised.[22] But the 1971

---

16. Mather v Mahoney (1968) 3 A E.R. 223.
17. See Graveson,Newman,Anton & Edwards,"The Eleventh Session of the Hague Conference of Private International Law"(1969)18 ICLQ 618 esp 620-42 and 658-664.
18. See (1970) Cmnd 4542. Scot Law Com No 16; Law Com No 34.
19. Cap 53, 1971.
20. Cap 43, 1973.
21. e.g. Colonial and Other Territories (Divorce Jurisdiction) Acts 1926-1950.
22. See Clive and Wilson, op. cit. p. 678.

Act does not apply to the recognition of "custody or other ancillary order" made in divorce proceedings.[23] While this is in line with Article 1 of the 1968 Hague Convention which excluded ancillary orders from its coverage, the provision has created some problem of interpretation. What is the position of guardianship orders made independently or outside of "proceedings for divorce or separation"? Furthermore, since the commonlaw rules of recognition of custody- guardianship orders mirror closely those of divorce, it would seem that by not applying to foreign guardianship-custody decrees the 1971 Act, while superseding the commonlaw rules of recognition for divorce has left those same rules intact for custody. Dicey and Morris[24] have acknowledged the possible extension to guardianship of the recognition principles laid down in the cases of Travers v Holley[25] and Armitage v Attorney-General[26] (i.e. rules (c) and (d) above). There would seem to be no reason why the principle of Indyka v Indyka[27] and its extension should not equally have possible implications for guardianship. The formulated test of "real and substantial" connection with a particular law district would seem to have the most valid claim as a basis for the recognition of foreign guardianship or custody orders, just as it would provide the most satisfactory test of jurisdiction and even of choice of applicable law. A state which has reasonable connection with the child's welfare

---

23. Section 8 (3).
24. Conflict of Laws p. 394, n. 20 and 22.
25. (1953) P 246 C.A.
26. (1906) P. 135.
27. (1969) 1 A.C. 33.

should have jurisdiction to appoint guardians for the person of the ward. This would not be objectionable in Nigeria which (it seems) has statutorily received and codified[28] the rule in Indyka v Indyka, although this reception has been criticised as "a mistake".[29] But even if the Indyka rule has no express application in custody law it is arguable that in most cases a real and substantial relationship would have been established by the criteria of residence, domicile, or nationality so that these latter would be merely (slight) variations of the formula of "real and substantial" connection.

The third point that arises from Dicey-Morris statement above relates to the time factor. At what time does the foreign court awarding custody or guardianship possess jurisdiction? Is it at the time of the application for custody or at the time of actual hearing and making of the order? It seems that either view is plausible. The English Court of Appeal has held that jurisdiction exists at the time of application,[30] in the case of a suit instituted in England. But both alternative grounds for assumption of jurisdiction seem to have been rejected by the Scottish Court in Oludimu v Oludimu[31]. In that case counsel for the mother first argued that the question of jurisdiction fell to be determined once and for all at the date of application to the court, so that if children were in Scotland

---

28. See Matrimonial Causes Decree, 1970 (No 180f 1970) S. 81.
29. See S. M. Poulter, Laws of Matrimonial Causes (in Nigeria) Book Review (1975) 38 M.L.R.110 at 111; See also Akanle, op.cit. pp 723-24.
30. See Re P (G.E.) (An Infant) (1965) Ch 568 C.A. at 581 where Lord Denning, M.R. said that jurisdiction "is a matter which must be determined as at the time when the mother issued her summons."
31. 1967 S.L.T. 105.

at that date, jurisdiction would be properly constituted and would last until the proceedings were terminated. Lord Fraser rejected that argument as "manifestly unsound"[32] adding that the protective jurisdiction in all guardianship-custody cases "fell as soon as the children ceased to be defacto in Scotland."[33] Counsel next argued that the Scottish courts had jurisdiction to protect a child if it was ordinarily resident - though not actually present - in Scotland at the material date of hearing the action. This was an argument based on the English case of Re P (G.E.) (An Infant). Again Lord Fraser disagreed, saying that the English case "proceeds upon principles which are quite alien to the law of Scotland."[34]

It may be said that the current Scottish courts attitude to the proper time for assuming jurisdiction is difficult to assess. Lord Fraser's opinions may have been influenced by the special facts of the Oludimu case, such as the attempt to foist English principles on the Scottish courts. It is difficult to see what fundamental objection Scots law would have to a rule that confers guardianship jurisdiction on the courts at the time of application.

(b) Powers and Rights of Foreign Guardians

(i) General: In general terms a guardian's powers and authority are limited to the territory of his appointment. The problem of recognition of the guardian's power and

---

32. Ibid at 107.
33. Ibid
34. Ibid at 107.

authority is encountered mostly in connection with the ward's property and its management, administration or control. Dicey and Morris[1] are of the view that the authority of a foreign guardian will only be recognised if the appointment was made by a court of a country to which the infant owes personal or local allegiance, except (perhaps) where such authority, although not conferred by the courts of the country of personal or local allegiance, is nevertheless recognised by the courts of the country to which the infant owes personal or local allegiance.[2] Where the authority of the foreign guardian is not contested, English conflicts law allows the guardian the exercise of his powers "without hinderance".[3] And during the last century English law did not equivocate in recognising the guardian's authority where the ward has been kidnapped from the foreign guardian. Thus, James L.J. in Re Goodman's Trusts[4] had no doubt in his mind what attitudes the courts should adopt in such a case. "Take the case of a foreigner resident abroad, with such a child", he started and then proceeded with his rhetorical question.

> "If that child were abducted from his guardianship and brought to this country, can anyone doubt that the courts of this country would recognise his paternal right and guardianship and order the child to be delivered to any person authorised by him?"[5]

Therefore, while the court would always retain jurisdiction to appoint its own local guardians in the interests of the

---

1. Dicey and Morris, The Conflict of Laws p.394.
2. c f Armitage v Attorney General (1906) P. 135.
3. Dicey and Morris, op.cit. p. 394.
4. (1881) 17 Ch 266.
5. Ibid at 297.

children, the court should not be so insular as to deny the authority of foreign guardians "as an unclean thing."[6]

(ii) Guardianship of the Person of the Child: Mere guardianship of the person of the infant would be of little or no relevance in terms of recognition were it not for the practical consequences of guardianship. The guardian's authority over the person of the child may extend, apart from the right to strict custody, to such matters as taking the child on holidays, the right to consent to the ward's marriage or its undergoing surgical operation, the ward's entering into legal transactions, the signing of legal documents, inclusion of the child's name in a passport etc. Each of these is significant enough to arouse our interest in the problem of recognition of the guardian's authority over the ward. In addition, the guardian seems[7] also to have power to effect a change in the domicile of the child and it may become necessary to determine whether the guardians power to change the domicile of the ward will be recognised by the courts. A South African writer has stated that the domicile of a child without parents should follow that of his guardian. "If domicile means the legal centre of a person's contacts and activities, could there be any better domicile, in the case of a minor without parents, than that of his guardian?"[8] he asked. No doubt,

---

6. Ibid at 298.
7. See Paulsen and Best, "Appointment of a Guardian in the Conflict of Laws," (1960) 45 Iowa L.Rev. 212 at 226-229.
8. E. Spiro, "Domicile of Minors without parents" (1956) 5 I.C.L.Q. 196 at 203.

health and other good reasons may justify such a change, but at the same time courts should be on their guard in case the guardian's change of domicile is made in bad faith or for other spurious reason which is not in the best interests of the child. It is our view that the exercise of the guardian's powers in good faith in each of the many situations where such powers could be exercised should be recognised.

Finally, under the English conflict of law rules which are in force in Nigeria, the powers and authority of a foreign guardian over the person of his ward are limited to the power and authority possessed by a guardian under English (or Nigerian) law; that is, the power is governed wholly by local English or Nigerian law. This is an obviously sound rule since a foreign institution (e.g. guardian) might be conferred with powers the exercise of which may be prejudicial to the morals or policy of the court asked to accord recognition. Furthermore, under English law if an infant has not been made a ward of court and if no guardianship or custody order has been made by the local court in respect of the child, the latter, if a foreign ward, can be removed from the jurisdiction without fear of legal proceedings being brought against the guardian.[9]

---

9. See Dicey and Morris, op.cit. pp 395-396; See also Nugent v Vetzera (1866) L.R. 2 Eq. 704.

(iii) Proprietary powers of the guardians: Whenever the administration of any property belonging to or held on trust for a Minor or the application of the income of such property is the subject of controversy, the Guardianship statutes[1] provide that the child's welfare shall be the first and paramount consideration. Accordingly, there is an obvious need that guardians be designated to conserve and preserve the property of a minor child in every jurisdiction where such property may be located. The relevant statutes speak of "any property" belonging to the ward, and this would include not only immovables such as land but also movable property. Thus a ward's contractual or tortious claims, or his interest in trust property would serve to support the appointment or designation of a guardian for the ward. In Scots law also, the mere acquisition of, or possession of interest in, any valuable property by the child will enable either parent to act as tutor or curator in respect of such property.[2] This position replaces the old commonlaw of Scotland which did not permit the mother to act either as tutor or as curator. A ward with property scattered in many different states or countries is liable to the possible appointment of an equal number of guardians or curators. This kind of situation has been dealt with in the United States of America by the Uniform Ancillary Administration of Estates and Probate Acts,

---

1. See e.g. Section 1, Guardianship of Infants Act, 1925; Sections 1 and 10, the Guardianship Act 1973.
2. See Guardianship Act, 1973, Section 10 (1); c f Kirk v The Scottish Gas Board, 1969 S.L.T. 18.

proposed by the U.S. National Conference of Commissioners on Uniform State Laws. The underlying philosophy of that Act is to regard the child's estate as a unit and then to propose that the domiciliary administration of the property ought to be the primary one that affects what goes on in other states.[3]

It should be noted that in English law today guardianship of the child's property is almost an obsolete institution[4]. The subject has now been largely consigned to the realm of trust law. Vestiges of the guardianship of property is contained in section 7 (1) of the Guardianship Act, 1973, which provides that a guardian shall have all the rights, powers and duties of a guardian of the minor's estate, including in particular the right to receive and recover in his own name for the benefit of the minor property of whatever description and wherever situated which the minor is entitled to receive or recover. Finally, it should be observed that different rules apply to movable and immovable property.

Movables: Under Scots private international law rules, a foreign tutor or curator has no greater powers in Scotland than he possesses under the ward's domiciliary law. The Scottish rules of recognition have been expressed succintly by Professor Anton in these words:[5]

---

3. The legislation is discussed in Paulsen and Best, "Appointment of a Guardian in the Conflict of Laws" (1960) 45 Iowa L. Rev. 212 at 237-238; and see also, Atkinson, "The Uniform Ancillary Administration and Probates Acts" (1954) 67 Harv. L. Rev. 619.
4. See Trustee Act, 1925, ss 31 and 32. See also Bevan, The Law Relating to Children (1973) pp 396, 406-7.
5. Anton, Private International Law p 382.

> "The Scottish court will recognise the title of a foreign curator whether appointed to the office by the courts of the ward's domicile or recognised as holding the office by the ward's domiciliary law, to sue for personal debts and otherwise deal with the ward's movable property in Scotland".

One can detect in this statement the application of the commonlaw rules of recognition of divorce decrees laid down in Armitage v Attorney-General[6] and Makoutipour v Makoutipour[7]. Under English law,[8] it seems that the guardian's power to deal with the ward's movable property is regulated by the law of the country to which the guardian owes his appointment. But if the guardian seeks payment to himself of a fund in court belonging to the ward, the court need not order such payment to the foreign guardian as a matter of right but may require from the guardian evidence that the money will be applied for the benefit of the ward.[9]

Immovables: Although English authorities are lacking as regards the applicable conflicts rules where immovables are involved in guardianship questions, it would seem that here, as in most areas of law pertaining to immovable property the lex situs would apply. Scots law similarly applies the lex situs. Thus where a ward has immovable property, in Scotland, the foreign curator has no powers in relation

---

6. (1906) p. 135.
7. 1967 SLT (Notes) 101. See also McKay v Walls 1951 S.L.T. 6.
8. See Dicey and Morris, The Conflict of Laws p. 396. See also Ibid. Rule 49 and comment at p. 382.
9. See Re Chatard's Settlement (1899) 1 Ch 712; See also, Morris, The Conflict of Laws p. 185.

to such property and to administer it a factor loco tutoris or a curator bonis must be appointed.[10] The lex situs rule must alos prevail in Nigerian law of guardianship of immovables.

C. The Problem of Recognition - An Evaluation

Until recently Scots and English rules of recognition of foreign guardianship and custody decrees proceeded along different lines. For a long time the Scottish courts gave recognition to foreign custody orders granted by the domiciliary court while the English courts refused any recognition to such decrees. However, under both systems of law the welfare of the child may call for the exercise of the protective jurisdiction of the court, thus leading to refusal to give recognition. Since we do not have post-custody award information whether the English (further inquiry) rule was preferable to the basic (no further inquiry) approach adopted under Scots law, it is difficult to say whether during this period recognition served the child's interest in a particular case more than non-recognition. The decision whether or not to recognise a foreign decree in any given case would depend on the social policy being pursued in each jurisdiction. And hard and fast rules in the field of recognition of custody decrees must be considered undesirable. In the succeeding discussion we shall first consider the arguments for non-recognition (and non-enforcement) of foreign custody orders, after which the arguments tending in the opposite direction will be reviewed.

---

10. Anton, Private International Law p 383 from which the statement is taken.

1. Against Recognition : The relevant considerations against recognition of foreign custody decrees will be discussed under two heads.

(a) Non-finality and changed circumstances: The formula of change of circumstances pervades the whole of custody-guardianship law and it often leads to the denial of recognition and enforcement of foreign custody or guardianship decrees. The doctrine of precedent has no place in custody law. Custody decrees are not in rem judgments and are never final "There is nothing permanent about custody orders; they can be varied at any time."[1] And "changed circumstances" can always be argued at any subsequent date. It was for these reasons that Lord Dunpark was able to say recently that "any judicial pronouncements in the earlier Inner House cases which may seem to elevate to inviolability a decree of custody pronounced by a foreign court of the husband's domicile cannot be taken at their face value."[2] But even apart from the change of circumstances, modification of a custody decree is always possible in the interest of the child who was not a party to the proceedings and especially if new evidence is presented to the later court asked to give recognition. It is right that the discretion of courts be left unfettered by rigid rules of recognition. There will always be something that is unknown in such a field as the child's welfare. As it has been rightly observed: "One court will seldom have so much of the story that another's inquiry is unimportant."[3]

---

1. See J. v C. (1970) A.C. 668. at 719 per Lord Upjohn.
2. Kelly v Marks 1974, SLT 118 at 123.
3. Paulsen and Best, "Appointment of a Guardian in the Conflict of Laws" (1960) 45 Iowa L.Rev. 212 at 226.

Furthermore, a local court may be confronted with two conflicting foreign custody decrees and it would only be right for the local court not to be bound by either of these decrees. But the change of circumstances formula may be open to abuse and it may lead to forum shopping. A judge can reach a desired or pre-conceived decision by either finding or denying a change of circumstances. For these reasons the merits of the formula are not as high as might have been thought.

(b) Welfare and public policy: The judicial attitude towards the problem of recognition is influenced largely by public policy considerations. As Lord Pearce once said, "this difficult problem of recognition contains so large an element of public policy."[4] It is a well known premise of the conflict of laws that even if a foreign judgment complies with the requirements of adequate jurisdiction and finality and due process of law, the courts will not automatically recognise and enforce foreign orders which violate or infringe the fundamental public policy of the legal system whose court is faced with the problem of recognition and enforcement. Such a situation could arise when the custody laws of a foreign country gave the father custody as of right or where the party who is guilty of a matrimonial offence is totally cut off from enjoyment of rights of custody or access simply as a punishment. In such situations the automatic recognition and enforcement of the foreign orders would be an abdication of responsibility. But the public policy argument is weak where the foreign decree involved emanate from a sister

---

4. Indyka v Indyka (1967) A.C. 33 at 89.

state such as any one of the law districts in the United Kingdom or in the Nigerian federation where the peoples of the different component jurisdictions share so much in common - socially culturally, politically and otherwise.

An interesting application of the public policy argument arose in the case Amdo v Amdo,[6] decided by the Supreme Court of Israel in 1950. The case relates to the custody of two infant children whose parents were of French nationality and domicile but Jewish by faith. After the parents' divorce the French courts had awarded custody to the mother with access rights to the father. While the children were visiting the father the latter kidnapped them to Israel. The mother followed them to Israel where she started habeas corpus proceedings. One of the questions before the Israeli court was whether it was bound to recognise a custody order pronounced by a competent foreign court. Counsel for the respondent (father) based his argument on the doctrine of public policy. He stated that recognition should be denied because it would be contrary to the declared public policy of Israel to send away Jewish children from the shores of Israel back to the Diaspora. The court rejected that argument Zmora J. said:

> "And as to the doctrine of public policy, this court and every judge in Israel would rejoice in every Jewish child who is brought to this country to receive his education and live here, but that is not the way to ingather Jewish children into Israel. Let us not turn our country into a haven for people who through rifts in their families smuggle children contrary to law and order. No good can come this way either to the children or to the country."[7]

6. Noted by E. Likhovski, "Foreign Orders of Custody" (1951) 4 I.L.Q.506. See also the recent Israel case of Goldstein v Goldstein (1972) (II) 26 P.D. 634, commented upon by C.I. Goldwater in "Enforcing Foreign Custody Orders" (1975) 10 Is L. Av. 135.
7. Ibid at 509-510. Query, whether the "Jews in Diaspora" argument would not tip the scales in favour of recognition where the kidnapping is from an Arab or Soviet-block countries.

2. In Favour of Recognition. We shall again present the different arguments here under two heads.

(a) The doctrine of comity and friendly nations: The doctrine of the "friendly state" seems to have been accepted into Scots and English private international law.[8] That doctrine in effect states that any judicial act which tends to prejudice relations with a friendly foreign nation should be discouraged or avoided. Sir Page-Wood V.C. in Nugent v Vetzera[9] underlined the applicability of this doctrine to guardianship law when, in confirming the authority of the Austrian guardians, he said:

> "Having regard to the principles of international law, and the course that all courts have taken of recognising the proceedings of the regularly constituted tribunals of all civilised communities, and especially of those in amicable connection with this country, it is impossible for me entirely to disregard the appointment of a guardian by an Austrian court over these children who are Austrian subjects, and children of an Austrian father."

A doctrine of "friendly nations" or "friendly state" points to the adoption of a judicial attitude which stresses interstate assistance and cooperation in the intractable area of custody in conflict of laws, particularly in cases involving kidnapping. It ensures a valuable curb on the free and easy modifiability and non-recognition of foreign custody orders which may tend to disturb a desired stability and continuity for the child's environment. The doctrine is therefore to be welcomed provided it is

---

8. See e.g. Regazzoni v K.C. Sethia (1944) Ltd. (1958) A.C. 301. See also Fraser, The Conflict of Laws in Cases of Divorce at p.74 where the author complains about the attitude of non-recognition adopted by English courts towards Scottish judicial decrees. As he stated, "The judgments of the Supreme Court of a friendly Kingdom are treatedwith a discourtesy that would be inexcusable in reference to the decisions of a Turkish cadi or a Texan slave court."
9. (1866) L.R. 2 Eq. 704 at 712. Emphasis added.

made to giveway in a proper case where the child's welfare so demands.

The doctrine of comity as justification for the recognition and enforcement of foreign custody or guardianship orders is more widely known and more controversial. Writers disagree on the relevance of comity to custody law. For example, Professor Ehrenzweig writes[10] that

> "Comity' between nations, if justifiable anywhere in conflict of laws, certainly has no room in the law of custody."

