

Anglo –Nigerian law: Common law of England or Common judicial assumption?

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INTRODUCTION

It is somewhat curious that inspite of nearly a century of the reception of "Common Law" into Nigeria the contents of the imported common law should still remain a matter of controversy.

Views have been expressed to the effect that the "Common Law" consists of:

- (a) The rules of common law and the doctrines of equity in force in England from time to time.¹
- (b) The rules of common law and the doctrines of equity in force in England on January 1, 1900.²
- (c) Nothing more than what one may conveniently refer to as the judicial technique evolved by English judges (that is, judicial tradition) as opposed to specific rules of English common law.³

A clarification of these contradictory views is necessary, not only for the study of the sources of Nigerian law, but also for the practical necessity of determining (as it is being argued), the binding force of current decisions of English courts in Nigerian law.

¹ Park, Sources of Nigerian Law, London, 1963, Niki Tobi, Sources of Nigerian law p. 36; Okonkwo, Introduction to Nigerian Law, p. 70; Obilade, Nigerian Legal System (1979) pp 70 – 71.

² Allott, The Common Law of Nigeria I.C.L. Q (supplement No 10 1965 pp. 31-49; Jegede, Principles of Equity, 1981, p. 2; Agbede, Themes on Conflict of Laws, 1989 pp 8-169.

³ Nwabueze, Machinery of Justice in Nigeria pp. 19-22; Asein, Introduction to Nigerian Law, 1988, p. 102.

For instance, if the first view is accepted it seems to follow, at least in theory that all current decisions of English appellate courts would apply without more in Nigeria. On the other hand, if the second view is adopted then all English cases decided after 1900 would be of no legal effect in Nigerian law until they have been specifically adopted by Nigerian courts. Lastly, if the third view is valid, it follows that no decision, of whatever date, of any English court is part or would be part of Nigerian law except in so far as Nigerian courts have adopted it.

These views were initially put forward by Park, Allott and Nwabueze respectively. This paper is devoted to the discussion of the arguments adduced by these writers in support of their individual views.⁴

For the benefit of the reader, the relevant provisions of the "reception statutes" being discussed are as follows:

Federal Law

"Subject to the provisions of this section and except in so far as other provision is made by any federal law, the common law of England and the doctrines of equity together with the statutes of general application that were in force in England on the first day of January, 1990 shall in so far as they relate to any matter within the legislative competence of the federal legislature shall be in force in Nigeria".⁵

Law of Western States

"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".⁶

⁴ Efforts will be made as far as practicable to limit the discussion to cases decided and statutes in force as at the time of their writing.

⁵ Section 32 Interpretation Act Cap. 192 LFN 1990.

⁶ Section 4 Laws of Oyo State 1978

Law of Eastern State

"Subject to the provisions of this section and except in so far as other provision is made by any Federal Law, the common law of England, the doctrines of equity together with the statutes of general application that were in force in England on the first day of January, 1900 shall, in so far as they relate to any matter for which the legislature of the state is for the time being competent to make laws, be in force within the jurisdiction of the court".⁷

Laws of Northern states

"Subject to the provisions of any written law and in particular sections 26, 33 and 35 of this 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 first day of January, 1900 shall, in so far as they relate to any matter for which the legislature of the state is for the time being competent to make laws be in force within the jurisdiction of the court"⁸.

These enactments repealed the earlier enactments.⁹ The controversy over the interpretation of these statutes appears to have been based on the effect of the limiting date - 1st January 1900 - on the reception of the common law. The various views will therefore be discussed primarily from this point of view.

⁷ Section 15 High Court Law Cap. 51 Law of Cross Rivers State 1979.

⁸ See High Court Law Cap 49 Laws of Northern Nigeria 1963 S. 26 which is reproduced in the High Court Laws of each of the Northern State.

⁹ S. 14 of the Supreme Court Ordinance Cap. 211 Laws of Nigeria 1923 which provides as follows: "Subject to the terms of any ordinance, the Common Law, the doctrines of equity and the Statutes of general application which were in force in England on the 1st Jan. 1900 shall be in force within the jurisdiction of the Court.