On the other hand, Professor Stansbury has expressed the view that "If there is a place anywhere in the law for that much-criticised word 'comity', it is surely here"[11] (i.e. in custody law). Judicial opinion is similarly divided over the proper place of comity in custody conflicts law. Often reference is made to the doctrine, but only to be dismissed as not a decisive consideration.[12] Lord Upjohn in J v C[13] stated as follows:

> "But many authorities make it plain that, even if there were in existence some order of a foreign court so that a question of 'comity' arises, yet in the case of custody of infants our courts have an independent power and duty to investigate the facts and make an order based on English principles notwithstanding that foreign order."

In a somewhat watered down version of this same opposition to

---

10. Ehrenzweig, "Recognition of Custody Decrees Rendered Abroad" (1953) 2 Am.J. Comp. L. 167 at 174.
11. Stansbury, "Custody and Maintenance Law Across State Lines" (1944) 10 Law and Contemp. Prob. 819 at 831.
12. See e.g. Re E (D) (An Infant) (1967) Ch 287 at 301 where Cross J. said that the American child kidnapped into England should continue to stay there "despite all considerations of comity" because it would be "utterly disastrous" to return the child to America.
13. (1970) A.C. 668 at 720.

comity doctrine, Lord Simonds in McKee v McKee[14] stated that a foreign custody order "has not the force of a foreign judgment: comity demands, not its enforcement, but its grave consideration." Does this imply that if his Lordship had considered a foreign custody order as a judgment - which we had earlier argued that it is - he would have taken a different view of comity in the matter of recognition and enforcement of foreign custody orders? It would seem, at any rate, that the "grave consideration" or the "proper regard" which the foreign custody order receives, might, depending on the circumstances of the particular case, attain the status of (or amount to) outright enforcement.[15]

It cannot be said that the comity doctrine is necessarily incompatible with the rule of the paramountcy of the welfare of the child. Lord Dunpark has said that "where the doctrine of comity conflicts with the welfare of the child, the latter must prevail."[16] Undoubtedly. But the statement at the same time seems to imply that where there is no such conflict the comity doctrine as a ground for enforcing foreign custody order might be applied.

It isrespectfully submitted that the recognition of a foreign custody or guardianship order because of the comity between nations is a desirable trend. It is a necessary first step in judicial assistance and cooperation in cases involving interstate or international custody disputes. Although the best interest

---

14. (1951) A.C. 352 at 365.
15. Ibid at 364.
16. Kelly v Marks 1974 S.L.T. 118 at 124.

and welfare of the child must remain the principal concern and the hard core in this whole area, that interest and welfare is hardly served by "fleeing sheriffs, dodging process, and flouting law. Nor is it wise that there be relitigation in which the sins of both parents are paraded in the view of both the public and the children."[17]

(b) "Clean Hands" doctrine: Professor Ehrenzweig's distinctive contribution to the resolution of the problem of custody in the conflict of laws lies largely in his crusade for the employment of a doctrine of "clean hands" as a basis of recognition of foreign custody decrees.[18] He sees the doctrine as an arm of the practice of comity, and it comes into operation in the case where a parent who is dissatisfied with a custody award seeks a redetermination of the issue in the court of a sister state or in the court of a foreign nation. He spelled out the "clean hands" doctrine tersely in these words:

> "Where the parent seeking or resisting a change of custody is doing so in disobedience to a foreign court, he will most likely be unsuccessful."[19]

The practical justification for such a rule is that if courts do not set their face against such scheming, forum shopping would be encouraged and the ultimate sufferers would be the children. But in applying the rule courts must ensure that the parent's wrongdoing by itself does not preclude a solution dictated by the child's welfare and best interests.

---

17. See Note: "Jurisdictional Bases of Custody Decrees" (1940) 53 Harv. L. Rev. at 1030.
18. See Ehrenzweig, Conflict of Laws p. 285; "Recognition of Custody Decrees Rendered Aborad" (1953) 2 Am. J. Comp L. 167, 174-175; "Interstate Recognition of Custody Decrees" (1953) 51 Mich L. Rev. 345, 357-369.
19. Ehrenzweig, "Recognition of Custody Decrees Rendered Abroad" (1953) 2 Am. J. Comp. L. 167 at 175; The Conflict of Laws p.285.

The United Kingdom and Nigerian courts have not often resorted to the express use of the phrase "clean hands". Counsel in Re B's Settlement in urging that the mother-kidnapper in that case should be denied custody, said that "she does not come to the court with clean hands."[20] And there was reference in the Kidnapping case of Re E (D) (An Infant)[21] to the aunt who had travelled to America "with clean hands." Cross J.'s deprecation of the "sudden and unauthorised removal of children from one country to another,"[22] bore all the marks of the "clean hands" doctrine. And it was for this reason that the judge ordered the return of the children to America. The "clean hands" reasoning patently underlies most judicial discussion of the kidnapping cases. In our view this doctrine is a wholesome one which should be the most important single criterion - apart from strict "welfare" - in determining whether or not to give recognition to foreign custody or guardianship orders in cases tainted with either the flouting of the foreign court's order or the deliberate transgression of the rights of the other spouse. But the "clean hands" doctrine should not be applied without exceptions.[23] In certain situations the courts would be justified in recognising or refusing to recognise the foreign custody orders without regard to the "clean hands" of the benefitting parent. This would be the case where the decree of the foreign court modifies the foreign court's own previous award merely or primarily for the

---

20. (1940) Ch 54 at 55.
21. (1967) Ch 287 at 300 per Cross J.
22. Re H (Infants) (1966) 1 W.L.R. 381 at 389.
23. See Ehrenzweig, Conflict of Laws pp297-299.

purpose of punishing disobedience. A rationale for such an exception is that although courts are determined to discourage child kidnapping across state or national boundaries, they would not "execute a discipline imposed by a foreign court without primary regard to the child's welfare."[24]

D. The United States Approach to the Problem of Interstate Recognition

The United States authorities, like their United Kingdom counterparts, have in general asserted the right not to blindly follow a foreign custody decree where circumstances have altered since the foreign decree was first made. The general approach is to conduct an independent inquiry in the interest of the child's welfare.

The main question that has arisen in the United States cases is whether full faith and credit should be given to sister state custody decrees under constitutional compulsion. The United States Supreme Court has been presented with a few opportunities to discuss this problem. But in none of the cases[1] has a definitive answer been given. Chief Justice Traynor of California once came out strongly in favour of recognising sister state custody decrees when he said:

> "As a matter of comity the courts of this State treat valid custody decrees of the courts of sister states with the same respect as the custody decrees of California courts."[2]

---

24. Ibid at 298.

1. See e.g. Halvey v Halvey (1947) 330 U.S. 610; May v Anderson (1953) 345 U.S. 528; Kovacs v Brewer (1958) 356 U.S. 604; Ford v Ford (1962) 371 U.S. 187. It is not considered necessary to discuss these cases in any detail. For a useful commentary on the last of these cases, see Note, "Ford v Ford. Full Faith and Credit to Child Custody Decrees" (1964) 73 Yale L.J. 134. In the first of these cases, the Court simply reserved for another occasion the issue of "whether the state which has jurisdiction over the child may, regardless of a custody decree rendered by another state make such orders concerning custody as the welfare of the child from time to time requires." Id 614.
2. Sampsell v Superior Court (1948) 32 Cal 2d 763 at 780.

But this dictum has not been endorsed by any decision of the United States Supreme Court. It is not surprising that in a field where Supreme Court decisions are particularly unhelpful, many states have not felt inhibited by Judge Traynor's "no further inquiry rule", and they have, instead, embarked upon their own independent inquiry with principal concern for what is best for the child's welfare and interests.[3]

The independent inquiry has to be seen as a potential arsenal that may be used to abrogate the "full faith and credit" clause thereby "paving the way for decisions based solely on the child's welfare."[4] Probably because of this potential impact of the "full inquiry" rule on a fundamental clause of the United States Constitution, the Justices of the Supreme Court have either hesitated to pronounce on the full faith and credit clause or they have been divided over its relevance to custody law. Mr. Justice Frankfurter, for instance, takes the view that the argument that the full faith and credit clause secures and safeguards uniformity, certainty and finality in United States inter-state judicial determinations is not relevant to custody law where "a more important consideration asserts itself to which regard for curbing litigious strife is subordinated - namely, the welfare of the child."[5] Again the opinions of the Supreme Court Justices in the much criticised[6] case of May v Anderson[7] highlight

---

3. But a few states still seem to continue to hold that the full faith and credit clause is applicable to custody decrees. See Note: "Child Custody Decrees - Interstate Recognition" (1964) 49 Iowa L. Rev. 1178 at 1185.
4. See supra, note 3 at 1196.
5. Kovacs v Brewer (1958) 356 U.S. 604 at 612 (dissenting opinion).
6. See e.g. Hazard "May v Anderson: Preamble to Family Law Chaos" (1959) 45 Va L. Rev. 379.
7. (1953), 345 U.S.- 528.

the competing policy considerations in all custody disputes. Frankfurter J. ruled against the applicability of full faith and credit clause, stating emphatically that "the child's welfare in a custody case has such a claim upon the State that its responsibility is obviously not to be foreclosed by a prior adjudication reflecting another State's discharge of its responsibility at another time."[8] But on the other hand Mr. Justice Jackson set his face firmly against relitigation. He was critical of the Frankfurter position, saying that "The interpretative concurrence, if it be a true interpretation, seems to reduce the law of custody to a rule of seize and run."[9] Both of these views have, we submit, over-stated their respective positions. Mr. Justice Frankfurter, no doubt, was motivated by the possibility of a change in circumstances, which occurence would often justify modification of foreign custody decrees. But this "change of circumstances" rule may be antithetical to the principle of the best interests of the child since modern psychiatric or psychoanalytic evidence points out that a child's best interests lay in optimum stability of his environment, not in endless change.[10] And Mr. Justice Jackson's opposing view appears too mechanical. True, the "seize and run" parent should not be rewarded. But the judge's view comes perilously close to making the punishment of a parent, rather than the welfare of the child, the criterion for decision.

The overwhelming number of American custody cases since 1944, according to the empirical reckoning[11] of Professors

---

8. Ibid at 536.
9. Ibid at 542.
10. See B.C. Lysaght, "Children in Transit: Child Custody and the Conflict of Laws" (1973) 6 Univ. Cal. at Davis L. Rev. 160 at 169-170. See also, Goldstein, Freud, Solnit, Beyond the Best Interests of the Child.
11. These researches were undertaken over a decade ago. But the position revealed by the researches has not fundamentally altered.

Stansbury[12] and Ehrenzweig[13] are against recognition of sister state custody decrees. The American courts tended to exercise their discretion freely in the paramount interest of the child's welfare. But these writers also found that recognition would not be given to a sister state decree where the case is tainted with the "unclean hands" of one of the parties. As Professor Ehrenzweig puts it:

> "On the one hand, in most cases in which courts have refused to re-examine foreign custody decrees, the spouse seeking such recognition was a fugitive from the state issuing such decree; and that, on the other hand, this element was usually absent where courts consented to the use of their independent discretion."[14]

For the most recent thinking on this subject in the United States, however, we must turn to the National Conference of Commissioners Uniform Child Custody Jurisdiction Act adopted by the Commissioners and approved by the American Bar Association in 1968.[15] Although the "full faith and credit" clause may not require the recognition and enforcement of sister state custody decrees, each state of the Union is free to recognise and enforce them. And into this situation of laissez faire has entered the recognition and enforcement provisions of the Uniform Child Custody Jurisdiction Act. The policy of the Act is that custody decrees of sister states will be recognised in

---

12. Stansbury, "Custody and Maintenance Law Across State Lines" (1944) 10 Law and Contemp Prob 819 at 828.
13. Ehrenzweig, "Interstate Recognition of Custody Decrees" (1953) 51 Mich L. Rev. 345.
14. Ibid at 358.
15. See Bodenheimer, "The Uniform Child Custody Jurisdiction Act." A Legislative Remedy for Children Caught in the Conflict of Laws" (1969) 22 Vand. L. Rev. 1207; "The Uniform Child Custody Jurisdiction Act" (1969) 3 Fam L.Q. 304.

other states. Thus, in the interest of security and stability of the child's overall development recognition is made mandatory under section 13. But the condition for the mandatory recognition is that the prior decree should have been made under statutory provisions similar to that contained in the Act, or that the factual basis for the "foreign" decree would have vested jurisdiction in the prior state if the Act had been law in that State. Outside these stated mandatory grounds, States retain a discretion in other situations whether or not they will grant recognition. The decision whether or not to modify a sister state decree may be influenced by whatever is disclosed by the certified transcript of the "foreign" decree which the recognising state is allowed to receive.[16] This ensures that whatever decision the court makes is based on as full an information as is available.

Perhaps the most significant provision of the Act for the present discussion is section 15(a). By filing a copy of the out-of-state decree with the clerk of the appropriate court, the decree is thereby converted into a local decree and becomes automatically enforceable by contempt proceedings or other means of enforcement available in the state where the decree is filed.

The above general policies of the Act relating to recognition and enforcement of interstate custody orders are also made applicable to international custody decrees where these are rendered by the appropriate foreign authority and provided that reasonable notice and opportunity to be heard were given to all affected persons.[17]

---

16. See section 14 (b) and Section 22.
17. Section 23.

In our opinion the Uniform Child Custody Jurisdiction Act makes provision for workable recognition and enforcement mechanisms. We would therefore commend the more salient features of the Act for adoption (with necessary modifications) in any future custody legislation in the United Kingdom or Nigeria.

E. CONCLUSION

Several years ago Patrick Fraser, in reviewing the English and Scots practice of recognition of foreign divorce decrees, predicted that "the time is not far distant, when the Christian concept of doing to others as we would that others should do tu us, shall be held applicable to nations as to individuals."[1] This has now been taken as the text for judicial review of the problem of recognition of foreign custody orders. Thus in Re H (Infants)[2] Cross J. said: "The maxim do as you would be done by applies to a judge exercising a wardship jurisdiction just as much as to anyone else." What attitude, then, do judges desire to see prevailing in this field? Clearly most judges would want to see their own custody orders respected abroad. Also, they would not wish to stick doggedly to a "further inquiry" or a "no further inquiry"rules. Rigid rules of recognition based on domicile would also be inadequate. In this connection it has been rightly observed of the Scots rules of recognition that in the custody field as in others, "the grip of the concept of domicile should be loosened and that custody orders made in a divorce decree should be recognised if the related divorce decree is recognised."[3] In connection with this statement it should be observed first that

---

1. P. Fraser, The Conflict of Laws in Cases of Divorce p.77.
2. (1966) 1 W.L.R. 381 at 393.
3. Clive and Wilson, The Law of Husband and Wife in Scotland pp 681-682.

Kelly v Marks,[4] although only an Outer House decision of the Court of Session, has now loosened that grip. In the second place tying the recognition rules of custody to those of divorce may have the effect of restricting developments in the custody field. We noted earlier with regards to the Recognition of Divorce and Legal Separations Act, 1971, that the entire field of divorce recognition is now being reshaped by legislation, and that these legislation have abolished the rules of recognition based on tests of reciprocity and "real and substantial" connection, the latter tests being particulary suitable, in our view, to custody. We saw further that the statutory rules for recognition of divorce decrees excluded "custody or other ancillary" orders, which implies that for these the commonlaw rules were preserved. It would therefore be unduly restrictive if custody decrees were to be recognised only "if the related divorce decree is recognised."

In the field of recognition the discretion of the courts should not be fettered and the "changed circumstances" rule should remain a potent weapon for modifying or re-examining a foreign custody order. But this should not be too readily invoked unless the change of circumstance is significant and material. For as the adjudication of such changes "is often a matter of individual value judgments, the temptation to seek a change of venue remains great."[5]

In the interests of the child and in the interests of justice to all the parties, the judge should, as much as possible, try to

---

4. 1974 S.L.T. 118.
5. Ehrenzweig, "The Interstate Child and Uniform Legislation: A Plea for Extralitigious Proceedings" (1965) 64 Mich L. Rev 1 at 8.

learn afresh all there is to know about the whole case and should not readily defer to the foreign decree even in cases of kidnapping where it may further be alleged that circumstances pertaining to the child have not altered. We would therefore support independent inquiry in most cases - until such a time as there is an adoption in the U.K. of the kind of provision in Section 15(a) of the United States Uniform Child Custody Jurisdiction Act which requires that the filing of an out of state custody decree automatically converts it into a local and enforceable decree. In cases involving kidnapping, the rule of via media discussed earlier seems to offer an attractive or best solution. The rule is not as rigid as to require recognition and enforcement without regard to the child's welfare, and it is not too flexible as to permit the non-recognition and non-enforcement, even in cases involving a "parent fugitive from justice", upon a mere denial of jurisdiction or a mere "change of circumstances" which can be alleged and proved at will."[6]

There is no "full faith and credit" doctrine in the Nigerian or United Kingdom constitutions, as in the United States. But even if there be one, it could not override denial of recognition of a foreign custody order where such denial was dictated by the interest and welfare of the child. At present there is no reciprocal or mutual arrangement for enforcement of orders of custody made in the various jurisdictions of the United Kingdom.[7] In Nigeria, the Sheriffs and Civil Process Act[8] provides that a judgment obtained in

---

6. Ehrenzweig "Recognition of Custody Decree Rendered Abroad" (1953) 2 Am. J. Comp L. 167 at 171.
7. See Report of the Committee on Conflicts of Jurisdiction Affecting Children (the Hodson Committee Report) Cmnd 842 para 56 p.13.
8. Cap 189, Laws of the Federation, 1958 ed. This is discussed fully by A Kanle, op.cit. at 64-65.

any state court may be registered in another state by the person in whose favour it was made. Under section 105 of that Act there is provision for the maintenance in each state of what is called the "Nigerian Register of Judgments", and into this Register is entered judgments obtained by persons seeking registration. From the date of registration the judgment shall be deemed to be a judgment of the registering court. It is significant to note that the Act defines judgment as including any judgment, decree, or order given or made by a court in any suit where any person is required to do or not to do any act or thing. Therefore, "judgment" would cover out-of-state custody or guardianship orders. Moreover, the recent Nigerian Matrimonial Causes Decree now provides[9] that where a decree is made under the Decree, it shall have effect in all the States of the Federation. The legislation goes on to define[10] a "decree" to include "a judgment, and any order dismissing a petition or application or refusing to make a decree or order." Accordingly, the definition would seem to cover custody and guardianship orders. Therefore, the problem of interstate recognition of custody or guardianship orders could hardly arise in Nigeria.

One point which should be noticed in connection with the problem of recognition and enforcement is the need for all countries to take preventive measures against child kidnapping. This is the starting point for any cure for recognition problem at least in one of its most odious forms. The Hodson Committee Report did recommend[11]

---

9. No 18 of 1970, section 80.
10. Ibid. Section 114 (1).
11. Cmnd. 842 para 56 p.13.

the need for arrangements whereby the Immigration authorities in all parts of the United Kingdom are warned when there is the risk of a child being removed out of the United Kingdom in contravention of an order of a competent court in England, Scotland or Northern Ireland. Also worthy of note is the Practice Direction[12] issued by the English High Court to prevent the removal of children out of the United Kingdom. The Practice Direction states, interalia, that when an infant is the subject of a custody order made by the High Court which provides that the infant may not be taken out of the jurisdiction without the leave of the court, any interested person may give written notice to the Passport Office that a passport should not, without leave of the court, be issued in respect of the infant. Furthermore, the Home Office will be prepared to try to prevent the unauthorised removal of the child out of England and Wales upon production by the Solicitor of a copy of the requisite court order or injunction. But the assistance of the Home Office "should not be invoked as a precautionary measure but only when absolutely necessary, that is, only when it is known that there is a real risk of the infant being removed from the jurisdiction."[13] The applicant would be expected to state his or her reasons for believing that the infant is likely to be removed out of the jurisdiction and whenever possible the Home Office should be informed as to when, from which port, and for what destination the infant is likely to be removed. All this

---

12. Practice Direction (Taking Child Out of Jurisdiction) (1963) 1 W.L.R. 947.
13. Ibid. para 3. Query whether this statement has not removed the effectiveness of the whole exercise by the Home Office.

is to ensure that the custody orders of the courts are not evaded, but the Home Office and other measures can still be evaded by a wily kidnapper.

The need for preventive measures in this field has also been underlined in some European countries. For example the subject-matter featured prominently in the French Senate Debates in November 1973.[14] On that occasion the French Minister of Justice stressed that the parent who has reason to believe that his ex-spouse would be tempted to take the child abroad and keep him there should ask from a court either at the time of the provisional orders made at the very beginning of the divorce proceding or at any time and in a case of urgency before le juge de referes that the conditions of exercise of the rights of access of the other parent should be laid down precisely. These conditions can go so far as the prohibition of the minors leaving France if the court thinks that appropriate and if that is requested. The person with the right to custody once in possession of such a decision will then be able to go to the police of his domicile or residence to obtain, in light of this decision, an opposition to the child's leaving the territory which will be distributed to all the frontier posts in France. The validity of this measure is limited to one year.

But in spite of these proposed measures in the different countries, the increasing facilities for travel across national

---

14. See J. O. Deb, Senat 16 Nov 1973 p. 1736 (Official Journal - Senate Debates 16 Nov. 1973). I wish to gratefully acknowledge my indebtedness to Dr. Eric Clive who drew this publication to my attention and who also undertook the task of translating the material into English.

boundaries mean that nations may not succeed in eradicating child kidnapping through unilateral preventive actions alone. An ultimate solution to the problem - in so far as we can speak of a "solution" - could only be achieved by the conclusion of international conventions. And in this connection mention must be made of the 1960 Hamburg Dreft Convention on the Recognition of the Orders on Custody of Infants.[15] Article 4 of the Convention provides that a custody order made by the courts of the country of the child's ordinary residence or nationality or where matrimonial proceedings were pending[16] "shall be recognised and enforced in the same manner and in the same conditions in the countries which are parties to the Convention as if the order had been made by the courts of these countries." But the courts of the country where the subsequent proceedings are begun may rescind, discharge or vary any previous order made by any court in any other country having regard to new facts which have occurred or new evidence which has become available since the previous order was made or if the previous order cannot be recognised or enforced on grounds of public policy.[17] This takes care of the "changed circumstances" and public policy grounds for non-recognition which we discussed earlier in this chapter. There is, however, a proviso to Article 5 to the effect that if the child has been removed in pursuance of an attempt to seek a change of custody in disobedience to a custody order validly made under the convention provisions, then

---

15. For the text of the convention, see (1960) 9 Am J. Comp L. 519.
16. See Articles 1 and 2.
17. Article 5.

no rescission, discharge or variation of the previous custody order shall be permissible. Thus the proviso incorporates into the Convention "the clean hands" doctrine associated inevitably with kidnapping cases.

The 1961 Draft Convention Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Infants[18] also contains a useful provision on recognition and enforcement of foreign custody decrees, and it deserves mention here. It is stated in Article 7 of that Convention that the protective measures taken by the competent authorities (of the countries which are parties to the Convention) within the meaning of the Convention shall be recognised in all contracting States. But if such measures involve acts of enforcement in a State other than that in which they were taken, their recognition and enforcement is to be governed either by the domestic law of the country in which enforcement is sought, or by the relevant international conventions.

Finally, it should be mentioned that within the seventeen nation Council of Europe, a Committee of Experts on the Legal Representation and Custody of Minors is currently framing a draft Convention which will deal with, among other things, the enforcement of foreign custody orders and methods of improving international cooperation in resolving conflicts of law over child custody.[19]

---

18. For the text of the Draft See (1960) 9 Am.J.Comp L. 708-711.

19. I wish to acknowledge my indebtedness to Mr. N. R. Whitty for the information contained in this paragraph.

CHAPTER EIGHT

CONCLUSION

A. General Summary

Our comparative study of guardianship and custody in private international law has, using Nigeria as the law district of primary concern to us, encompassed England and Scotland as well. Nigerian law of conflicts derives from English law, but we have broadened our comparison to embrace Scots law because the custody conflicts problems encountered in the United Kingdom's imperfect unitary system are analogous to those which federal Nigeria will eventually have to solve. In any case, as a former British Colony, a study which embraces Nigeria's non-indigenous laws will be incomplete without looking at the law of the "mother country" - which is not England alone.

In our survey of the sources of Nigerian law of guardianship, we saw that apart from customary and islamic law, much of the Nigerian law of guardianship derived from English common law, doctrines of equity and statutes of general application in force in England on January 1st, 1900. With regards to English common law, the arguments seem equally balanced as to whether the received common law is that before 1900 or whether it is the common law for the time being in force. The former view would mean the retention in Nigerian law of much English legal debris on guardianship: the latter view is incompatible with the country's political status as a sovereign state. This matter awaits authoritative determination by the Supreme Court of Nigeria or early legislative action to clarify the position.

As to the statutes of general application, although these apply in Nigeria only in so far as the limits of the local jurisdiction and local circumstances permit, and are further subject to local enactments

as well as formal verbal alterations, these limitations are not enough. As Dr. Elias rightly states,

> "One of the most intractable problems of our legal system is to determine what are statutes of general application in England on 1 January 1900 which are deemed to apply in Nigeria."[1]

Moreover, the denial of the applicability of that formula to Scottish statutes remains one of the curiosities in our legal history. Also inexplicable is the failure to set a downward limit to the received English laws-as is the case with the upper limit (1900). The underlying policy for setting an upper limit to the received laws should logically be applicable to laying down a lower date of reception.

In any case, social, economic and political developments in Nigeria call for a Nigerian approach to our legal problems. The course of English law before 1900 was determined largely by the prevailing English social, economic and psychological conditions. English law reflects the values and way of life of English society. The English (or British) Parliament in passing laws on guardianship and the English courts in interpreting those laws, are thinking of English, not Nigerian social conditions. It is inexcusable, therefore, for an independent Nigeria to continue to apply English law which England herself had long considered unsuitable and therefore abandoned. The pre-1900 English laws received mechanically into Nigeria are a drag on the coat tails of Nigeria's legal development and they must now be expunged from our statute books.

The concept of the paramountcy of the welfare of the child was the theme of a major chapter in this work. But it is clear that the welfare rule pervades all aspects of custody law - domestic and

---

1. T. O. Elias, Law in a Developing Society (Inaugural Lecture, University of Lagos, 1969) p.7.

conflictual. The concept is the one unbroken thread running through the different departments of conflicts law - jurisdiction, choice of law, and recognition and enforcement of foreign custody orders. Recent writings are beginning to question the size of the role played by the welfare concept in custody law. The question is whether that role is too large or too small. Robert Geddes, for example, thinks that in kidnapping cases the welfare rule "should be treated as a

> consideration of great importance, but not as the paramount consideration."[1]

Alec Samuels, on the others hand, feels that the present role of the welfare concept in custody law is not big enough. As he says[2]:

> "The interests of the child should be not merely the first and paramount consideration but the sole consideration."

As applied in the jurisdictional sphere, an unpublished working paper for the Law Commission[3] has also rejected the welfare concept. The defects of the concept may be summarised as follows:

(1) the welfare test seems to take insufficient account of the need to do justice as between the litigants. In a kidnapping case, for example, it is difficult to see why the person from whom the child has been kidnapped should be put to the trouble and the expense of litigating on the merits in another country. While the English courts have said that in kidnapping cases justice to the innocent party[4] and the kidnapper's conduct[5] are factors favouring the immediate return of the child, they have not only rejected a mandatory "clean hands"

---

1. R. Geddes, "Should Something Be Done About Kidnapping Cases?" (1972) 21 ICLQ 774 at 781. Emphasis added.
2. A. Samuels "Custody and the Welfare of the Child" (1970) 114 Sol. Jo. 365 at 366.
3. See "Conflicts of Jurisdiction Affecting Children", Law Commission (Unpublished) Working Paper (1975) (Although Working Papers do not represent the settled views of the Commission, they may be taken as an indication of the Commission's thought).
4. Re H (Infants) (1966) 1 WLR 381.
5. Re L (Minors) (1974) 1 WLR 250 at 265.

rule requiring the return of kidnapped children but have emphasised that it would be "wrong to suppose that in making orders in relation to children (in the exercise of wardship jurisdiction) the court is in any way concerned with penalising any adult for his conduct."[1]

(2) the welfare test in any case is most unlikely to deter kidnapping and other unilateral removal of children. While the (English) courts have undoubted discretion to attach such weight as they think fit to kidnapping, it would nevertheless appear that in spite of judicial strictures against kidnapping, a kidnapper removing a child to England may have a good chance of having the case decided on the merits in England.[2]

(3) So long as the English courts retain jurisdiction over children who have been kidnapped from England despite the failure to satisfy the test of physical presence,[3] the adoption of the welfare test in matters of jurisdiction in all the United Kingdom law districts would cause great uncertainty as to which court has jurisdiction where concurrent or successive proceedings are brought in different parts of the United Kingdom.

As far as Nigerian law is concerned, the securing of the welfare of the child is the primary purpose of judicial intervention in matters of custody. And this determines the exercise of jurisdiction in both the Higher and lower courts. We endeavoured to underline in different chapters the relevance of English law as well as the Nigerian constitutional provisions to the Nigerian conflicts (and domestic) law of guardianship. And at various points we observed the interaction of Nigerian customary law with English law.

---

1. Ibid.
2. See e.g. Re E (D) (An Infant) (1967) Ch. 287; and 761 (C.A.)
3. See Re P (G.E.) (An Infant) (1965) Ch. 568.

We saw that from the point of view of the Higher courts, customary law of guardianship has to be relegated to a reservation from where it could not expand. With the impact of foreign ideas, the courts in Nigeria are beginning to measure what accords with the child's welfare according to the scales of "Western" countries. And the various governments in Nigeria, judged by the Legislative inactivity in the customary legal sphere, appear to be encouraging the judicial attitude. Thus an attitude begun in the Colonial era has been allowed to continue even in post-Republican Nigeria.

> "From the point of view of the new states (in Africa) customary law is divisive, it is a centrifugal force. The new states will have to level it down, will have to transform it, make it innocuous."[1]

In our view this is an untenable point of view in so far as it applies to custody law. For custody is such a complex issue that "Western" law should not be assumed to offer all answers to the "welfare" problem through some kind of major or magical "salvage" operation.

Customary law and practice have steadfastly followed a rule of "tender years" (and of "boys to the father") in awarding custody. But the High Courts in Nigeria, like their English and Scottish counterparts, have set their face against anything like "rules". It must be conceded that an enormous proliferation of rules will be needed if one embarks on the admission of "rules" in the custody field. But even if rules are not admissible at all, customary law appears to offer a viable method of approaching the central problem of the "interest and welfare" of the child where the parents are fiercely and emotionally entangled in a custody dispute. Customary law, as a

---

1. A. Neekam, Experiences in African Customary Law" p.12

learned writer has observed, is

> "a system of keeping the balance, of arriving at satisfactory results: it was geared not to intellectual persuasion but to emotional approval, not to decisions imposed, but to acceptable solutions. What the decision-maker under customary law achieved was the finding of a balance in accordance with the values of the community."[1]

And as Foster and Freed have stated, what is needed in custody matters

> "is an open-minded skepticism"[2]

to such issues as "rules", social and psychiatric information, to solutions offered by other legal systems etc. For a custody case "is not only a legal matter. It is also a social problem."[3] If the invocation of "rules" would effectuate the interests and welfare of children in general without being prejudicial to the welfare of children in particular cases, we should not hesitate to use the "rules". Once again, to quote Foster and Freed in a passage remiscent of the statement of Professor Neekam just quoted above,

> "traditional procedure should be relaxed so that problem-solving rather than contest-supervision becomes the principal aim"[4]

of the courts adjudicating custody disputes.

We noticed how problems of conflicts of jurisdiction in matters of child custody can arise within the United Kingdom or in a truly international setting. The problem of jurisdiction, we observed, has not yet started to cause Nigerian courts any anxiety although most of the conditions promoting jurisdictional problems are present in Nigeria, and we added that the work being pursued

---

1. Neekam, op cit at 3.
2. Foster and Freed, "Child Custody" (Part II) (1964) 39 N.Y.U.L. Rev. 615 at 627.
3. Ibid
4. Ibid

in the jurisdictional sphere by law reformers in the United Kingdom and the United States of America should be keenly watched by Nigerian law makers. Furthermore, we saw that a child and his parents or guardians may be connected through their domicile, residence or presence with different law districts and the question would then arise as to which law district ought properly to exercise jurisdiction in the matter. We saw that although Rule 50 (1) in Dicey-Morris, Conflict of Laws and section 79 of the American Restatement, Second, Conflict of Laws allow assumption of jurisdiction on alternative grounds, nevertheless, different law districts tend to emphasise different connecting factors. Thus, in the United Kingdom, while the English rules emphasise residence or mere presence as adequate basis of jurisdiction in custody, Scots law on the other hand bases jurisdiction primarily on the child's domicile. Given this sort of divergence on the proper connecting factor for purposes of jurisdiction, it is not surprising that concurrent proceedings may be promoted and conflicting decisions rendered, where, for instance, the child is present or resident in England but domiciled in Scotland. This kind of situation gave rise to some of the leading cases in this field decided by the House of Lords in the nineteenth century. The problem, of course, is far from quiescent. Perhaps the most disturbing aspect of a failure to devise a workable formula for such jurisdictional conflicts is that besides encouraging forum shopping and child kidnapping, such conflicts damage the reputation of the law in addition to being wasteful of the resources of both the parties and the state. We noticed that the absurdity of such an attitude of avidity to exercise jurisdiction by the courts in the different law districts in a unitary country led to the

Hodson Committee Report in 1959,[1] which Report was never implemented.

It is significant to note however, that as far as Scots law is concerned there is a welcome trend to broaden the bases of jurisdiction of the Scottish courts in custody matters. The Children Bill (1975) now before Parliament confers jurisdiction on the Court of Session, inter alia where (a) the child resides in Scotland; and (b) the child is domiciled in England and Wales.[2] In some ways this brings the English and Scottish rules of jurisdiction closer and is likely to result in fewer occasions for conflict of jurisdiction between the English and Scottish courts.

Perhaps the most important thing to emerge from our consideration of the jurisdictional problem pertains to choice between the competing bases for assuming custody jurisdiction. Should jurisdiction be based on mere presence, on nationality, on domicile, or on residence? Could it be based on some other connecting factor apart from these enumerated ones? And what of cases requiring the taking of urgent action in the interests of the child? Brief remarks on these different bases of jurisdiction will now be in order.

We shall start with mere presence as a basis of jurisdiction in custody. Mere presence is included by Dicey-Morris, in Rule 50 (1) (a) of their Conflict of Laws, among the grounds on which the English courts assume jurisdiction. Scots law, of course, never countenanced this as a legitimate or adequate test of jurisdiction. In our view, mere presence is unsuitable as a basis of jurisdiction. The child and the parties interested in his custody may not have any

---

1. Cmnd 842 (1959)
2. See Children Bill (1975) Clause 47 (1).

long-term connections with the courts of the territory in which the child is present, (nor are those courts likely to have a legitimate claim to the application of their laws to the case). Mere presence as a basis of jurisdiction encourages child kidnapping and promotes conflicts of jurisdiction. These are the very ills which should be suppressed in custody conflicts law. Nigerian law should eschew mere presence as a basis of jurisdiction.

Next, nationality as a test of jurisdiction has been supported in English wardship proceedings,[1] but it is not a ground used in Scots law. However, nationality is used as a test of jurisdiction in some European countries, including Italy, the home of Mancini - champion of the nationality test. In addition, the Hague Convention of October 1961 concedes jurisdiction in custody matters to the courts of a child's nationality, as among the permissible alternatives. On the whole, however, nationality as a test of custody jurisdiction is not likely to be favoured in the private international law of Scotland, Nigeria or even England. In spite of its advantage of ease of application, nationality as a test has some severe disadvantages. It may not point to a court which is fair and convenient for the parties; it does not necessarily point to a court with which the child has practical, as opposed to theoretical or legal, connections; and it is unsuitable for use in federal or quasi-federal states.

Turning now to domicile, we saw that it has primacy as a test amongst the Scottish rules of jurisdiction in custody. But the great merits of domicile have been whittled away by legal developments

---

1. See Re P (GE) (An Infant) (1965) Ch 568 C.A.

in both the divorce and custody fields. The 1973 Domicile and Matrimonial Proceedings Act now concedes different domiciles to husband and wife (father and mother) and has also worked out a more rational domicile of dependence for the child. As a test of jurisdiction, domicile has many disadvantages. If the dependent domicile of a child follows that of the mother - with whom the child has his home - the ascertainment of that domicile may in turn lead to the mother's domicile of origin. And this domicile may not point to a fair and convenient forum for the litigants and the jurisdictional competence of such courts may not be recognised internationally, e.g. outside the "commonlaw" countries. In particular, as pointed out in Re P (G.E.) (An Infant)[1] domicile has the major defect that its ascertainment may be difficult and it may occasion delay and expense. The domicile of the child in most cases will depend on the intentions of other persons. The cases have established that the intention must be unlimited and "must have a fibre stronger than the changing fancies of an invalid."[2] Clearly the evidence that would be required in ascertaining and evaluating this intention will be difficult and time consuming. And since in all custody and guardianship proceedings time is of the essence, domicile is far from being an ideal test of jurisdiction. Furthermore, the general rule is that illegal residence is irrelevant in determining domicile, but this rule does not seem applicable to kidnapping cases. The result, therefore, is that the test of domicile may encourage child kidnapping and thus can produce unfair results as between the opposing parties.

---

1. (1965) Ch 568 e.g. at 583 C.A.
2. Fairbairn V Neville (1897) 25R 192 at 206 per L.P. Robertson

Domicile would also not be suitable for adoption as a basis of custody jurisdiction in Nigeria. It is true that the Matrimonial Causes Decree has now provided for a national domicile by the declaration that "a person domiciled in any State of the Federation is domiciled in Nigeria."[1] But this rule only applies to "matrimonial causes". The definition of "matrimonial cause" in section 114(1) of the Decree does, however, exclude independent custody or guardianship proceedings arising outside a matrimonial cause. With regard to independent custody - guardianship proceedings, therefore, the position would appear to be either

(i) that there is a national domicile; or (which is more likely)

(ii) that the controversy as to whether there is state[2] or national[3] domicile in Nigeria is kept alive to trouble the Nigerian courts and authors.

The addition of this controversy to the enumerated deficiencies associated with domicile clearly condemn the concept of domicile as a test of jurisdiction in custody matters in Nigeria.