"LIMITING-DATE" IRRELEVANT

Nwabueze, relying on the interpretation of "Common Law" in Jackson's Machinery of Justice in England as "the system and habits of legal thought that Englishmen have evolved", went on to say:

"It is in this sense that the common law is applied in some of the older Commonwealth Countries and in America and, it is submitted, should be applied in Nigeria".¹⁰

The writer went further to assert that:

"It is wrong to suggest that our courts are absolutely bound by the specifically English text or version of the common law. Though its basis is admitted the 'system and habits of legal thought of Englishmen, the common law can no longer be regarded as an exclusively English heritage'.¹¹

In conclusion he added:

"It is for our courts to find out what the common law is with regard to any particular situation and, in doing so, they ought to be free to regard the common law in other common law countries outside England, and finally to choose that formulation of it which is best suited to our needs and conditions".¹²

In his criticism of this "interpretation" Allott rightly pointed out that "one must distinguish between what is now the law and what one will like it to be".¹³ (It will be shown subsequently that not only Nwabueze but also Allott and Park have expressed similar views). Allott went on to say that the "Reception of the common law in this vague general sense is, I would suggest, impossible, or at least so fraught with uncertainty as not to constitute a satisfactory and certain basis for a new legal system".¹⁴

¹⁰ Nwabueze op. cit. p. 21.

¹¹ Ibid.

¹² Nwabueze op. cit. p. 21.

¹³ Allott Supplement p. 36. See also New Essays p. 34.

¹⁴ Supplement p. 37.

It is difficult to appreciate the force of Allott's argument when he himself admitted that it is this conception of the common law as a world-wide system that is now in force in Ghana.¹⁵

If it is true that it is the conception of common law as a world-wide system¹⁶ that was received into older Commonwealth Countries and America¹⁶ as claimed by Nwabueze (and Allott did not contradict this claim), and if in fact such conception of the common law is what is currently in force in Ghana afortiori Allott's criticism cited above cannot be sustained. Therefore his suggestion that it will be necessary to take legislative steps to bring about such a result in Nigeria is hardly relevant. For, if the common law as a world-wide system is an impossible, or at least an unsatisfactory basis for a new legal system, it is difficult to see how the point about taking legislative steps to bring about such a result comes into the argument.

To reject Allott's criticism however, is not to defend Nwabueze's position. The present writer holds the view that Nwabueze's "interpretation" of the term "Common Law" appears to have taken this term out of context. Words are meaningless, (or capable of bearing several meanings) in isolation and, as such their context must always be taken into account. For instance, the term undergoes a shift of meaning in the following expressions: common law right; common law and equity; common law and statute law; common law and civil law systems. It is clear that the term has different significance in English law depending on the context. It may be used, as stated by Allott, in antithesis to enacted law, in opposition to equity or in contrast to civil law system.¹⁷

¹⁵ Allott, Supplement p. 36.

¹⁶ Commenting on the reception of common law in America, Roscoe Pound wrote "although some courts insist that in the absence of statutory rules they must apply English decision as they stood in the first year of James I, the tendency of American decisions, as they stood is to hold that the doctrine and the statutes refer primarily to the common law as a system. On this ground courts consider that they may refer to recent decisions as against the seventeenth-century authorities, if the former are better expression of the principles of the common law system" Pound: "Common Law" 1937 Encyclopedia of Social Science, p. 58.

¹⁷ See Allott, Supplement p. 24.

Therefore to take the contextual meaning of this term in an expression such as 'common law and civil law systems' as its meaning in a context like "the common law of England, the doctrines of equity and statutes of general application ..." (as Nwabueze has done) is to do violence to the patent meaning of the term. Whenever you want to construe a statute says Brett M.R.

"... you do not construe it according to the mere ordinary general meaning of the words but according to the ordinary meaning of the words as applied to the subject-matter with regard to which they are used".¹⁸

Nevertheless, doing violence to the patent meaning of words in order to avoid an inconvenient or absurd result is not without support from authorities. Lord Reid was of the opinion that where the literal interpretation of words would defeat the obvious intention of the legislature and produce a wholly unreasonable result, it would be necessary in order "to achieve the obvious intention and to produce a reasonable result" "we must do some violence to the words ..."¹⁹ Mackinnon, L.J., was more emphatic when he said "it may even be necessary, and therefore legitimate, to substitute for an inept words or words that which such intention requires"²⁰

Be that as it may, it should be pointed out that Nwabueze did assume in various parts of his work that specific rules of English common law apply in Nigeria.²¹

In any case there is something unpractical in Nwabueze's interpretation which is contradicted by countless cases²² and which

¹⁸ *Lion Insurance Association v. Tucker* [1863] 12 Q.B.D. 176, 186.

¹⁹ *Luke v. Inland Revenue Commissioners* [1963] A.C. 557. See also *Alder v. George* [1964] 1 All E.R. 628.

²⁰ *Sutherland Publishing Co. v. Caxton Publishing Co.* [1931] Ch. 294 at p. 201.

²¹ See, for example, pp. 19 & 40 of his *Machinery of Justice* in Nigeria.

²² To mention just a few of the countless cases see *Lanlehin v. Rufai* [1959] F.S.C. 184; *Solomon v. African Steamship Co. Ltd.* (1928) 9 N.L.R. 99; *Barzasi v. Visinoni Ltd.* (unreported) Suit No K/129/71 Kano High Court 6th Jan. 1973. *Cole v Cole* [1898] 1 N.L.R. 15; *Benson v. Ashiru* [1967] N.M.L.R. 361, *Bata Shoe Co. Ltd. Melikan* [1956] 1 F.S.C. 100 in which Nigerian courts have adopted specific English common law rules as

has never been adopted in any known decision. Such an interpretation becomes somewhat odd when it is claimed to represent the law.

RECEPTION LIMITED TO 1900

In a lecture delivered at Windsor in 1964, Professor Allott gave his reasons for taking the view that the "Common Law" received into Nigeria was the common law of England as it stood in 1900.²³

In Allott's view "it is obviously necessary to look first of all at the exact working of the statutes applying English law, and the form of that statute will be decisive in resolving the problem we are discussing".²⁴

Perhaps, forgetting this simple and correct statement of English approach to statutory interpretation he admitted, in principle, that "the current legislation receiving the English law in the Federation, the Federal Territory, and the different Regions [States] of Nigeria, expressly excluded the possibility of the date applying to the common law"

Elaborating on this he went on to say that:

"Only the Eastern Region (state) has kept the old formula ...while the Interpretation Act ...provides clearly for Lagos that the date relates only to the statutes of general application. Northern Nigeria ...clearly separates common law and equity from the statute of general application" Western Nigeria has

the law in Nigeria. It is rare to find any judgment of Nigerian courts in which English cases have not been cited and in several cases adopted.

²³ See supplement pp. 31-45. This lecture was delivered at the Commonwealth Conference on African Law which was sponsored by the British Institute of International and Comparative Law. The lecture was, in part, a reply to Park's criticism of Professor Allott's view expressed in his *Essays on African Law*. Professor Allott has further developed his view in *New Essays* pp. 28-69.

²⁴ Supplement p. 38; *New Essays*, p. 64.

repealed the statute of general application altogether and its Law of English (Application) Law ...provided that ... the common law of England the doctrine of equity observed by Her Majesty's High Court of Justice in England shall be in force throughout the Region (state)".²⁵

If this be so, one wonders why this learned author should insist as he has done, that the limiting date must control the application of common law and equity.²⁶

Allott's position in this respect is contradicted by overwhelming authorities. It will serve no useful purpose to cite more than a few of these authorities.