What then, of residence? Should it be the residence of the child himself or of one of the parties to the custody dispute? This has not been authoritatively answered in Nigeria or the United Kingdom. But the child's own residence seems to be favoured in the United States of America.[4] And what about the quality of the residence? Should it be "ordinary" or "habitual" residence? It

---

1. No 18 of 1970, section 2 (3).
2. In support of State domicile, see e.g. Okonkwo v Eze (1960) N.R.N.L.R.80; Machi v Machi (1960) L.L.R. 103; Adeoye v Adeoye (1962) N.R.N.L.R. 63.
3. In support of national domicile, see e.g. Nwokedi v Nwokedi (1958) L.L.R. 94; Udom v Udom (1962) L.L.R. 112; Odiase v Odiase (1965) N.M.L.R. 196.
4. See Uniform Child Custody Jurisdiction Act, 1968 (U.S.A.)

would seem to us, however, that some variety of residence as a test would be appropriate. Modern trend is to favour habitual residence. However, if habitual residence is eventually chosen as the proper test, it would be necessary to be cautious in approaching the problem of the duration of that residence. For if the period is too short, child kidnappers would benefit from their wrongdoing. But if the period is too long, there would be the risk that the most convenient court having the greatest access to relevant evidence may be excluded especially if the child has already formed roots in that residence which technically has not fulfilled the stated durational quality of residence.

It must be conceded, though, that the test of residence, like domicile, would sometimes create problems when applied to the child who often may have to acquire these connecting factors through others. Jurisdiction based on such a rule as the "most significant contact" appears irresistible. In any case, in situations of urgency the courts of the territory in which the child is physically present should retain jurisdiction in matters of the child's custody.

In light of the various problems and developments surveyed in connection with jurisdiction, we would frame the criteria for allocating or assuming jurisdiction in the form of these propositions:[1]

(1) The welfare of the child is the first consideration in determining its custody. The determination of the child's true welfare will be most reliably made by the court having maximum access to the relevant evidence.

---

1. We have drawn heavily from the following works in framing the propositions: Ratner, "Child Custody in a Federal System" (1964) 62 Mich L. Rev 795, esp 808-810; "Legislative Resolution of the Interstate Child Custody Problem ..." (1965) 38 So. Cal. L. Rev 183, esp 196-197.

(2) Jurisdiction should, wherever possible, vest in the courts of the territory with which the child and other persons concerned with the case have the closest and most significant long-term connections. Such courts may be located in the child's "home" state or in the child's "habitual" residence. This basis of jurisdiction would seem to be consistent with the reasonable expectations of both parties.

(3) The rules of jurisdiction should point to a forum which is convenient for all the parties concerned. Convenience is to be taken in a wide sense of accessibility of the court to the litigants, ease of procuring relevant evidence and (perhaps) the system of law applied by the court. These factors, singly or together, contribute to a realisation of the true welfare of the child.

(4) The courts having jurisdiction in a principal cause to which custody is ancillary should, in general, be competent to determine the custody dispute as well.

(5) The rules allocating jurisdiction should be clear and easy to apply. Parents, guardians or other claimants and their advisers should be able to ascertain with a reasonable degree of certainty the appropriate forum.

(6) The basis of jurisdiction should not be so broad as to encourage forum shopping or illegal removal of the child by either parent or as to encourage conflicts of jurisdiction.

(7) The grounds of jurisdiction should be such that the courts claiming jurisdiction would themselves be prepared to recognise them if applied or exercised by foreign courts.

(8) Parents should be encouraged to settle custody disputes without the necessity for invoking the court's jurisdiction. Extra-litigious machinery that is of aid in this regard should be utilised.

(9) The rules of jurisdiction should point to a forum whose adjudicatory competence will be recognised abroad. This means that the rules should not be so peculiar (too narrow or too broad) that it would not receive international acceptability.

(10) The court of the place in which the child is physically present shall have residual jurisdiction to take temporary measures to secure the protection of the child in cases of emergency or urgency.

It should be added that the wisdom of including the "welfare of the child" among the jurisdictional criteria as we have done above has been doubted. The Law Commissions' (Unpublished) working paper takes the view that the principle of the welfare of the child "is not .. an appropriate criterion for the assumption of jurisdiction"[1] because it is "discretionary, uncertain in its effects and much more difficult to apply"[2]. But we respectfully disagreed with this opinion and we have followed tradition[3] in including the welfare principle since it forms, in our view, the pivot for any aspect of custody law and administration, be these matters of jurisdiction, choice of law, recognition and enforcement, or general administrative and other problems.

---

1. "Conflicts of Jurisdiction Affecting Children". Law Commission (Unpublished) Working Paper, P.16.
2. Ibid, at 19.
3. "The benefit of the infant, which is the foundation of the jurisdiction, must be the test of its right exercise." per Lord Campbell, in Johnstone v Beattie (1843) 10 Cl & Fin 42 at 122; 8 E.R. 657, 688.

In chapter six of our work we saw that choice of law considerations are generally ignored in the treatment of guardianship in private international law. In particular, we observed that on this problem Rule 50 (2) in Dicey-Morris, Conflict of Law, has taken a firm stand on the irrelevance of choice of law, being of the view that the forum's domestic law prevails, irrespective of choice of law considerations. Most writers and judical opinions, as we indicated have followed this line of thought. We showed however, that the practice in international conventions, and considerations pertaining to the child's property indicate the relevance of choice of law considerations in custody law. And we explored some choice of law methodologies which could lead to the application of domestic **lex fori** but as a result of rational choice. In particular, we saw how the few specific choice of law legislations in Nigeria, although imperfect, have opened the door for judicial concern for choice-incluencing considerations. For example, the provisions that the Nigerian High Courts are to observe and enforce the rules of customary law which are applicable to a cause and which are not repugnant to natural justice, equity and good conscience nor incompatible with any law for the time being in force, are capable of leading to the application of English law where the said customary law violates the statutory injunction. Furthermore, we noted that where the parties have made an express choice of English law (or other non-customary law), or where the subject matter in controversy is unknown to customary law, a choice of English law would again be justifiable. And that (in the 6 Northern States) where no express rule is applicable to any matter in controversy, the High Courts are to be governed by the

principles of justice, equity and good conscience which again can lead to the choice of English or other non-customary law of guardianship. In particular we observed that the provisions for the lower courts in Nigeria are also choice of law oriented, thus dispelling any views that customary law (which these courts mostly apply) adopts essentially a non-conflicts approach. The practical operation of these provisions, we observed, can lead and has led to the choice of islamic, customary and other non English law, as well as resort to rules of common sense and natural justice, equity and good conscience. Some of these options as we saw, have been documented by a string of cases.

What remains to be emphasised in this conclusion is that as a general proposition, choice of law in guardianship should be governed by the overriding policy of securing the child's welfare and best interests. Since this policy may sometimes be secured best by foreign law, domestic (forum) law ought not to enjoy monopoly of legal wisdom in this controversial area of the child's welfare. Hence we submit our conclusions on choice of law in the form of propositions[1] which on the whole promote the major choice of law considerations in the conflict of laws.

(1) Application of forum (domestic) law: This is based on considerations of the forum's domestic policies and interests, which

---

1. In formulating these propositions we have derived assistance from, among others, the following works: Cheatham and Reese "Choice of the Applicable Law" (1952) 52 Col. L. Rev. 959; Leflar, "Choice Influencing Considerations in Conflicts Law" (1966) 41 N.Y.U.L. Rev. 267; and "Conflicts Law: More on Choice-Influencing Considerations" (1966) 54 Cal. L. Rev. 1584; Hartley, "The Policy Basis of the English Conflict of Laws of Marriage" (1972) 35 M.L.R. 571.

may indicate that in certain situations domestic law should be applied in a conflict of laws case - with or without the additional justification that domestic (forum) law is the "better law". What we would urge, however, is that these policies must not be excessively parochial and the asserted interests must be real and substantial. If these conditions are fulfilled, the **lex fori** should govern where any other course would prejudice those interests and policies. However, since the basic forum (domestic) policy in custody law is the protection of the child's welfare, forum law is not likely to do anything which is so fundamental in character that most other legal systems would not do it. In other words, most legal systems are concerned with the child's physical, moral, religious, emotional, material and total welfare. This is a consideration which ought to diminish the preponderance of forum law in guardianship cases involving conflicts of laws.

(2) Maintenance of interstate and international order: Most people agree that any effective and lasting solution of the problems of the custody of the international child requires the goodwill and cooperation of all concerned states. Considerations of comity, friendship, and internationalism should lead courts to recognise the possible application of foreign law in a custody conflicts case. But if the foreign law is fundamentally different from forum law, and if the application of the foreign law will be unacceptable to the (international) public policy of the forum state, then the foreign law should not be applied. For in this kind of situation neither comity nor a spirit of

internationalism demand the choice and application of foreign law. (The considerations in this paragraph are also relevant to the recognition and enforcement of foreign custody orders.)

(3) International uniformity of decision: Probably the best solution would be to apply the law of the territory with which the child and the parties are most closely and rationally connected. The adoption of this approach would ensure uniformity of results. It avoids forum shopping. In particular, with reference to Scots law which regards guardianship-custody as status matters, uniformity of status is best achieved through the application of choice of law rules which have rational connection with the child and which have attained international acceptance. Agreement on choice of law may also be furthered by the conclusion of international conventions.

(4) Reasonable expectations of the parties and predictability of results: The policy of protecting the justified and reasonable expectations of the parties as to the law governing their family relationships (including custody) is one based on fairness and justice. It is important, where parties have acted on their expectations as where they entered into a particular form of marriage (e.g. the islamic form) and with a view to the parents and children living in a particular country, that those expectations be not thwarted by the application of another law as a result of the sudden break up of the matrimonial home and the abduction of the child out of one jurisdiction into another. The social policies of most forum states call for the sustenance of legal arrangements entered into in good faith by the parties. This would also discourage forum shopping. To apply forum law

just because the child is temporarily within the jurisdiction can result in a sense of injustice especially where the expectations are quite reasonable and justifiable and the foreign law is not otherwise objectionable.

(5) Convenience and simplicity of the judicial task: The policy of convenience or simplicity of judicial task generally points to the direction of the lex fori . Prima facie, a judge before whom a child appears is as qualified as any other to determine the child's welfare. Courts do not like to do things the hard way if an easier way equally serves the ends of justice. It would be difficult and impractical for a court hearing a conflicts case to apply the procedural law of the place where the principal facts occured. This is why courts resort to their own procedural rules in guardianship and custody cases, including their own rules of evidence, proof and pleading. Moreover, familiarity with forum law obviates the need to establish foreign law through expert evidence which may be expensive and time-consuming. These should be avoided as far as possible in guardianship cases.

These five choice-influencing considerations may at times conflict and overlap. But they furnish guidelines, singly or in combination,for a court deliberating on a custody case involving conflict of laws. Some of the policies may also be more important than the others as choice-influencing considerations in different departments of law. We have nevertheless put forward these proposals in the hope that Professor Willis L. M. Reese is right when he said:

> "one can rarely feel confident in dissenting from the suggestions of any thoughtful person on the subject of choice of law. This

> is because large areas of the subject are as yet so undeveloped and uncertain that it is often difficult to do more than hazard a guess as to what the ultimate solution of a given problem will be. Under the circumstances, all suggestions, however, provocative and disruptive, are to be welcomed."[1]

Our examination of the problem of recognition and enforcement of foreign custody orders revealed, once again, the intense controversy surrounding this and the other subjects of custody in conflicts law. We propose here to state in the form of two propositions the policy considerations which should be paramount in any question concerning the recognition and enforcement of foreign custody decrees.

(1) International uniformity of decison and the maintenance of interstate and international order: In the field of guardianship-custody law this policy is concerned with ensuring the welfare of the child by ways that avoid forum shopping and kidnapping and hence securing stability of environment for the child. This policy, as with many others in the guardianship field, contains mutually opposing considerations. On the one hand, by its very nature, the rule of the paramountcy of the welfare of the child requires that every court must exercise an independent judgment in custody matters. Furthermore, custody decrees are never final as are decrees involving, say, divorce or legitimacy. Custody decrees are always subject to review and modification depending on changes in circumstances. Recognition and enforcement may therefore not be premised on comity. Hence it has been said that comity demands, not the enforcement of foreign custody orders but only their grave consideration.[2] This is because:

---

1. Willis L. M. Reese, "Major Areas of Choice of Law" (1964) I Recueil Des Cours, 315 at 339-340.
2. See McKee v McKee (1951) A.C. 352 at 365 per Lord Simonds (P.C.)

> "The passage of even a relatively short period of time may work great changes, although difficult of ascertainment, and the difficulty ascertainment, in the needs of a developing child. Subtle, almost imperceptible, changes in the fitness and adaptability of custodians to provide for such needs may develop with corresponding rapidity. A court that is called upon to determine to whom and under what circumstances custody of an infant will be granted cannot, if it is to perform its function responsibly, be bound by a prior decree of another court, irrespective of whether 'changes in circumstances' are objectively proveable."[1]

On the other hand, non-recognition and non-enforcement of foreign custody decrees may lead to evasion of custody orders by forum shopping, kidnapping and unnecessary relitigation of custody disputes, with possible alteration in the child's environment after each decision. Under a claim of 'changed circumstances' a litigant may be forum-shopping or seeking a second round in a running battle. As Foster and Freed have stated,

> "The alleged changes of circumstances may or may not be significant, may or may not present a new problem, and may or may not constitute an appeal to local prejudice."[2]

In any case, where children are involved in litigation it is clearly essential to remove undignified games of shuttlecock and battledore. In particular, a forum whose concern with a set of facts is negligible, e.g. the mere presence of the child in the jurisdiction through a recent act of kidnapping, should not refuse recognition and enforcement of the decree of a State which has clearly superior concern with the facts. The court should, of course, be satisfied that the result of

---

1. Kovacs v Brewer (1958) 356 US 604, at 612 per Justice Frankfurter (dissenting).
2. H. Foster and D. Freed, "Child Custody" (Part II) (1964) 39 N.Y.U. L. Rev. 615 at 622.

its recognition and enforcement of the foreign order would not entail any harm to the child.

(2) Reasonable and Justified expectations of the parties: This is another policy factor in the field of recognition and enforcement. A party who has gained custody or access rights in respect of a child with the backing of a court order expects that order to be obeyed and not to be flouted through denial of his rights which results from the abduction of the child out of the jurisdiction. And the party thus illegally deprived of custody expects obedience to law because (presumably) he would himself have obeyed the judicial injunction. And in particular, where both parties had agreed that the child should not be unilaterally taken out of the jurisdiction of the court and one of them subsequently breaks this solemn undertaking, elementary justice and fairness demand that the justified expectations of one party be not frustrated in this way, and that the restoration of the status quo is desirable. This would often be achieved by a policy of recognition and enforcement especially where the foreign decree emenates from a court operating in a legal system which is not dissimilar to that of the jurisdiction asked to give recognition.

We would observe that if these policy considerations fail to yield viable rules of recognition and enforcement - evolved through judicial restraint and cooperation - then efforts would have to be intensified in furthering the unification of conflict of laws rules of custody by multilateral international conventions or through the conclusion of reciprocal or mutual

enforcement conventions between two or three closely-knit law districts or on limited regional basis.

We would point out further that the policy of international uniformity of custody decisions through viable rules of recognition and enforcement does not address itself to uniformity or agreement as to how guardianship - custody is to be classified: whether as pertaining to status matters or not. For one thing, however, we are not aware of known cases of "limping" guardianship statuses, so that the problem may well be left alone.

It may be worth reiterating that in practical terms the core of the problem of recognition centres on the three different rules which are vying for ascendancy especially in kidnapping cases. These being the "full inquiry" rule which requires the court to go into the last dregs of the custody issue and be satisfied on these before it decides on any course of action; the "no further inquiry" rule which on the other hand concentrates on the avoidance of any measures that might appear to be rewarding wrongdoing, as would inevitably be the case if the child is allowed to form roots while the full inquiry goes on; and the rule of via media which allows the court to make a preliminary inquiry to determine whether a full investigation of the merits or a summary order for the return of the child need be ordered as the best measure comformable to the child's welfare. While we may express a preference for the rule of via media, it should be stressed that there are no clear-cut advantages of any particular approach over its competitors. And whether a fundamentally different approach should be adopted in kidnapping cases -

as distinct from ordinary cases raising the problem of recognition and enforcement - is not a settled point, although it was the subject of judicial comment in Re L (Minors).[1]

We would end this part of our conclusion by making these further observations. First, we would suggest that in line with the United States Uniform Child Custody Jurisdiction Act, 1968, a duty should be imposed on a party to wardship or custody proceedings to disclose to the court, as soon as he or she has information of them, the existence of any subsisting custody orders made by a sister state court or by a foreign court pertaining to the child. Parties should also be made to disclose to the court knowledge of concurrent custody proceedings which are in progress in a sister state or in a foreign country. These disclosures should include the names of persons (e.g. foster parents) who may be asserting a claim to the child's custody. These suggested measures are to ensure that the involved courts exchange views on the custody proceedings which may affect the decision either to stay (or sist) or to continue with an action. And they would enable all known custody claims to be disposed of in one proceeding. This would be a practical demonstration of much-needed interstate judicial cooperation on which so much depends in this complex field. This would benefit both the court and the parties in the saving of time and expenses etc., as well as benefitting the child who is spared possible exposure to the full glare of two or more probing courts.

---

1. (1974) 1 W.L.R. 250 at 256 C.A.

Secondly, while efforts are being intensified in the United Kingdom to devise workable rules of jurisdiction, recognition and enforcement in inter-United Kingdom custody cases, and while Nigeria is yet to receive a comprehensive guardianship-custody legislation, the international legislative efforts to find a solution to custody in private international law should be properly emphasised. Nigeria may in time come to channel her efforts to the cause of a future convention on custody conflicts law formulated under the aegis of say, the Organisation of African Unity or some West African regional groupings. And Britain for her part is already actively participating in European regional efforts directed towards the solution of this same problem. In this connection we would mention the Council of Europe - a regional organisation consisting of some seventeen member states, including the United Kingdom. This organisation is at the moment deliberating on the problem of conflicts of jurisdiction and judgments in matters pertaining to custody and guardianship of children. At the 7th Conference of the European Ministers of Justice in Basle, held in mid May, 1972 a resolution[1] was passed

> "That the member States of the Council of Europe should adhere to the Hague Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of infants."

The different institutions in which Nigeria and the United Kingdom are, and will be, part of may in time help to free Nigerian legal thinking from being predominantly English-oriented. So that the common foundation or experience in legal matters between Nigeria

---

1. See Council of Europe Doc. Exp/Rep Leg 74 p.4. I am grateful to Mr. Niall R. Whithy for making accessible to me the document containing the above resolution.

and England (brought about by historical factors) are bound to diminish with the years. As a learned Nigerian writer has observed:

> "There is no doubt that Nigeria and Britain will find themselves in different international bodies. And in so far as treaties of such International Organisations will affect rules of private international law in both countries, so far will the rules of private international law in both countries diverge."[1]

That divergence has already begun with Britain's membership of the European Economic Community. On the occasion of Britain's entry into the E.E.C., Lord Denning M.R. commented on the resource and skill that will be required in grafting the new laws emanating from the E.E.C. on to the old English laws.

> "Let there be no doubt about it," the Master of the Rolls began "In this island we are no longer subject to English law alone. We are to be governed by European law as well."[2]

This new position has come about in British law because the European Communities Act, 1972[3] enacts that all things

> "provided for by or under the Treaties, ... are without further enactment to be given legal effect or used in the United Kingdom."

What this implies is that the United Kingdom will no longer be able to close her eyes to European developments in the field of private international law. Indeed it may be said categorically that with Britain's entry into the E.E.C. we shall be witnessing increasing reluctance of the United Kingdom to depart or deviate from the mainstream of European private international law. The development of United Kingdom private international law has come full circle. English and particularly Scots conflicts law started by

---

1. I. O. Agbeds, The Conflict of Laws in Nigeria (Unpublished) Ph.D. Thesis, Univ. of London 1970 pp 73-74.
2. See Forward into Europe, A Special Report to mark Britain's Entry into the E.E.C. The Times 2 January 1973, Part I p.2.
3. Cap 68, 5 - 2 (1)

looking towards Continental writings[1] on private international law until this was ended, among other things, by "the perplexing variety of opinions"[2] exhibited by European jurists, coupled with the decline in the knowledge of members of the (Scottish) Legal profession of Continental systems[3] - especially after the Napoleonic wars and codification swept across Europe. Then under the influence of a number of high quality legal works written first hand in English, conflict of laws in the United Kingdom became truly home-grown and the influence of Continental juristic writings waned. Now with the entry of Britain into the E.E.C., we shall be witnessing a reversion to, or at least the convergence of United Kingdom conflicts law with its European origins. Although the full impact of the new legal order on United Kingdom conflicts law is yet to be felt, we can illustrate the force of much of the statement in the preceding paragraph by the following statements.

The Treaty of Rome, 1957, "provides for a rapproachment between the legislations (of Community members) where necessary to meet the objectives of the Treaty"[4]. Article 220 of the Treaty of Rome imposed special duties upon the parties, such as the facilitation of mutual or reciprocal enforcement of judgments. Pursuant to this objective, the Common Market countries concluded a Convention on September 27, 1968 on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters. The Convention excludes questions

---

1. See Anton, Private International Law pp 10-11.
2. Ibid at 12.
3. Ibid at pp 11, 13.
4. Nadelman, "Need for Better Coordination of Organisational Work on Conflict of Laws Regulations" (1974) I Revue De Droit Uniforme (Uniform Law Review) 44 at 52.

relating to "the status or legal capacity of natural persons."[1] But it does apply to actions for maintenance or aliment. The Convention provisions are likely to raise nice problems for United Kingdom law of jurisdiction in proceedings involving custody and maintenance or aliment. Does custody pertain to "the status --- of natural persons"? Different answers are likely to be given in different parts of the United Kingdom. If custody does pertain to "status" as Scots law would (tend to) hold, what would be the attitude of the United Kingdom to the Convention directive where custody and maintenance questions arise together in one suit? If the United Kingdom courts apply the Convention provisions to custody matters (even if combined with other ancillary matters) the courts would be going against the spirit of the Treaty of Rome at the least. In spite of the absence of a "supremacy clause" in that Treaty, if there is any conflict between a United Kingdom (or any national) law and the Treaty of Rome, the provisions of the Treaty will prevail. As Lord Denning M.R. has said in a leading case:

> "on matters with a European element the Treaty (of Rome) was like an incoming tide. It flowed into the estuaries and up the rivers. It could not be held back. Parliament has decreed that the Treaty was henceforth to be part of our law, equal in force to any statute."[2]

Britain's entry into the E.E.C., therefore, may leave nothing specifically "English" about English conflict of laws[3] from which Nigerian conflicts law has originated. One wonders whether these times are not propitious for Nigerian conflict of laws to break off from its English main stock to which it has for so long been

---

1. Article 1 (1).
2. H. P. Bulmer Ltd. and Showerings Ltd. v J. Bolinger S.A. and Champagne Lawson Pere et Fils, Times (Law Report) May 23, 1974 p. 7 (C.A.).
3. We must add, however, that this transformation of English conflict of laws will be a slow process.

engrafted. In our view there is a crying need for an autochthonous Nigerian approach to private international law.

While Nigeria and the United Kingdom may find themselves belonging to, and participating in, different regional groupings which may be called upon to tackle the problem of custody in private international law, we would emphasise that by its very nature the problem of custody in the conflict of laws may not be satisfactorily resolved by narrow regional groupings. True, inter local (inter-state) as well as regional efforts in this regard should be welcomed. But a more satisfactory solution would have to be devised by an independent international agency such as the Hague Conference on Private International Law which is devoted to formulating conflicts prescriptions on a more global basis. As a learned commentator has stated;

> "In conflict of laws, many problems are intrinsically difficult. They may or may not be capable of solution. The difficulty does not disappear as a result of the formation of a new grouping. The problems have to be talked out on neutral ground. For private international law, the specialised agency (such as the Hague Conference on Private International Law) is a proper - if not <u>the</u> proper - forum."[1]

B. Concluding Remarks

Modern trends in guardianship and custody law in the United Kingdom, America, Europe and in several Commonwealth countries as well as the practice in international conventions indicate an eventual eclipse of preferential treatment as between father and mother or between parents and strangers or between legitimate and illegitimate children. The major focus is, and will be, on the child's interests

---

1. Nadelman, "Need for Better Coordination of Organisational Work on Conflict of Laws Regulations" (1974) I <u>Uniform Law Review</u> 44 at 59.

and welfare. There is also an increasing awareness of the damage which conflicting jurisdictions and judgments can cause to the child, the parties and the reputation of the law. There are, accordingly, considerable activities going on in different places and at different spheres to reduce or eradicate the chaos which has characterised the conflict of laws of guardianship.

The trend of development in Nigeria would not be different from the above global phenomenon even though the inheritance of pre-1900 English common and statute law of guardianship has left Nigeria with much fossilised law. The legacy of the British to the post-Colonial Nigerian government was one of piecemeal remedial legislation in the guardianship and custody sphere. This should now be unacceptable to the Federal Military Government which should see itself as parens patriae responsible for the interest and welfare of all Nigerians - especially children who are caught in an emotional battle for custody. The Federal Military Government is the trustee of public interest and it would be shirking its duties if it failed to enact a comprehensive, nationwide legislation on guardianship and custody of children. Up till now the government of the day in Nigeria has not concerned itself with remedial legislation in the custody field, thus dispelling any belief in the claim about "the great extent of reforming legislative activity which has characterised the post independent era" in Nigeria.[1] The truth is that guardianship has been relegated to an insignificant corner in the field of law in Nigeria.

---

1. T. O. Elias, Law in a Developing Society (Inaugural Lecture, University of Lagos, 1969) p.12.

In the United Kingdom itself, since 1958 but in particular since 1971, a rapid succession of statutes on guardianship and custody has enabled the government (and the courts) to cope with wide-ranging issues that have a bearing on the child's welfare. These internal measures have proceeded side by side with United Kingdom participation in a number of international conventions, international organisations and other similar endeavours whose objectives are to solve the problem of guardianship in private international law. The activities of the Law Commissions are also helping to bring home the urgent need for remedial measures in the complex field of custody conflicts law. Nigeria, no doubt, faces essentially the same problem as the United Kingdom and other countries, yet Nigeria's law is still encrusted with old (and now mostly abandoned) English law. In a passage in which he impliedly urged African countries to reappraise their uncritical and mechanical borrowings from exclusively English law sources, Professor T. B. Smith said:

> "I have yet to be convinced that any or adequate consideration has been given to the fact that, apart from islamic law and customary native law, the English legal system is not the only European law of relevance for Africa's future."[1]

Present and future trends would seem to indicate that the relevance of European law to Nigerian law would increasingly take the form of comparative study of solutions attempted in other systems rather than forced or self-imposed loans as is the case at the moment.

A comparative approach to the study of specific areas of law would enable Nigeria and other African countries to tap the best from the vast storehouse of legal experience in Scotland, England, America and other countries. This comparative borrowing is likely

---

1. T. B. Smith, British Justice : The Scottish Contribution, p.40

to be especially profitable in a field where similar problems are presented in all countries and where the solutions devised in different countries are not too dissimilar and have a basic unity of theme. Our comparative study of the phenomenon of guardianship in private international law bears out the observations of Lord Macmillan who said:[1]

> "No one can address himself to the study of comparative law without being struck with the essential similarity of the problems of human relationship all the world over and, despite the diversity in form of the solutions which each national system of law has devised, with the general resemblance in substance of these solutions."

---

1. Macmillan, "Scots Law as a Subject of Comparative Study", in Law and Other Things p.144.

TABLE OF CASES

A and B (Infants) (1897) 1 Ch. 786 — 1, 261
A and B, Petitioners 1971 S.L.T. 258 (H.L.) — 39
A.B. v C.D. (1847) 10D. 229 — 364
Ababio II v Nsemfoo (1947) 12 W.A.C.A. 127 — 117
Acutt v Acutt 1936 S.C. 386 — 486
Adadevoh, Re (1951) 13 W.A.C.A. 304 — 190
Adegbola v Folaranmi (1921) 3 N.L.R. 89 — 137, 175
Adeoye v Adeoye (1962) N.R.N.L.R. 63 — 190
Aderawo Timber Trading Co. Ltd. v Federal Board of Inland Revenue (1966) 2 All.E.R. 449 — 530
Adoption Application 52/1951, Re (1952) Ch.16 — 531
Adoption Application 41/61, Re (1963) Ch.315 — 302
Afonja v Afonja (1972) Univ. Ife L.Rep. 105 — 62, 353-354
Agar Ellis Re (1878) 10Ch.D.49; (1883) 24 Ch.D.317 — 102, 228, 229, 235, 298
Agboruja, Re (1949) 19 N.L.R. 38 — 123, 302-303, 336, 357, 676
Akparanta v Akparanta (1972) 2 E.C.S.L.R. 779 — 260, 359, 420
Allen v Allen (1948) 1 All.E.R. 413 — 346, 359, 367
Alli v Okulaja (1971) 1 Univ. Ife L. Rep 72 — 161, 162
Amachree v Goodhead (1923) 4 N.L.R. 101 — 158, 662-664
Amdo v Amdo (1951) 4 I.L.Q. 506, at 507 — 764
Apatira v Akanke (1944) 17 N.L.R. 149 — 104
Apt v Apt. (1948) P83 — 51
Arinze v Arinze (1966) N.M.L.R. 155 — 550
Arnold v Arnold (1957) P.237 — 536
Armitage v Attorney-General (1906) P.135 — 750, 752, 755, 760
Ashekoya v Olawunmi (1962) All N.L.R. 125 — 531
Aster, Re (1955) 1 W.L.R. 465 — 261
Attorney-General for Alberta v Cook (1926) A.C.44 — 67
Att-Gen. v John Holt (1910) 2 N.L.R.1 — 100, 164, 170
Att-Gen. v H.R.H. Prince Ernest Augustus of Hanover (1957) A.C. 436 — 286
Att-Gen. v Times Newspapers Ltd. (1974) A.C.273 — 388, 390
Austin v Austin (1865) 34 Beav.257; 55 E.R.634 — 321, 322, 337
Australia Consolidated Press v Uran (1969) A.C. 590 — 28
B (An Infant), Re (1962) 1 W.L.R. 550 — 269, 320, 323, 329-332, 336, 346
B v B (1924) P.176 — 348, 380, 381
B v B (B)(An Infant)Intervening)(1971) 1 W.L.R. 1486 — 381, 382
B v S (formerly B)(1973) 118 Sol.J.219 — 349, 350
Babington v Babington 1955 S.C 115 — 439, 509, 515, 555-556, 586, 587, 588, 683-686
Bath v Whitehaven and Furness Railway Co. (1850) 3 H.L.C.1 — 683

Bamgbose v Daniel (1955) A.C. 107 175, 190
Baltimore and Ohio Railroad v Kepner (1941) 314 U.S. 44 582
Barkworth v Barkworth 1913 S.C. 759 549
Barnado v McHugh (1891) A.C. 388 272, 311
Barr v Barr 1950 S.L.T. (Notes) 15 351
Battaglia v Battaglia 1967, S.L.T. 49 423, 550
Beaufort v Berty (1721) 1 P. Wm. 703 126
Bell v Kennedy (1868) L.R. H.L. Sc & Div 307 143, 538
Begbie v Nicol 1949 S.C. 158 250, 350
Benson v Ashiru (1967) N.M.L.R. 363 27,49,148,173, 184, 694
Besand, Re (1879) 11 Ch.D.508 230,297,328, 337, 350
Bin v Bin (1952) A.C.1 724
Bliersbach v MacEwan 1959 S.C.43 443
Boys v Chaplin (1968) 2 Q.B.1 (C.A.) 18,26, 512
Bradshaw v Bradshaw (1826) 1 RUSS 528 125
Brand v Shaws (1888) 16 R.315 311
British Bata Shoe Co. Ltd. v Mellikian(1956) 1 F.S.C.100 72
British South Africa Co. v Companhia de Mocambique (1893) A.C.602 476
Brown v Brown 1948, S.C.5 343
Browne v Browne 1969 S.L.T. (Notes) 15 377
Brown's Trusts, Re (1865) 12 L.T. 488 644
B's Settlement Re (1940) Ch.54 591,627,700, 715-718,742, 769
Buchan v Grimaldi (1905) 7 F 917 480
C(A)(An Infant)(1970)1 W.L.R. 288 320,328,333, 421
C(L) (An Infant)Re 1965) 2 Q.B.449 345
C(M.A) Re 1966) 1 All.E.R. 646 270
Calder v Calder 1960 S.L.T. (Notes)52 592
Cambouris v Prokos (Unreported) A.C.-App-5-1944 672
Campbell v Campbell 1920 S.C.31 320,343, 442
Campbell v Campbell 1956 S.C. 285 250
Carroll Re (1931) 1 K.B.317 285,298- 299
Carrick v Hancock (1895) 12 T.L.R. 59 477
Case Concerning the Treatment of Polish Nationals in Danzig P.C.I.J. Rep. Series A/B, No.44 418
Case Concerning the Application of the Convention of 1902 Governing the Guardianship of Infants (Netherland v Sweden (1958) I.C.J. Rep. 54 385,386,389, 390,395,406-7, 409-419, 638-639
Chaplin v Boys (1971) A.C.380 25,26,27,185, 583
Chattard's Trustees, Re (1899) 1 Ch.712 760
Chidiku v Chidano (1922) S.R. 55 667
Chipperfield v Chipperfield (1952) 1 All.E.R.1360 266
Christison v Christison 1936 S.L.T. 275 266,350, 421
Chollom v Gatak, Birom Tribal Court, 19 Feb., 1960 324

Clark v Clark 1967 S.C. 296 550
Clark v Clark 1966 N.H. 351 615
Clark-Jervoise v Scutt (1920) 1 Ch 382 280, 286
Cochrane v Keys 1968 S.L.T. (Notes) 64 251,288,296,360
Codrington v Codrington and Anderson (1864) 3 Sw & Tr 496 358
Collins (An Infant) Re (1950) 1 Ch 498 297,309,346, 352, 421
Cole v Cole (1898) 1 N.L.R.15 92,137,190,650
Cole v Cole (1944) 16 N.L.R.9 292,348,365, 422
Cole v Akinyele (1960) 5 F.S.C. 84 175
Coleman v Shang (1961) A.C. 481 (P.C.) 138, 175
Colt Industries Inc v Sarlie (1966) 1 W.L.R. 440 477
Compagnie Financere v Peruvian Guano Co. (1882) 11 Q.B.D.55 223
Compagnie Tunisien de Navigation S.A. v Compagnie d'Armament Maritime S.A. (1971) A.C. 572 25
Constantine v Tifaya (Unreported) A.C.-App-13-1946 672
Copeland v Copeland 1968 S.L.T. (Notes)101 274
Copeland v Copeland 1969 S.L.T.(Notes) 70 251
Craven v Elibanks Trustees (1883) 15 D.781 543
Crichton's Trusts, Re (1855) 24 L.T.(OS)267 645
Cruse v Chittum The Times, March 15,1974 p.10 533
Cuartero v Cuartero (1968) V.R.230 263- 264
D (An Infant) Re (1943) 1 Ch 305 503
D'Alton v D'Alton (1878) 4 P.D. 87 297,358, 427
Dalrymple v Dalrymple (1811) 2 Hagg.Con.55 52, 600
Dawodu v Danmole (1962) 1 W.L.R.1053 54
Dawson v Jay (1854) 43 E.R. 300 503
Dede v African Association (1910) 1 N.L.R.130 61,168-170, 187
Des Bordes v Des Bordes and Mensah (1884) Sar.F.C.L.267 163,171, 317
Desramault Caroline (Infant)(1971) 121 New L.J.399 11
Diri v Nyikwa (Unreported) Suit No K/M91/1965 133,272,307, 360, 367
Di Savini v Lousada (1870) 18 W.R. 425 698,706,709- 712, 738
Djabartey v AwuaII (1938) 4 W.A.C.A.202 224
Donaldson v Haldane (1840) 7 Cl & F 762 62
Donoghue v Stevenson 1932 S.C.(H.L.)31 61, 335
Douglas v Douglas 1950 S.C.453,1950 S.L.T. 302 290, 425
Douglas v Forrest (1828) 4 Bing 686 479
Drevon v Drevon (1864) 34 L.J.Ch.129 420
Duguid v McBrinn 1954 S.C.105 311- 312
E.A.W. and M.W.(Infants) (1949) N.I.L.R.1. 372- 373
E(D)(An Infant) Re(1967) Ch 761 C.A. 268,367,371, 423,729,734-737, 766,769, 786
Ealing London Borough Council v Race Relations Board(1972) A.C.342 74

Earl of Buchan v Harvey (1839) 2 D.275 542
Edet v Essien (1932) 11 N.L.R. 47 669- 670
Edgar & Fisher's Trustees (1893) 21 R.59 437
Edokpolor v Idehen (1961) W.N.L.R. 11 117
Edwards Re (1873) 42 L.J.Q.B. 99 228
Eleko v Govt of Nigeria (1931) A.C. 662 121
Ehigiator v Ehigiator (1966) N.M.L.R. 372 328,361, 423
Ehigie v Ehigie (1961) 1 All N.L.R. 842 117
Ehioghae v Ehioghae (1964) N.M.L.R. 842 117
Emmanuel v Symon (1908) 1 K.B. 302 475, 476
Eyre v Countess of Shaftesbury (1724) 2 P.Wins 103 91,125, 236
F (An Infant) Re (1969)2 All E.R.766 333,365,372, 423, 434
Fairbairn v Neville (1897) 22 R.192 792
Feyerick v Hubbard (1902) L.J.K.B. 509 480
Finlay v Finlay (1925) 240 New York 429 231
Ford v Ford (1962) 371 U.S.187 770
Fraser v Fraser and Hibbert (1870) § M.400 484
Fynn, Re (1842) 2 DeG.& SM457;(1848) 64 E.R. 205 230, 503
G. (An Infant)Re (1956)2 All E.R.876; (1956) 1 W.L.R. 911 312,376, 377,
G.(An Infant) (1962) 2 QB.141 297
G. (Infants) Re (1899) 1 Ch.719 319,368, 381
G. (J.D.M.)(An Infant) Re 1969) 1 W.L.R.1001 423,587, 592
G.M. (An Infant) (1967) S.A.714 664- 665
Gault, Re (1967) 387 U.S.1 239
Ghamson v Wobill (1947) 12 W.A.C.A. 181 326, 659
Gibson & Hagen 1960 S.L.T.(Notes) 24 249
Gilmour v Coats (1949) A.C. 426 352, 358
Godwin v Crowther (1934) 2 W.A.C.A. 109 199
Goldstein v Goldstein (1972) II 26 P.D.634 764
Gooding v Martins (1942) 8 W.A.C.A. 108 137, 175
Goodman's Trusts, Re (1881) 17 Ch.266 755
Gover v Gover 1969 S.L.T. (Notes) 78 348, 381
Gray v Formosa (1963) P.259 179
Gyang v Gyang (Unreported) Appeal No. J.D./13 A/ 1969 (Benue-Plateau) 117
H (Infants) Re (1966) 1 W.L.R. 381 111,319,351, 366,422,545, 547,587,621,713, 721, 733, 736,738,739, 741,742-745, 769,775, 785
H v H and C (1969) 1 W.L.R. 208 324
H v H (Child:Judicial Intervention) (1974) 1 W.L.R. 595 349- 350
Hamlyn & Co. v Talisker Distillery (1894) A.C. 202 143
Harben v Harben (1957) 1 W.L.R. 261 510,511,519, 545
Harvey v Harvey (1860) 22 D.1198 513
Hassan v Mzee (1944) 11 E.A.C.A. 4 666
Hawksworth v Hawksworth (1871) 6 Ch.Ap. 539 229, 310
Hellman's Will, Re (1866) L.R.2 Eq. 363 644
Henderson v Patrick Thomson Ltd. 1911 S.C. 246 484