Jervis C.J. held in *Abley v. Dale* that:

"If the precise words used are plain and unambiguous, in our judgement, we are bound to construe them in the ordinary sense, even though it does lead, in our view, of the case, to absurdity or manifest injustice".²⁷

"Better to be accused of a narrow prejudice for the letter of the law" Baron Branwell said "than set up or sanction vague claims to disregard it in favour of some hypothetical interpretation more consonant with the supposed intention of the framer or the spirit which ought to have animated them".²⁸

Perhaps Esher M.R. put the point more forcibly when he said:

"If the words of an Act are clear, you must follow them even though they lead to absurdity.
The court

²⁵ Supplement P. 40 New Essays P. 66.

²⁶ In his conclusion, Allott stated that "The common law of England first as it was in 1863, then in 1873, then in 1885, then in 1900, was taken as the basis of Nigerian law." See Supplement p. 41. This view has been slightly modified in New Essays at p. 67.

²⁷ [1851] 11 C.B. 378 at 391.

²⁸ [1851] 11 C.B. 378 at 391.

has nothing to do with the question whether the legislature has committed absurdity."²⁹

Modern authorities are, on balance, in support of this approach. We can do no more than cite one or two cases.

In *Conservancy Board v. Internal Revenue Commissioner*, Lord Dunedin protested that he was bound to give a judgment "which will, to a great extent, defeat the object for which the Act of parliament ... was passed"³⁰ In the same year Romer L.J. held in *Re South East Lancashire Insurance Co.* "I have struggled to avoid putting a construction ... which will have the result - a result which is difficult to support the legislative intention - but I find myself unable to do so".³¹

Should we not recall the protest of Viscount Simonds L.J. against a "naked usurpation of the legislative function under the thin disguise of interpretation"?³²

But Professor Allott appears to have based his interpretation on the assumption that:

"In interpreting any statute, it is reasonable indeed necessary to have regard to the general state of the law and the general opinion thereon immediately prior to the passing of the statute, to the meanings habitually attributed to the terms used therein to the constitutional practices of the time and to the way in which the statute has been consistently interpreted by the judges. It is also necessary to examine the history

²⁹ R v Judge of the city of London Court [1892] 1 Q.B. at p. 290, Supplement p. 40 New Essays p. 66.

²⁹ In his conclusion, Allott stated that "The common law of England first as it was in 1863, then in 1873, then in 1885, then in 1900, was taken as the basis of Nigerian law." See Supplement

³⁰ [1934] 1 K.B. 343, [1931] A.C. 549.

³¹ 51 T.L.R. 143 at 147

³² [1952] A.C. 189 at 191.

of the provisions of this type in our colonial law and the way in which legislatures and judges in other colonial territories -- in Africa and elsewhere -- have viewed the matter".³³

This view appears to be a restatement, in a novel form, of the rule laid down in *Heydon's case*³⁴ that one cannot interpret a statute properly until one knows the social policy it was passed to effect.

Allott's view is novel, in the sense that it has never been accepted as a rule of statutory interpretation under the English law (at any rate as at the time of his writing) that a judge should necessarily have regard to some of the materials he mentioned in the statement quoted above. Surely no court in England will necessarily have regard to the views of "legislature" of other jurisdictions in interpreting a statute that may be *in pari materia* with those of such foreign legislature.³⁵

One can assert categorically that no court in Nigeria can, under the existing practice, go to the extent, as Allott has gone, of consulting the draftsmen "then responsible in the colonial office"³⁶ in order to ascertain the meaning of a Nigeria statute. One wonders whether it is the intention of the draftsmen in contradiction to the "supposed" intention of the legislature that is material.

Again, to support his interpretation Allott went further to assert that:

"It is not good enough merely to cite the latest Nigerian Statutes on the reception of English law because their meanings are to some extent controlled by those meanings habitually given to the statutes they replace."³⁷

³³ Supplement p. 38, New Essays pp. 64-65.

³⁴ [1584] 3 Rep 7a

³⁵ Particularly outside the European Union.