Hewer v Bryant (1970) 1 Q.B. 357 — 30, 43, 46
Hope v Hope (1854) 4 DeG.M.& G.328 — 237-238,501, 502-503,510, 511, 624
Hope v Hope (1968) N. Ir. L.R. 1 — 517
H.P. Bulmer Ltd. and Showerings Ltd. v J. Bolinger S.A. etc. The Times (L.R.) 23 May, 1974, p.7 — 810
Hopkings, Exp. (1732) 3 P.Wms 151 — 1
Hoy v Hoy 1968 S.C. 179 — 449,451, 591
Huddart v Huddart 1960 S.C.300,1961 S.C.393 — 275,376, 378
Hunter v Atkins (1834) 3 My & K 113 — 84
Ibralebbe v The Queen (1964) A.C.900 — 202
Ilevbare v Ilevbare (1958) W.R.N.L.R.46 — 328
Indyka v Indyka (1966) 3 W.L.R.603 C.A. (1969) 1 A.C. 33 — 59,60,144,179, 181,185,474, 533,539,694,697, 750,752,753, 762
J v C (1970) A.C. 668 (H.L.) — 37,102,157,229, 232,251-254,261, 265,266,270,277, 280,283-290, 298-301,308,344, 347-348,366-367, 422,424-425,503, 546,617,627,665, 762,766
Jacobs, Marcus & Co. v The Credit Lyonnais (1884)53 L.J.Q.B156 — 16
Jegede v Jegede, C.C.C.H.C.J/12/72 (Lagos High Court) — 374,420, 421
Jelfs v Jelfs, 1939 S.L.T. 286 — 519
Joel v Gill (1859) 21D 929 — 482, 512
Johnson v Johnson 1972 S.L.T.(Notes)15 — 348
Johnstone v Beattie (1843) 10 Cl & F 42 — 91,144,240,242-244,473,499,504, 557,589-590,592, 627,703-705,707, 713,726, 796
Jussa v Jussa (1972) 2 All E.R.600 — 334,455,457, 458, 460
K(Infants) Re (1963) Ch 381;(1965) A.C.201 — 395,686, 687
Kamcqca v Nkhota and Anor (1968) 12 J.A.L.173 — 664,666,667, 679
Kansas v Colorado (1907) 206 U.S.46 — 202
Kasebiye v Adeyemi (1963) 1 Doig.L.J.125 — 326
Kelly v Marks 1974 S.L.T.118 — 338,347,429-430 499,509,516,529, 549,560,592,595, 698,715,749-750, 762,767, 776
~~Kernot (An Infant) Re 19~~
Kennedy v Clark 1970 S.L.T. 260 — 279
Kernot (An Infant) Re (1964) 3 W.L.R1210 — 319,500,552,586, 587,588,634,637, 642

Kerr v McGregor 1931 S.C. 736 486
Ketchen v Ketchen (1870) 8 M.952 321
Kirk v The Scottish Gas Board 1969 S.L.T.18
1969 S.C. 328 42,78, 758
Kitson v Kitson 1945 S.C. 434 10,127, 492
Kodieh v Affram (1930) 1 W.A.C.A.12 681
Kofi v Brentuo (1944) 10 W.A.C.A. 92 224
Kovacs v Brewer (1956) 356 U.S.604 770, 803
Kpelanya v Atsoo (Unreported) Appeal No.
M.D/64A/1970 117
Kwesi-Johnston v Effie (1953) 14 W.A.C.A.254 681
L (Infants) Re (1962) 1 WLR 886 261,323,329-332,
365-367,370,372,
381,420,422,425
L (Minors) Re (1974) 1 W.L.R.250 729,737,740,
785, 806
Lafun v Lafun (1969) N.M.L.R.401 363, 381
Lakanmi v Att-General (Unreported)
Suit No. S.C. 58/69 204
Lang v Lang (1869) 7 M 445 266,362-363,
377
Lawal v Younan (1961) All N.L.R.74 162,165,172,
188, 189
Lawson v Siffre (1932) 11 N.L.R.113 62
Le Mesurier v Le Mesurier(1895) A.C.515 749, 750
Levene v I.R.C. (1928) A.C.217 532
Lewis v Bankole (1908) 1 N.L.R.81 116, 123
Lewis v Lewis (1956) 1 W.L.R. 200 539
Liddell's Settlement Trusts (1936) Ch 365 C.A. 511
Liyanage v The Queen (1967) A.C.259 202
Lloyd v Grace,Smith & Co.(1912) A.C.716 184
Lord Advocate v Jeffrey (1921) A.C.146 517
Lord v Colvin (1859) 4 Drew 366;28 L.J.Ch.361 488
Longworth v Hope (1865) 3 M.1049 581
Loromeke v Nekegho (1957) 3 W.A.L.R.306 671, 676
Lovell v Lovell (1950) 81 C.L.R.513 (Australia) 409
Low, Petitioner, 1920 S.C.351 438, 440
Luch's Settlement Trusts, Re (1940)Ch 864 15
M v M (1973) 2 All.E.R.81 376
M v M 1926 S.C.778 271,343, 367
M.W. Investments v Kilburn Envoy (1947)
Ch 370 223
Macallister v Macallister 1962 S.C.402 292-293,295-
296, 346
MaChado v Fontes (1897) 2 Q.B.231 27, 185
Machi v Machi (1960) L.L.R.103 72, 793
McClements c McClements 1958 S.C.268 268,271, 355-
56, 380
McElroy v McAllister 1949 S.C.110 143, 144
McHenry v Lewis (1882) 22 Ch.D.397 582
MacIntyre v MacIntyre 1962 S.L.T.(Notes)70 259
McIver v McIver (1859) 21 D.1103 364
MacKay v MacKay 1957 S.L.T.(Notes) 17 354- 356
McKay v Walls 1951 S.L.T.6 750, 760
McKee v McKee (1951) A.C. 352 16,261,326,
500, 503
620,627,700,
710,711,713-
727,731-734,
739,742,767,802

Mackie v Darling (1871) L.R.12 Eq 319 645
MacKellar v MacKellar (1898) 25 R 883 321,327, 377
McLarty v Steele (1881) 8 R. 435 144
McLean v McLean 1947 S.C.79 62,290,320, 327,343,421,425, 587, 591
MacKinnon's Trustees v Inland Revenue 1920 S.L.T. 240 517
McLean v Hardie 1927 S.C.344; 1927 S.L.T.340 284, 321
McNaught v McNaught 1955 S.L.T.(Sh.Ct) 9 279
McGrath (Infants) Re (1893) 1 Ch.143 229, 346
McShane v McShane 1962 S.L.T.221 516, 519
McShane v Paxton 1922 J.C.26 279
McKeiver v Pennsylvania (1971) 403 U.S.528 239
MacPherson v Leishman (1886) 14 R. 780 311
Macrae v Macrae (1949) P.397 539
Maharanee of Baroda v Wildenstein (1972) 2 Q.B.283;(1972) 2 All E.R.689 477, 584
Makouipour v Makouipour 1967 S.L.T.(Notes)101 760
Malomo v Olushola (1954) 2 N.L.R.1;(1955)15 W.A.C.A.12 262
Mangrulkar v Mangrulkar 1939 S.C.239 486
Mariyama v Ejo (1961) N.R.N.L.R.81 671,673,674, 679
Mather v Mahoney (1968) 3 All E.R. 223 696, 751
Martin v Martin (1895) 3 S.L.T.150 320, 343
Martin v Martin (1940) 9 N.L.R.126 124
Mathew v Brise (1851) 14 Beav. 341 84
May v Anderson (1953) 345 U.S.528 739, 770
Miesegaes v C.I.R.(1957) 37 T.C.493 534
Meinhard v Salmon (1928) 249 New York 458 82
Messina v Smith (1971) P.322 696
Mozeley Stark v Mozeley Stark (1910) 79 L.J.P.D.98 381
Muir v Mulligan (1868) 6 M 1121 363
Murray v Forsyth 1917 S.C.721 249
Nash v Nash (1973) 2 All E.R. 704 378
National Bank of Greece and Athens S.A. v Metliss (1958) A.C.509 281
Nicol v Nicol 1953 S.L.T. (Notes) 67 288,295-96,348, 360, 364
Nugent v Vetzera (1886) L.R. 2Eq 704 348,423,493, 600,698, 700, 706-709,712-13, 717,718,726, 757, 765
Nwokedi v Nwokedi (1958) L.L.R.94 793
"O" (An Infant) Re (1963) Ch.23 360
O.E. (An Infant) Re (1973) 137 J.P.N.85; The Times Feb. 15, 1973, p.15 305-7, 351
O (Infants) Re (1962) 1 W.L.R.724 268,328,337, 347,378,421, 422,559, 637
O (A Minor) Re (1973) 137 J.P.N.85; (1973) Rev. Ghana Law 304-5, 351
Odiase v Odiase (1965)N.M.L.R.196 793
Odunjo v Odunjo (1964) L.L.R.43 550
Ogilvy v Ogilvy Trustees 1927 S.L.T.83 546
Oguche v Iliyasu and Ors (1973) 17 J.A.L.116 96

O'Hara, Re (1900) 2 Ir. R.232 348
Okolie v Ibo (1958) N.R.N.L.R. 89 681
Okoh v Olotu (1953) 20 N.L.R.123 681
Okonkwo v Eze (1960) N.R.N.L.R.80 14,67.72,793
Okpaku v Okpaku (1947) 12 W.A.C.A.137 170-172, 187
Olawoyin v Att-General (1960)N.R.N.L.R.53 147
Oludimu v Oludimu 1967 S.L.T.105 508,516,550, 560, 693,753
Omodion v Fasoro (1966) W.N.L.R. 27
Onwuka v Taymani (1965) L.L.R.62 53
Orr Ewing v Orr Ewing's Trustees (1884) 11.R.600 73
Orr Ewing's Trustees (1885) 13 R (H.L.)1 582
Osunde v Osunde (1961) L.L.R.29 325
Owonyin v Omotosho (1961) 1 All N.L.R.304 116
Oyedu v Oyedu (1972) 2 E.C.S.L.R.41 289.292,320, 374, 422
P (.G.E.) (An Infant) Re (1965) Ch 568C.A. 238-240;503-508, 512,513,519,523, 534,535,545,546, 559,562,748,753-4, 786,791-2
P (LM) v P(G.E.)(1970) 3 All E.R.659 378
Perin v Perin 1930 S.L.T. 51 750
Priest v Priest (1963) 9 F.L.R. 384 (Australia) 263 - 4
Ponder v Ponder 1930 S.C.233; 1930 S.L.T. 187 239-240,492 314-5,516,519, 521,529,549, 560,580, 585
Porter v Frendenberg (1915) 1 K.B.857 475
Pow v Pow 1931 S.L.T. 485 247,284 -285
Philip v Eyre (1870) L.R.6 Q.B.1 27,148,173,185
R v R and I (1961) 1 W.L.R.1334 348
R v Clarke (Re Race) (1857) 7 E & B 186; 119 E.R. 1217 229
R v De Manville (1804) 5 East 221 228
R v Greenhill 4 Ad & El 624; 111 E.R.922 228, 272
R v Gyngall (1893) 2 Q.B. 232 231, 271
R v New (1904) 20 T.L.R. 583 298
R v Walcott (1694) Mod 395 393
Rahintoola v Nizam of Hyderabad (1958) A.C. 379 475
Radoyevitch v Radoyevitch 930 S.C.619 529,549,585,715
Razelos v Razelos (No.2) (1970) 1 All E.R.386 477
Regazzoni v K.C. Sethia (1944) Ltd. (1958) A.C.301 29, 765
Reid v Reid (1887) 24 S.L.R.281 542
Reid v Reid (1901) F 330 320
Ribeiro v Chahin (1954) 14 W.A.C.A. 476 190
Richards v Mellish (1824) 2 Bing 229 387
Robb v Robb 1953 S.L.T.44 437, 592
Robinson v Bland (1760)97 E.R.717 680
Robinson-Scott v Robinson-Scott (1958) P.71 696
Rogers v Guarantee Trust Co. (1933) 288 U.S.123 582
Ross v Ross (1885) 12 R. 1351 437
Rotibi v Savage (1944) 17 N.L.R.77 681

S (An Infant) Re (1958) 1 W.L.R.391 322
S (Infant) Re (1967) 1 W.L.R. 396 427
S(M) (An Infant) Re (1971) 2 W.L.R. 296 588, 592
S v S 1967 S.C. (H.L.) 46 273
S v S (1970) 3 All E.R. 107 340
S v S (1962) 1 W.L.R. 445 377
S v S (1968) 132 J.P.N.197; The Times 14 March 1968 323, 459
Sampsell v Superior Court (1948) 32 Cal 2d. 763 770
Santos v Santos (1972) Fam. 247 98,256, 524
Sargeant v Sargeant 1973 S.L.T.27 587
Savage v Macfoy (1909) Ren505 216
Schibsby v Westenholz (1870) L.R.6 Q.B.155 478, 479
Scrimpshire v Scrimpshire (1752) 2 Hagg.Con.395 52
Seddon v Seddon & Doyle (1862) 2 Sw. & Tr. 640 337, 363
Serbian and Brazilian Loan's Case, P.C.I.J. Rept., Series A, Nos 20/21 1929 32
Shanks v Shanks 1965 S.L.T. 330 517
Shaw v Gould (1868) L.R.3 (H.L.)55 52
Shelley v Westbrooke, Jacob 266; 37 E.R.870 230
Sholy, Re (1932) 11 N.L.R. 37 61,171, 187
Sim v Robinow (1892) 19 R.665 483, 582
Singh v Rajah of Faridkote (1894) A.C.670 478
Skinner, Ex p. (1824)9 Moor C.P.278 228
Smith v Smith (1924) 5 N.L.R.105 137, 138
Smith v Smith 1964 S.C.218 251
Solomon v African Steamship Co. (1928) 9 N.L.R. 99 185
Somorin v Somorin CCHCJ/11/72 (Lagos High Court) 260,269,325, 421
Sowa v Sowa (1961) P.70 180
Srini Vasan v Srini Vasan 1946 P.67 16
Starkowski v Attorney General (1954)A.C.155 282, 615
Stergiou v Stergiou (1963) S.L.J.R. 182 661- 662
Stewart v Stewart 1914 S.L.T. 310 364
Stuart v Moore (1861) 4 Ml 73,88,144,473, 499,503,593, 700,704-5, 726, 728
Sutherland v Sutherland 1959 S.L.T.(Notes)61 294, 295
Sutherland v Taylor (1887) 15 R 224 211
Syme v Cunningham 1973 S.L.T.(Notes)40 273, 312
Symington v Symington (1875) 2 R (H.L.41 228,235,247,268, 320,327,364,372,377

T (An Infant) Re (1969) 1 W.L.R.1608 424
T (Infants) Re (1968) Ch 704 372,546,587, 745,746

Taylor v Taylor (1935) 2 W.A.C.A. 248 199
Taylor v Taylor (1970) 44 Aust. L.J.559 429
Terry's Will, Re (1854) 19 Beav. 580 35
Thain, Re (1926) Ch 676 292,302,319,347, 421, 714

Travers v Holley (1953) P.246 C.A. 750, 752
Travnicek v Travnicek (1966) A.L. R964 (Australia) 456

Trustees of Islamic Missionary Society v Anjorin (Unreported) Suit No. CAW/116/68 (Western Nigeria) 62
Udny v Udny (1869) L.R. 1 Sc & Div. 441 52, 61, 143
Udom v Udom (1962) L.L.R.112 15, 793
United Africa Co. Ltd. v Saka Owoode (1955) A.C.130 184
United Railways of the Havana, Re (1961) A.C. 1007 22
Voinet v Barrett (1885) 55 L.J.Q.B.39 481
W v W (1926) P.111 342, 346
W v W and C (1968) 1 W.L.R. 1310 327
W (An Infant) Re (1971) 2 All E.R.49 (H.L.) 40
W (An Infant) Re (1970) 3 All E.R.990 C.A. 344
W (An Infant) Re (1964) Ch 202, C.A. 43, 455
Wakeham v Wakeham (1954) 1 W.L.R. 366 346,359,420, 457
Ward v Laverty (1925) A.C.101 297,310,346, 360
Ward v Walker 1920 S.C. 80 311
Warden v Warden 1951 S.C. 508 750
Warrender v Warrender (1835) 2 Sh & M 151 141
Wellesley v Wellesley (1828) 4 E.R.1078(H.L.) 236, 362
Westergaard v Westergaard 1914 S.C. 977 549, 715
Whicker v Hume (1858) 7 H.L. Cas.124 522
Whitworth Street Estates (Manchester)Ltd. v James Miller & Partners Ltd. (1969) 2 All E.R. 210 C.A. 22, 26
Whyte, Re (1946) 18 N.L.R. 70 670,673,674 675,677-8
Willoughby v Willoughby (1951) P.184 293,343,359, 367, 421
Willoughby v Willoughby (1885) 30 Ch.D.324 510
X's Settlement, Re (1945) Ch.44 590
Young v Abina (1940) 6 W.A.C.A. 180 62,171,172, 188
Young v Bristol Aeroplane Co.(1944)K.B.718 340
Zamoski v Zamoska 1960 S.L.T.(Notes)26 364
Setlin v Akpan (Unreported) Suit No. M/14/69 (Lagos High Court) 378

TABLE OF STATUTES

A. UNITED KINGDOM ENACTMENTS

Act of Union 1707 19
Art IV 69
" XVII 72
Administration of Justice Acts, 1956 (C.46) S.4 533
Adoption Act, 1926 38
Adoption Act, 1958 (C.53) S.11 533
Appellate Jurisdiction Act, 1876 144

Bastards (Scotland) Act, 1836 (C.22) 313
Betting, Gaming and Lotteries Act, 1963
SS21 and 22 403

Children Act, 1938 400
Children Act, 1948
SS.1 and 2 303
S.12 266,404
Children and Young Persons Act, 1933 399
S.1 401
SS. 5 and 7 403
SS. 8 and 9 404
SS. 11 and 12 403
S.31 402
SS. 37, 39 and 44 402
Children and Young Persons Act, 1969 SS.1 and 70 6
Children and Young Persons Harmful Publications Act, 1955 404
Children and Young Persons(Scotland) Act,1937 (C.37) 400
S.12 279,401
SS.16 and 18 403
SS.19 and 20 404
SS.22 and 23 403
SS.45 and 46 402
SS.49 and 56 402
Children Bill (1975)
Clause 4 447,454
Cl. 7 455,527
Cl. 37 453,454
Cl. 45 453
Cl. 47 790
Cl. 54 467
Colonial and Other Territories Divorce Jurisdiction Act (1926-1950) 751
Conjugal Rights (Scotland) Act, 1861 S.9 246
Criminal Law Amendment Act, 1885, SS.2,4-7 401
Criminal Law Amendment Act,1922 S.4 401
Custody of Infants Act, 1839 (C.54) 1,245
Custody of Infants Act, 1873 245,246
Custody of Children Act 1891 (C.3) 248
S.1 249,300
S.2 249,250
S.3 250,300
S.4 250,279