³⁶ Op. cit. 41. Certainly unsatisfactory approach to statutory interpretation. Judges will no longer be concerned with ascertaining objectively the meaning of the words used in the Statute but with the meaning the draftsmen intended the words to convey. This statement is not included in the New Essays.

³⁷ New Essays p. 65.

We assume that the writer is suggesting that the meanings placed on "words" in a repealed Statute control "to some extent" the meanings of so much of such words as are contained in the repealing statute. If this be so, it is submitted that this proposition is open to many objections notwithstanding its practical utility.³⁸

In the first place, is it not an inevitable consequence of this proposition that repealed statutes should rule us from their graves? Secondly, does it not ignore the fact that words undergo a shift of meaning in the course of time?

Furthermore, is it not the case that words, like chameleons, take their colour from their surrounding? Must we ignore the context in which the words appear in the repealing statutes? Lastly, the proposition appears to disregard the stark reality that statutes generally speak through time to succeeding generations. If written law is to serve the needs of society it must be construed in the light of the requirements of the particular generation. "Few" wrote Chafee "will follow the lawyer who wrote a book to prove that congress could not regulate railroad rates under its power over 'commerce' because the only transportation in 1789 was by boats and wagons".³⁹

As Mr. Justice Holmes has rightly observed "a word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in colour and content according to the circumstances and the time it is used".⁴⁰

³⁸ This view is probably based on the statement of James L.J. in *Ex parte Campbell* (1870) L.R. 5 Ch at p. 706, that "once certain words in an Act of Parliament have received a judicial construction in one of the Superior Courts and the legislature has repeated them without any alteration in a subsequent Statute, I conceive that the legislature must be taken to have used them according to the meaning which the court of competent jurisdiction has given them." Although this statement is often relied on by English judges yet it can find no justification if its effect will be to ignore the contextual meaning of words.

³⁹ Chafee 41 Col. L. Rev. 389, 404.

⁴⁰ *Towne v. Eisner* 245 U.S. 418, 425 (1918)

Be that as it may, the underlying idea in Allott's interpretation is clear. It is simply that statutes should be interpreted to achieve the social policy it is intended to effect. To that extent Allott's view is consonant with the views of great reformatory judges and eminent scholars.⁴¹ Lord Denning, for example, has always stood for the principle that where there is a choice between literal and reasonable interpretations we should choose the reasonable one.⁴²

In fact, the policy of giving effect to the "intent" of Parliament which is fashionable with the literal approach is but a way of referring to the social policy of the statute.

The English Property legislation of 1925 (after some uncertain beginning) has always been consistently interpreted on the basis of the "general scheme and object" of the Act.

Such was the view of Akpata J. when the learned judge said:

"But we no longer construe Act of Parliament according to their literal meaning. We construe them according to their object and intent"⁴³

It is our view that judicial law-making is bound to work, at least on occasions, unjustly and inequitably under the existing practice whereby the courts are inhibited from having recourse to legislative relevant materials which would have helped them in ascertaining the real purpose of statute.⁴⁴

⁴¹ Roscoe Pound favoured an interpretation that would achieve the social purpose of an Act. Herbert Wechsler advocated a result-orientated interpretation. Brandeis evolved the so-called "Brandeis brief". Lord Dunedin suggested that a principle be laid down that statutes should be treated "as designed to be workable". Lord Mansfield, Lord Wright and Mr. Justice Cardozo (U.S.A.) may be mentioned as typical adherents of a functional approach to statutory interpretation. Strangely enough (in view of his definition of law) Austin favoured a liberal interpretation of statutes.

⁴² See *Henny v. Taylor* [1954] 1 Q.B. 513.

⁴³ In *Mettitri v. University of Benin & ors* (unreported) suit No. B/1M/78 delivered 9th May, 1978 (adopting Denning M.R. Dictum in *Engineering Industry, Training Board v. Talbot (Engineers) Ltd* [1959] 2 W.L.R. 464.

⁴⁴ Judges in the U.S usually make use of legislative materials.

Therefore, an approach, whether "comparative", which will enable the courts to ascertain the main objects of statutes as suggested by Allott, is to be preferred.

Nevertheless, when we are concerned with stating the law we must state it as it is, and not as we think it ought to be. It is one thing to ascertain the meaning of a statutory provision with the aid of established canons of statutory interpretation but quite a different thing to put together half of such settled rules of interpretation and with the aid of the synthetic hybrid. To that extent, Allott's argument, regardless of the validity of his conclusion, is hardly acceptable.

RECEPTION NOT LIMITED TO 1900

Park appears to be responsible for provoking what Allott described as a "seemingly sterile and technical argument" but which Allott considered to be of importance as "the independence and power of development of the Nigerian legal system are at stake."⁴⁵ One can only hope that it is not being insinuated that Nigerian judges have surrendered to legal writers the duty of interpreting Nigerian statutes.

Park, dismissing Allott's view as not the "correct one", asserted that "it is the current common law and equity of England which is in force within Nigeria, and not that which existed over sixty year ago". He supported his view by stating that "the draftsmen have resolved the ambiguity clearly in favour of the view which Prof Allott rejects" adding that "no amount of 'necessary intendment' can prevail over the plain meaning of words".⁴⁶

It is intended to evaluate the force of Park's argument from two angles, viz. (i) by assessing the validity of the "plain meaning" approach and (ii) by examining his claim that the ambiguity has been clearly resolved in favour of the view rejected by Allott. The dictum of Lord Esher that "if the words of an Act are clear, you must follow them even though they lead to absurdity"⁴⁷ has overwhelming

⁴⁵ Supplement p. 42, New Essays p. 68.

⁴⁶ Park, op. cit. p. 21.

⁴⁷ R. v. Judge of the city of London Court, supra.

support from decided cases. It must however be stressed that there is undoubtedly something unreal in ascribing to the legislature an intention to enact absurdities and injustices. The rule achieves no more than what the judges think the legislature intended. If this be so, there is no point in referring to it as something apart from judicial creation. As a matter of fact writes Max Radin, "in most cases when the courts say that a statute is plain and therefore needs no interpretation they do so in the inverted fashion which marks so much of the judicial process. They have already interpreted and they then declare that the statute needs no further interpretation".⁴⁸

The "plain meaning" approach is undoubtedly a delusion since no words are so plain and unambiguous that they do not need interpretation in relation to context of language and circumstances.⁴⁹ It is equally unhelpful since there will always be ample room for choice of purposes and selection of results. For example, Section 46 of the [British] Administration of Estate Act, 1925, provided that "the residuary estate of an intestate shall be distributed ... to the issue". In *Re sigsworth*⁵⁰ A, the son of a woman whom he murdered, was the sole "issue" and fell precisely within the "plain meaning" of that term. However Clauson J. invoked the principle of public policy to create an exception and disinherited A.⁵¹

Furthermore, the "plain meaning rule" suffers from the inherent weakness that it is not easy to say whether a word is plain or not. "The cases in which there is real difficulty" said Lord Blackburn, "are those in which there is a controversy as to what the grammatical and ordinary sense of words used with reference to the subject matter, is."⁵²

Sir Carlton K. Allen is of the opinion that:

"The attraction of literal interpretation have not been enhanced by the characteristic of English language, which does not, like Latin and French, readily lend itself to precise and lucid expression".⁵³

⁴⁸ Max Radin: Statutory "Interpretation" 43 Harvard Law Review p. 869.

⁴⁹ Ibid p. 879.

⁵⁰ [1935] Ch. 89.

⁵¹ See generally 16 Can. Bar Rev. P. 1.

⁵² [1881] 6 App. Cas 114 at pp. 131 – 132.

⁵³ K. C. Allen, Law in the making p. 506.