Custody of Children (Scotland) Act, 1939 (S.1) 513

Divorce Reform Act, 1969 (C.55) S.2 525
Domicile and Matrimonial Proceedings Act,1973 (C.45) 516, 751
Schd. 1 47, 577
Schd. 2 519, 550
Schd. 3 47, 577
S.1 517
S.2 60
SS.3 and 4 517
S.5 332, 532
S.7 234
S.10 532, 550

Education (Scotland) Act, 1962 (C.47)
S.S. 8-10 279
S. 31 279, 399
Elementary Education Act, 1876 399
Employment of Children Act, 1973 S.2 400
European Communities Act, 1972 (C.68) S.2 808

Family Allowance Act, 1965 S.3 314
Family Law Reform Act, 1969
S.1 447
S.14 314
Firearms Act 1968 SS. 22-24 403

Gaming Act, 1968 SS. 7 and 17 403
Guardianship Act, 1973 (C.29)
Scdl. 3 222, 758
S. 1 41,223,278,291, 541
S.4 453
S.7 84
S.10 41,78,223,291,541, 758
S.12 453
Guardianship of Infants Act, 1886 (C.27) 312
SS.2,3 and 5 247
S.7 248, 300
S.9 165, 247
Guardianship of Infants Act, 1925 (C.45)
Preamble 284
S.1 102,221,253-5,259, 276
290, 540, 758
S.3 447
S.7 165,455, 527
S.8 452
S.10 83
Guardianship of Minors Act, 1971(C.3)
S.1 225,253,259,276, 540
S.9 447
S.13 452
Guardianship (Refugee Children) Act, 1944 (C.8) 4

Hypnotism Act, 1952 S.3 404

Illegitimate Children (Scotland) Act, 1920 S.2(1) 312

Judicial Proceedings (Regulation of Reports)Act,1926 439

Land Transfer Acts, 1875, 1897 169, 171
Law Commission Act, 1965 13, 49
Law Reform (Miscellaneous Provisions) Act,1940 S.2 313
Law Reform (Miscellaneous Provisions) Act,1949 (C.100) S.9 272-3
Legitimacy Act, 1926 (C.60) S.9 313
Legitimacy Act, 1959 (C.73) 312-313

Matrimonial Causes Act, 1950 S.23 361
Matrimonial Causes Act, 1973 (C.18) 397
S. 23 361
S. 27 361, 447
S.41 397
S.42 397, 548
S.43 397
Matrimonial Proceedings (Children) Act 1958 (C.40) 255, 397
S 1 314
S.4 361
S.6 257,397, 400
S.10 257
S.11 257,258, 687
S.12 258
S.14 288
S.7 256
Matrimonial Proceedings (Polygamous Marriages)Act 1972 (C.38) 13,146, 180
Money Lenders Act, 1900 S.5 404

National Insurance Act, 1965 S.41 314
Nigeria (Const) Order In Council 1954 (S.I. No. 1146 of 1954) 70
Nigeria (Const) Order in Council 1960 (S.I. No. 1652, 1960) 71
Nigeria Independence Act, 1960 (C.55) 71
Nigeria Republic Act, 1963 S.1
Nurseries and Child Minders Regulation Act 1948 400

Pawn Brokers Act, 1872 404

Recognition of Divorces and Legal Separations Act 1971 (C.53) 60,695, 751
S.3 533
Registration of Births, Deaths and Marriages (Scotland) Act 1965
S.19 314
S.43 278
Rules of Court of Session 189 (a) 273, 563

Social Work (Scotland) Act 1968
Schd. 2 402
Schd. 8 257, 303
S. 39 402
Statutes of Distributions, 1670, 1687 190
Statute of Limitations, 1623 168

Tattooing of Minors Act 1969 404
Trustee Act, 1925 SS. 31 and 32 84
Trusts (Scotland) Act, 1961 S.2 83

Wills Act, 1963 (C.44) S.1 533
Workmen's Compensation Act, 1925 S.4 36

B. NIGERIAN AND FEDERAL

(References to a Chapter number are, except where otherwise indicated, references to the Chapter number in the 1958 Revised Edition of the Laws of Nigeria and Lagos).

Children and Young Persons (Harmful Publications) Act (No. 52 of 1961) S.2 400
Children and Young Persons Act, Cap. 32 448
Constitution of the Federation of Nigeria (No.20 of 1963)
Schd 105, 198
S.23 244
S.26 375
S.27 205
S.28 392, 690
S.69 200-201
S.120 57, 724
S.156 148
Constitution of Nigeria 1954 68
S.3 70
S.142 71
S.149 70
Constitution of Nigeria 1960 68
Constitution (Suspension and Modification) No.9 Decree (No. 59 of 1966) 95
S. 1(1) 63
Constitution (Suspension and Modification)No. 5 Decree (No. 34 of 1966) 63, 95
Constitution (Suspension and Modifications) Decree (No .1 of 1966) 72, 95
S. 3 200, 201
Criminal Code Act (Cap 42) Schd. S. 362 220, 401

Federal Supreme Court (General Provisions) (Act Cap 68) S.147 70

Interpretation Act (or Law Reform Miscellaneous Provisions) Act (Cap 89) 21, 149
S.3 213, 649
S.45 21,153,160, 175
188,213, 252
649, 695

Liquor Licensing Act, 1959 S.36 403

Matrimonial Causes Decree (No.18 of 1970) 135-6
S.1 473
S.8 199, 174
SS.11-14 375, 376
S.57 97-99,256, 584
S.69 98, 275
S.71 44,97,257-8,260,262, 446
S.72 258
S.73 446
S.80 778
S.81 59,186,218,696, 753
S 114 44,199,473, 778
Part IV 256

Marriage Act, Cap 115 33, 198
Mid-West Region Act No.6 of 1962 94
Mid-West Region (Transitional Provisions) Act, No.19 of 1963 94

Revised Edition (Laws of the Federation) Decree, No. 52 of 1971 15

Sheriffs and Civil Process Act (Cap 189)
S.105 777-8
State Courts (Federal Jurisdiction)Act (Cap 177) S.4 199
States (Creation and Transitional Provisions) Decree (No.14 of 1967) 95,96,128, 646
States (Creation and Transitional Provisions) (Amendment Decree) (No.19 of 1967) 96
Supreme Court Ordinance (No.4 of 1876) 93
Supreme Court Ordinance (No.17 of 1906) 93
Supreme Court Ordinance (No.6 of 1914) 94
Supreme Court Ordinance,1943 (No.23 of 1943) 128, 211
Supreme Court Proclamation (No.6 of 1900) 93

C. EASTERN STATES

Adoption Law, Eastern Nigeria, No.12 of 1965 38

Children and Young Persons Law (Cap 19) 399

Fatal Accidents Law (Cap 52) 35

Magistrates Courts (Amendment Edict.)1971 (No.23 of 1971) S.16 651

High Court Law (Amendment) Edict 1971 (No.22 of 1971)S.3 127
High Court Law (No.27 of 1955)
SS. 11 and 14 127
S.17 174, 207
S.19 102,156, 157
S.20 648

D. LAGOS STATE

Children and Young Persons Act Cap 32 399

Lagos State (Adaptation of Laws)(Miscellaneous Provisions) Order 1972 (L.S.L.N.16 of 1972) S.2 127

High Court of Lagos Act (Cap 80 in Laws of Nigeria 1958 ed)
S.6 694
S.11 127
S.13 156
S.15 102, 157
S.16 174, 199
S.27 207, 648

E. MID WESTERN STATE

Customary Courts Edict, No.38 of 1966
Schd. 2 44, 130
Part VI 329
S.25 44,222,259, 656
S.27 886
S.33 129

High Court Law, No.9 of 1964 S.10 128

F. WESTERN STATE

Chiefs Law (No.20 of 1957) S.17 531
Children and Young Persons Law (Cap 20) 399
Criminal Code (Cap 28) S.302 220
S.303 401
Customary Courts Law (Cap 31)
S.17 653
S.19 212, 653
S.20 653
S.23 212, 656

High Court Law (Cap 44)
S.9 127
S.12 153,207, 648
S.16 102, 157

Infants Law (Cap. 49) 21,101,132, 135
S.2 136, 313
S.7 136
S.12 727
SS.16-19 248
S.17 249
S.18 250
S.23 452
S.24 221, 250

Laws of England(Application) Law. Cap 60 192
S.3 101,151, 160
S.4 101

Marriage, Divorce and Custody of Children Adoptive Bye Law (W.N.L. Notice 456 of 1958) 120

G. NORTHERN STATES

(Chapter references are to the 1963 Edition of the Laws of N.Nigeria)

Area Courts Edict (North-Central State,No.2 of 1967)
Schd. 1 44,130, 132
S.2 107,131, 215
S.4 133, 134

Area Courts (Contd.)
S.14 481
S.17 130
S.20 153,652-656, 660
S.21 153, 678
S.23 44,45,222,259, 656
S.28 86
SS.33 and 48 129

Children and Youmg Persons Law 1958 398

Declaration of Borgu Marriage and Custom Order (para. 6) 278

High Court Law (Cap 49)
S.13 174
S.17 127, 212
S.28 150,160,178,647, 695
S.29 472, 647
S.30 156
S.31 102, 157
S.34 3,153,207,647, 661

Idoma Local Authority Declaration (of Customary Law) para 15 119,158, 669
Igbirra Local Authority Declaration (of Customary Law) para 22 325
para 33 120, 325

Native Authority (Amendment) Edict, Kano State (No.14 of 1968) S.2 119
Native Authority Law (Cap 77) S. 49 118-119
Native Courts Law Cap 78 (No.6 of 1956) 654
S.2 105, 131
Northern Nigeria Constitution (No.33 of 1963) 105, 106

Penal Code Law SS 387,388 205

Sharia Court of Appeal Law Cap 122 (No.16 of 1960)
S.12 44,46, 106, 113, 659

INTERNATIONAL CONVENTIONS (TREATIES)

Convention on the Jurisdiction of the Authorities and the Law Applicable in the Matter of the Protection of Minors (1961).

Hague Convention on Guardianship (1902).

Hague Convention on Jurisdiction, Applicable Law and Recognition of Decress Relating to Adoptions (1965).

Hague Convention on the Recognition of Divorces and Legal Separations (1970)

Hamburg Draft Convention on the Custody of Infants (1960)

Statute of the International Court of Justice

Treating of Session of Lagos (1861)

United Nations Declaration of Elimination of Discrimination Against Women (1967)

United Nations Declaration of Human Rights (1948)

United Nations Declaration of the Rights of the Child (1959)

SELECT BIBLIOGRAPHY

A Books

Aguda, - Select Law Lectures and Papers (1971 Ibadan)
Allott, A.N. - New Essays in African Law (1970 - London)
Anderson, J.N.D. - Islamic Law in the Modern World (1959 - London)
Anton, A.E. - Private International Law (1967 - Edinburgh)
Arbery, A.J. - The Koran Interpreted (1964
Beale, H. - The Conflict of Laws (1935 New York)
Bevan, H.K. - The Law Relating to Children (1973 - London)
Bing, G. - Reap the Whirlwind: An Account of Kwame NKrumah's Ghana from 1950 - 56
Blackstone, W. - Commentaries on the Law of England (1787 ed - London)
Bromley, P.M. - Family Law (4th ed 1971 - London)
Brownlie, I. - Basic Documents on Human Rights (1971 - Oxford)
Cavers, D.F. - The Choice of Law Process (1965 Ann Abbn)
Cheshire, G.C. - Private International Law (1st and 7th eds
Cheshire and North - Private International Law (8th London)
Clive, E.M. and Watt, - Scots Law for Journalists (2nd ed 1969 - London and Edinburgh)
Clive, E.M. and Wilson, - The Law of Husband and Wife in Scotland (1974 - Edinburgh)
Coulson, N.J. - A History of Islamic Law (1964
Cretney, S. - Principles of Family Law (1974 London)
Currie, B. - Selected Essays on the Conflict of Law (1963 Durham, North Carolina)
Daniels, E.W. - The Common Law in West Africa (1964 - London)
Dicey, A.V. and Morris, J.H.C. - The Conflict of Laws (8th ed 1967 - London)
Duncan and Dykes - Principles of Civil Jurisdiction (1911 - Edinburgh)
Elias, T.O. (ed) - Law and Social Change in Nigeria (1972 Lagos)
Elias, T.O. - Law in a Developing Society (1969 Lagos University)
Elias, T.O. - The Nature of African Customary Law (1962 Manchester)
Elias, T.O. - The Nigerian Legal System (1963 2nd ed London)
Elias, T.O. - Nigeria: The Development of its Laws and Constitution (1967 London)
Elias, T.O. - The Impact of English Law Upon Nigerian Customary Law (1958 Lagos)
Elias, T.O. - Makers of Nigerian Law
Ehrenzweig, A.A. - Conflict of Laws (1962 St. Paul, Minnesota)
Erskine - Institutes of the Law of Scotland (1828 Edinburgh)
Fraser - Parent and Child (2nd ed 1856
Fraser, P. - The Conflict of Laws in Case of Divorce (1860 Edinburgh)
Friedman, W. - Law in a Changing Society (2nd ed 1970 London)
Gibb, A.D.G. - The International Law of Jurisdiction (1926
Gloag and Henderson - Introduction to the Law of Scotland (6th - Gibb and Walker ed 1956 Edinburgh)
Handbook of the National Conference of Commissioners on Uniform State Laws (1920 USA) (and 1968)
Harper, F - Problems of the Family (1952 Indianapolis)
Harrison, F - On Jurispondence and the Conflict of Laws (1919 Oxford)
Goldstein, Freud, and Solnit - Beyond the Best Interests of the Child (1973 New York and London)
Graveson, R.H. - The Conflict of Laws (6th ed 1969 London)

Graveson R.H. ed - A Century of Family Law (1957 - London)
Hart, H.L.A. - The Concept of Law (1961 - Oxford)
Kames - Principles of Equity 1760 Edinburgh
Kames - Historical Law Tracts (4th ed 1827 - Edinburgh)
Kahn - Freund, O - The Growth of Internationalism in English Private International Law (1960 Jerusalem)
Kasunmu, A.B. and Salacuse, J - Nigerian Family Law
Keay E.A. and Richardson, S.S. - The Native and Customary Courts in Nigeria (1966
Kittrie, N - The Right to Be Different (1971 Baltimore)
Lauterpacht, Sir H - International Law: Collected Papers (Vol I - General works) E Lauterpacht ed 1970 Cambridge)
Lloyd - Public Policy (1953 London)
Lowenzen - Selected Articles on the Conflict of Laws
Lorimer, J - Institutes of the Law of Nations (1883-4 Edinburgh)
Luggard, Sir F - Political Memoranda 1913-18
MacCormick, N - Law As Institutional Fact (Univ of Edinburgh, Inaugural Lecture 52 1973)
MacKintosh, J.P. - Nigerian Government and Politics
MacMillan - Law and Other Things (1938 Cambridge)
Morris, J.H.C. - The Conflict of Laws (1971 - London)
Mortlock, B - The Inside of Divorce (1972 - London)
Mustafa, Z - The Common Law in the Sudan (1971 Clarendon Press, Oxford)
Neekam, A - Experiences in African Customary Law (1966 Edinburgh)
Nwarbreze, B.O. - Constitutional Law of the Nigerian Republic (1964 London)
Nwarbneze, B.O. - Machinery of Justice in Nigeria (1963 London)
Nygh, P.E. - Conflict of Laws in Australia (2nd ed 1971 Sydney)
Odumosu, O - The Nigerian Constitution: History and Development (1963 London)
Parental Custody and Matrimonial Maintenance (1963 British Institute of International and Comparative Law)
Parry, C - The Sources and Evidences of International Law (1965 Manchester)
Park, A.E.W. - The Sources of Nigerian Law (1963 Lages)
Patterson, - A Compendium of English and Scottish Law (1860 Edinburgh)
Pollock, F and Maitland F.W. - The History of English Law (2nd ed 1898, Reissued 1968 Cambridge)
Rabel, E - The Conflict of Laws: A Comparative Study (4 Vols: 2nd ed Ann Abbor 1958)
Read, H.E. - Recognition and Engorcement of Foreign Judgments in the Common Law Units of The British Commonwealth (1938)
Restatement of the Law, Second, Foreign Relations Law (American Law Institute 1965)
Restatement of the Law, Second, Conflict of Laws (American Law Institute)
Salacuse, J - Selected Survey of Family Law in Northern Nigeria (1965 Zaria)
Shakespeare, W - Macbeth
Shapira, - The Interest Approach to Conflict of Laws (1970 The Hague)
Shorter Oxford Dictionary
Smith, T.B. - A Short Commentary on the Law of Scotland (1962 Edinburgh)
Smith, T.B. - British Justice: The Scottish Contribution (1961 London)
Smith, T.B. - Studies Critical and Comparative (1962 Edinburgh)
Spiro, E - Conflict of Laws (1973 Cape Town)
Statement made by the Government of Northern Nigeria on Additional Adjustments to the Legal and Judicial Systems of Northern Nigeria (Govt Printer, Kaduna)
Story- J - Commentaries on the Conflict of Laws - Foreign and Domestic (1835 Edinburgh)
Trimingham - A History of Islam in West Aftrica (1962)
Wolff, M - Private International Law (1950 Oxford)

PERIODICALS

1 "African Foster Children", In West Africa (magazine)
2 Agbede, I.O, "Lex Domicili in Contemporary Nigeria: A functional Analysis" (1973) 9 African Law Studies (N.Y.) p 61
3 Aguda and Aguda "Judicial Protection of Some fundamental Rights in Nigeria and the Sudan before and during Military Rule (1972) 16 J.A.L. 130
4 Aihe, "Fundamental Human Rights and the Military Regime in Nigeria: What did the Courts say?" (1971) 15 J.A.L. 213
5 Ajayi, "The Interaction of English Law and Customary Law in Western Nigeria" (1960) 4 J.A.L. 48
6 Akolawin, N.O, "Personal Law in the Sudan: Trends and Developments" (1973) 13 J.A.L. 149.
7 Allott, A.N, "The Common Law of Nigeria" in Nigerian Law: Some Recent Developments (1965) I.C.L.Q Supplementary Publication No. 10 p 31
8 Anderson, J.N.D., "A, Major Advance" 1961 24 M.L.R 616
9 Anderson, "Conflict of Laws in Northern Nigeria" (1957) 1 J.A.L 2
10 Anton, "The Introduction into English Practice of Continental Theories on the Conflict of Laws" (1956) S.I.C.L.Q 536
11 Atkinson, "The Uniform Ancillary Administration and Probates Acts" (1954) 67 Harv L. Rev. 619
12 Bates, F "Custody of Children: Towards A New Approach" (1975) 49 Aust.L.J.
13 Beach, J.K, "Uniform Interstate Enforcement of Vested Rights" (1918) 27 Yale L.J. 655
14 Benda-Beckmann, F. "Conflict of Marriage Laws in Malawi" (1968)
15 Berriedale - Keith, A, "Foreign Guardianship and English Control of Wards" (1940) 22 Jo Comp. Leg (3rd Se) 234
16 Blom-Cooper, L.J. "The Paramountcy of the Child's Welfare" (1955) 18 M.L.R. 490
17 Bodenheimer, BM, "The Uniform Child Custody Jurisdiction Act" (1969) 3 Fam L.Q. 304.
18 Carter, "Some Impressions of Private International Law in Australia" (1954-56) 3 Annual Law Review 67
19 Cavers, "Change in Choice of Law Thinking and its Bearing on the Klaxon Problem" (in A.L.I. the Division of Jurisdiction between States and Federal Courts)
20 Cavers, "Contemporary Conflicts Law in American Perspectives" (1970) III Recueil Des Cours Vol 1310 75
21 Cavers, "The Value of Principled Preferences" (1971) 49 Tex L. Rev 211
22 Charteris, "Scotland and the Common Law System of Private International Law" (1938) 11 Austr. L.J. 378
23 Cheatham, "Problems and Methods in Conflict of Laws" (1960) Recueil Des Cours II, p 237
24 Cheatham, "A federal Nation and the Conflict of Laws" in the Conflict of Laws and the International Contracts (Univ Michigan Summer Institute on International and Comparative Law 1949)
25 Clive, E.M., "Changes in the Law of Domicile " 1973 SLT (News) 241
26 Clive, E.M., "Domicile and Guardianship of Children" 1973 SLT (News) 84
27 Clive, E.M., "The Domicile of Minors" (1966) Jur. Rev. 1.
28 Clive, E.M., "The Guardianship Act 1973" 1973 SLT (News) 225

29 Clive, E.M., "The New Law on Jurisdiction in Divorce" - 1973 SLT (News) 249
30 Comment, "forum non conveniens, A New Federal Doctrine" (1947) 56 Yale L.J. 1234
31 Cooper, "The Common Law and the Civil Law - A Scot's View" (1950) 63 Harv. L.Rev 468
32 Cotran, "The Matrimonial Causes Decree 1970" (1972) 16 J.A.L. 40
33 Cottrell, J, "An End to Slavishness? A Note on Alli v Okulaja" (1973) 17 J.A.L. 247
34 Cretney " The Application of Equitable Doctrines by the Courts in East Africa" (1968) 12 J.A.L. 119
35 Cretney, "Custody and Morals" (1969) New L.J. 822
36 Cross "Wards of Court" (1967) 83 L.Q.R. 200
37 Currie "Comment on Babcock & Jackson" (1963) Col. L.Rev 1233
38 Currie "The Disinterested Third State" (1963) 28 Law & Contemp Prob 754.
39 Daniel, "The Interaction of English Law with Customary Law in West Africa" (1964) 13 I.C.L.Q. 574
40 Davies, C "The Department Committee on the Adoption of Children and the Tug of War Cases" (1973) 36 M.L.R. 245
41 Diwan, P., "The Welfare Principle and Public Responsibility towards Children in Modern World" in Lawyer (Journal of the Indian Law Institute - Madras State Unit) (1969) Volume 1 No. 8 p 147.
42 Donaldson, "Some Conflict Rules of Scots Law" 1954 39 Grotius so 145.
43 Du Bois, A.B., "The Significance in Conflict of Laws of the Distinction Between Interstate and International Transactions" (1933) 17 Minn L. Rev 361
44 Dworkin, R.M. "Does Law have a Function? A Comment on the Two-Level Theory of Decision" (1965) 74 Yale L.J. 640
45 Dworkin, R.M., "Is Law a System of Rules?" (in Essays in Legal Philosophy, Summers Ed, Oxford 1968)
46 Dworkin, R.M., "Social Rules and Legal Theory" (1972) 81 Yale L.J. 855.
47 Ehrenzweig A.A., "A Proper Law in a Proper Forum: A "Restatement" of the 'Lexfori Approach'" (1965) 18 Okla L. Rev. 340
48 Ehrenzweig A.A., "Interstate and International Conflicts: A Plea for Segregation" (1957) 41 Minn L. Rev 717.
49 Ehrenzweig A.A., "Interstate Recognition of Custody Decrees" (1953) 51 Mich L. Rev. 345
50 Ehrenzweig A.A., "The Interstate Child and Uniform Legislation: A Plea for Extraligions Proceedings" 1965 64 Mich L. Rev 1.
51 Fain, H, "The Role and Responsibility of the Lawyer in Custody Cases" (1967) 1 Fam L.Q. 36
52 Finlay & Gold, "Paramount Interest of the Child in Law Psychiatry (1971) 45 Aust. L.J. 82

53 Finlay, H.A., "First or 'Paramount'? The Interests of the Child in Matrimonial Proceedings" (1968) 42 Aust.L.J 96

54 Foster & Freed, "Child Custody Law" (1964) 39 N.Y.U.L Rev 423

55 Geddes, R.S., "Should Something be done about Kidnapping?" (1972) 21 I.C.L.Q 774

56 Goadby, "Othodox Law of Divorce" (1913) 13 Jo. Comp Leg. (3rd Series 268)

57 Goldwater C.I. in "Enforcing Foreign Custody Orders" (1975) 10 Is L. AV 135

58 Goodrich, "Foreign Facts and Local Fancies" 25 Verg. L Rev. 26

59 Graveson, R.H., "B oardman & Boardman Through English Eyes" 23 Conn B.I. 173

60 Graveson, R.H., "Choice of Law and Choice of Jurisdiction in the English Conflict of Laws" (1951) 28 B.Y.B.I.L. 273

61 Graveson, R.H., "Judicial Justice, as a Contemporary Basis of English Conflict of Laws" in 20th Century" Comparative and Conflicts Law 1961 p 307

62 Graveson, R.H., "The Judicial Unification of Private International Law" (in Netherland's International Law Review, 1962 Ed).

63 Graveson, R.H. "Jurisdiction Matters of Child Custody" (1952) Conn B.J. 44

64 Graveson, Newman, Anton & Edwards, "The Eleventh Session of the Hague Conference of Private International Law (1969) 18 I.C.L.Q. 618

65 Graveson, R.H., "Philosophical Aspects of the Conflict of Laws" (1962) 78 L.Q.R. 337

66 Graveson, R.H., "The Special Character of English Private International Law" (1972) 19 Neth. Int. L. Rev. 31.

67 Greig J.W. "The Joint and Equal Guardianship of Infants in Various Legal Systems (1924) 6 Jp Comp. Leg 238

68 Hall, J.C., "Family Law- Custody of Children" (1962) Camb L.J. 169.

69 Harris B "Split Custody Orders and Maintenance" (1972) 122 New L.J. 300

70 Hartley, "The Policy Basis of the English Conflict of Laws of Marriage" (1972) 35 M L R 571

71 Hatherley, J.E. "The Role of the Child's Wishes in Califonia Custody Proceedings" (1973) 6 Univ Cal, Darries L Rev. 332

72 "H.M." (Contributor) "Legal Kidnapping" (1959) 75 Scottish L. Rev 165

73 Horowitz "Towards A Federal Common Law of Choice of Law 1967 14 U.C.L. A Law Rev. 1191.

74 Ijalaiye, D.A., Comment: " Chime & Elikwu - Judicial Precedent" (1971) 9 Nig. B.J. 63

75 Ijaodola, "The Proper Place of Islamic Law in Nigeria" (1970) 4 H.L.J. 129

76 Ibegbune, "A Critique of the Nigerian Law of Divorce under the Matrimonial Causes Decree 1970" (1970) 14 J.A.L. 178

77 Inglis, B.D., "Jurisdiction, The Doctrine of Forum Conveniens and Choice of Law in the Conflict of Laws" (1965) 81 L Q R 380

78 Inker & Parretta, "A Child's Right to Counsel in Custody Cases" (1970) 55 Mass L.Q 229

79 James, "The Legal Guardianship of Infant" (1966) 82 L.Q.R., 323

80 Jegede M., "Equity and Nigerian Law" (1969) 3 Nig L.J. 57.

81 Kahn-Freund, O, "Guardianship in Private International Law" (1940) 4 M.L.R. 64

82 Kahn- Ferund, O "Reflections on Public Policy in the English Conflict of Laws" (1953) 39 Grotius So. 39.

83 Kasunmu, "The Matrimonial Causes Decree 1970. A Critical Analysis" (Part II) (1971) 2 Nig. Jo. Contemp L 135.

84 Katzenbach, N, "Conflicts on an Unruly Horse: Reciprocal Claims and Tolerances in Interstate and International Law" (1956) 65 Yale L.J. 1087.

85 Kay. H. "Ehrenzweig's Proper Law and Proper Forum" (1965) 18 Okla L. Rev 233.

86 Kay, H. & I. Philips "Provery and the Law of Child Custody" (1960) 54 Cal. L. Rev 717

87 Keith, A.B., "Foreign Guardianship and English Control of Wards" (1940) 22 Jo. Comp L. 234

88 Kelly S "Localising Rules and Differing Approaches to the choice of Law Process" (1969) 18 I.C.L. Q. 249.

89 Kleinfeld, A., "The Balance of Power Among Infants, Their Parents and the State" Part III (1970) 5 Fam. L.Q. 63

90 Laing, D.J.S. "The Status of Foreign Custody Orders in New Zealand" (1974) 7 Victoria University of Wellington L. Rev 351

91 Leflar, R, "Choice - Influencing Considerations in Conflicts Law" (1966) 41 N.Y.U.L. Rev. 267

92 Leflar, R, "Conflicts Law: More on Choice- Influencing Considerations" (1966) 54 Cal. L. Rev. 1584.

93 Leflar, R., "True "False Conflicts', et alia" (1968) 48 Boston U.L. Rev. 164

94 Likhouski, E, "Foreign Orders of Custody" (1951) 4 I.L.Q. 506

95 Lipstein, K., "The Hague Conventions on Private International Law, Public Law and Public Policy" (1959) 8 I.C.L. Q. 506.

96 Lysaght, "Children in Transit: Child Custody and the Conflict of Laws" (1973) 6 Univ. Cal at David L. Rev. 160.

97 Malina and Blochman, "Parens Patriae Suits for Treble Damages Under Anti- Trust Laws" (1970-71) 65 North-Western Univ. L. Rev. 193.

98 Marshall, O.R., "Conflict of Interest and Duty" (1955) 8 Current Leg Prob 91

99 Martyn, R, "Principles and Practice in Infancy Cases" (1970) New L.J. 668

100 McNair, "The Debt of International Law in Britain to the Civil Law and the Civilians" (1954) 39 Grotius 50 183

101 Mehren, Von, "Conflict of Laws in a Federal System: Some Prespectives" (1969) 18 I.C.L.Q. 681.
102 Michaels, N "The Dangers of A Change in Parentage in Custody and Adoption Cases" (1967) 83 L.Q. R. 547.
103 Nadelman, "Joseph Story and George Joseph Bell" 1959 Jur - Rev. 31.
104 Nadelman, "Marginal Remarks on the New Trends in American Conflicts Law" (1963) 28 Law and Contemp Prob 860
105 Nadelman, "Need for Better Coordination of Organisational Work on Conflict of Laws Regulations" (1974) 1 Revue De Droit Uniforme (Uniform Law Review) 104
106 Newhaus, P.H. "Legal Certainty Versus Equity in the Conflict of Laws" (1963) 28 Law and Contemp Prob 795
107 Nevitt, D. A and Levin, J. "Social Policy and the Matrimonial Home" (1973) 36 M.L.R. 345.
108 Note :"Academic Judges in Africa" (1972) 16 J.A.L. 101
109 Note : "A Child's Religion" (1962) 106 Sol. J. 804
110 Note : "Child Custody Decrees- Interstate Recognition" (1964) 49 Iowa L. Rev. 1178.
111 Note : "Ford & ford: Full Faith and Credit to Child Custody Decrees", (1904) 73 Yale L.J. 134
112 Note : "Jurisdictional Bases of Custody Decrees" (1939-40) 53 Harv. L. Rev 1024.
113 Note : "McKee & McKee: Custody of Infant - Duty of Court in Face of Foreign Order" (1951) 4 I.L.Q. 384
114 Note : "The Califonia Custody Decree" (1960) 13 Stan L. Rev 108
115 Nussbaum, "Public Policy and the Political Crisis in the Conflict of Laws" (1940) 49 Yale L.J 1038
116 Obilade, A, "Jurisdiction in Customary Law Matters in Nigeria: A Critical Examination" (1973) 17 J.A.L. 227
117 O'Connell, D.P. "Rival Claims of Parents in Custody Suits" Vol. 1 Univ Queensland L.J. p 187
118 Pace, P.J., "Guardianship of Minors" (1971) 121 New L.J 315
119 Palmer, N. "Domicile and Matrimonial Proceedings Act" (1973) New L.J. 960
120 Palmer N, "The Domicile of An Infant- Some Comments Upon the 1973 Act" (1974) Fan Law (Journal) 35
121 Paulsen M, and Best J, "Appointment of a Guardian in the Conflict of Laws" (1960) 45 Iona L. Rev 212
122 Prebble, "Choice of Law to Determine the Validity and Effect of Contracts A Comparison of English and American Approaches to the Conflict of Laws (1973) 58 Corn L.R. 433.
123 Ratner, L.G., "Legislative Resolution of the Interstate Child Custody Problem: A Reply to Professor Currie and a Proposed Uniform Act" (1965) 38 So Cal L. Rev 183
124 Reese and Green, "That Elusive Word 'Residence' (1953) 6 Vand L. Rev. 561.

125 Reese, W.L.M.,"Contracts and the Restatement of Conflict of Laws Second" (1960) 9 I.C.L. Q 531
126 Reese, W.L.M, "Choice of Law: Rules or Approach" (1972) Corn L Rev 315.
127 Reese, W.L.M, " Major Areas of Choice of Law" (1964) I Recueil Des Cours 315
128 Ross, "Has the Conflict of Laws become a Branch of Constitutional Law?" (1931) 15 Minn L. Rev. 161
129 Samuels, A, "Custody and Access Principles" (1963) 107 Sol J. 49
130 Samuels A, "Custody and the Welfare of the Child " (1970) 114 Sol. J. 365
131 Salacuse, "Birth, Death and the Marriage Act: Some Problems in the Conflict of Laws" (1963) I.N.J. 59
132 Sayre, "Awarding Custody of Children" (1942) 9 U Ch L. Rev 672.
133 Schoch, "Conflict of Laws and Private International Law" (1939) Proceedings of Am So. int. Law p 81
134 Scoles, E.F., "Interstate and International Distinctions in Conflict of Laws in the United States" (1966) 54 Cal L. Rev 1599
135 Seidman, " The Reception of English Law in Colonial Africa Revisited" (1969) 2 E.A.L. Rev 47
136 Seidman, " A Note on the Construction of the Goldcoast Reception Statute" (1969) 13 J.A.L. 41
137 Smith, T.B., "Strange Gods: The Crisis of Scots Law as a Civilian System" (1959) Jur. Rev. 119
138 Smith, T.B., "The Union of 1707 as Fundamental Law" (1957) Public Law 99
139 Sornarajah "Parental Custody: The Recent Trends" (1973) 90, S.A.L. J. 131
140 Spiro, E. "Foreign Custody Orders" (1950) 32 Jo Comp. Leg. 73
141 Spiro E, "The Domicile of Minors Without Parents (1956) 5 I.C.L.Q. 196
142 Stansbury, D.F., "Custody and Maintenance Law Across State Lines" (1943-44) Law and Contemp Prob 819.
143 Stumberg G.W. "The Status of Children in the Conflict of Laws" (1940-41) 8 U. Ch. L. Rev. 42
144 Unger, "Use and Abuse of Statutes in the Conflict of Laws" (1967) 83 L.Q.R. 427
145 Utton, "Nigeria and the United States of America: Some Constitutional Comparisons" (1965) 9 J.A.L. 40
146 Walker, D.M. "Some Characteristics of Scots Law"
147 Walker D.M. "The Constitution and the Proposed Scottish Convention" 1970 S.L.T. (news) 117
148 Webb, P.R.H., "Some Thoughts on the Place of English Law as Lex fori in English Private International Law" (1961) 10 I.C.L. Q. 818
149 Webb, P.R.H., "Wardship of Court and the English Conflict of Laws" (1965) 14 I.C.L.Q. 663
150 Weinman, C.A., "The Trial Judge Awards Custody" (1943-44) 10 Law and Contemp Prob 721.

151 Wengler, W."The Significance of the Principles of Equality in the Conflict of Laws" (1963) 28 Law and Contemp Prb. 823.

152 Weston "False Conflicts" (1967) Cal. L. Rev. 74

153 Yntema H.E., "Basic Issues in Conflicts Law " (1963) 12 Am. J. Comp. L. 474.

154 Yntema H.E., "The Objectives of Private International Law" (1957) 35 Can. B. Rev. 721

155 Zweigert, K., "Some Reflections on the Sociological Dimensions of Private International Law or What is Justice in Conflict of Laws" (1973) 44 U. Colo. L. Rev 283

REPORTS AND COMMAND PAPERS

1 Parental Rights and Duties and Custody Suits: A Report by Justice (1975)

2 Report of the Committee on Conflicts of Jurisdiction Affecting Children (1959) Cmnd 842

3 Report on the Hague Convention on Recognition of Divorces (1970) Law Com No. 34: Scot Law Com No. 16.

4 Report on Jurisdiction in Consistorial Causes Affecting Matrimonial Status (1972) Scot Law Com No. 25

5 Report on Jurisdiction in Matrimonial Causes (1972) Law Com No. 48

6 Royal Commission on Marriage and Divorce 1951 - 1955 Cmnd 9678 (1956)

7 Royal Commission on the Constitution 1969-1973 Cmnd 5460 (1974)

BOOK REVIEWS

Gibb, A.D. "British Justice The Scottish Contribution" (by T.B. Smith) 1962 S.L.T. (News) 22

Ehrenzweig A.A., "Private International Law in European Peoples' Democracies" (by Szaszy) (1964) 13 Am J. Comp L. 633

Denbitz, N, " Beyond the Best Interest of the Child" (by Goldstein, Freud, and Solnit) (1974) 83 Yale L.J. 1304

Morris J.H.C. " The American Law Institute Restatement of the Law, 2nd Conflict of Laws" (1973) 21 Am J. Comp L 322

Poulter, S.M. "Laws of Matrimonial Causes (in Nigeria) (by Adesanya) (1975) 38 M.L.R. 110.

Radcliffe, "Final Appeal A Study of the House of Lords in its Judicial Capacity " (1973) 36 M.L.R. 559.

Schlesinger, "Private International Law. A Comparative Treatise on American Conflicts Law" (by A. Ehrenzweig) (1968) 16 Am. J. Comp L. 608.

Strauss P and Strauss J. "Beyond the Best Interests of the Child" (by Goldstein, etc) (1974) 74 Col L. Rev. 996.

Read, W.E. "Beyond the Best Interests of the Child" (by Goldstein, etc) (1973-74) 13 Jo. Fam. L. 601.

UNPUBLISHED MATERIALS

Agbede, I.O, - Conflict of Laws in Nigeria (Unpublished) Ph.D. Thesis, Univ. of London (1970)

Akanle - Some Aspects of Nigerian Private International Law of Family Relations: A Comparative Study (unpublished) Ph D. Thesis, Univ. of London (1970)

Coulson, N.J. Zeroz Teaching materials, Ahmadu Bello University, Zaria, Nigeria (1965)

Ijewere, MidWestern Nigeria: Family Law with Special reference to Marriage and Divorce (Unpublished) Ph. D. Thesis, Univ of London (1970)

Law Commisson Conflicts of Jurisdiction Affecting Children (Unpublished) Working Paper (1975)

MacCormick, N - Class Notes on Jurisprudence (Mimeograph Materials, Spring 1973, University of Edinburgh)

Oloyede - The Law Relating to Children and Young Persons Under the Customary and Statutory Laws of Nigeria, with Special Reference to Lagos and Western States (Unpublished) Ph. D. Thesis, Univ. of London (1970)

NEWSPAPERS AND MAGAZINES

The Observer (Magazine) London
Sunday Times (London)
Sunday Times (Magazine) London
Sunday Times (Lagos)
The Times (London)
West Africa (magazine) London and Lagos.