Now, Park claims that the statutory provisions are so "plain" as not to be capable of bearing any meaning, other than his own. On the contrary, Allot has argued that if the intention of the legislature was to give the application of English common law an "ambulatory" effect it would be pertinent to include a clause like "for the time being in force". But in *Godwin v. Crowther*⁵⁴ the West African Court of Appeal interpreted a similar expression – the law for the time being in force – in a Sierra Leonean statute to mean the law in force at the time the "reception-statute" was enacted.⁵⁵ Undoubtedly this court would have taken a view, on the Nigerian statutes in question, different from that of Park.⁵⁶

Indeed Petrides J., a judge of the Nigerian High Court, held in *Solomon v. African Steamship Co.*⁵⁷ that the common law received into Nigeria was the one in force in England in 1900. But Park dismissed this view as incorrect.

Furthermore in *Ali v. Okulaja, Berekely, J.* said:

"I do not think that this court [Nigerian High Court] can be held bound by that authority of the Court of Appeal of England, this country now being an independent sovereign state but judgment of an eminent judge like Lord Justice Denning, Master of the Rolls, would certainly be of the most persuasive

⁵⁴ [1934] 2 W.A.C.A. 109.

⁵⁵ Delivering the opinion of the court Macquarrie J. said: "It appears to me that strong evidence would be required if the intention of the legislature is to effect such unusual purpose as the wholesale application of all future English law, whatever it might be, on the subject in question... No such evidence exists".

⁵⁶ It may be appropriate to mention Park's comment on the expression – the English law for the time being in force which is contained in a Nigerian Statute, "This section" writes Park, "unmistakably introduced English law that is in force for the time being rather than that which existed at any particular time". Park's view is in line with the decision of the W.A.C.A. in *Taylor v. Taylor* [1935] 2 W.A.C.A. 348. One would have however supposed that both interpretations are equally plausible except that Park thinks that the expression is unmistakably capable of only one interpretation.

⁵⁷ [1923] 9 NLR 99.

... authority and would be followed except the court feels otherwise strongly about the ratio decidendi of such a decision".⁵⁸

We can only add that the fact that a jurist of Allott's standing, Nwabueze, a colleague of Park at the University of Lagos, a Nigerian High Court judge and (by inference) a Court no less than the West African Court of Appeal, took a different view on this provision, ought to have convinced Park that his supposedly "plain meaning" is not so plain.

Furthermore, the 'plain meaning' rule is subject to so many exceptions and presumptions as to render it empty of practical contents.

One of such exceptions in relation to the interpretation of the statutes in question will be found in the nature of the Nigerian judicial oath. Under the federal law, for example, a judge must swear an oath to "do right to all manner of people in accordance with the constitution of the Federation as by law established and in accordance with the laws and usage of the Federal Republic of Nigeria ...".⁵⁹

This oath binds the judge to apply Nigerian law – statutes, case-law and customary/Muslim law. It excludes his applying the law of any other realm save insofar as Nigerian law expressly permits.

In any event, it will be more reasonable and compatible with the sovereign status of an independent country that its courts should approach statutory interpretation with the presumption that the national law applies unless there is express provision compelling the application of any extraneous law in place of the national law. In the absence of any express provision directing the application of the English common law "for the time being in force" Park's view has nothing to commend it for acceptance in Nigeria.

It should be observed that Park's arguments in other respects are not, to say the least, altogether free from inconsistencies. It will be sufficient to point out a few of his contradictory arguments.

⁵⁸ [1971] 1 U.I.L.R. 77 (It is not clear how the cut-off date time of independence becomes relevant to the issue).

⁵⁹ See The Oath Act (No 23 of 1963, first Schedule) Laws of the Federation of Nigeria and Lagos 1963.

He is of the opinion that the addition of the phrase: "of England" to the expression "common law" in the "current" legislation is, in some way, a retrograde measure "for it effectively prevents the development of a uniquely Nigerian common law".⁶⁰ Underlying this view is the assumption that there is no such inhibition regarding the development of Nigerian common law in the repealed statutes. But can Park mean that? To him "it is artificial to attempt to freeze the common law at a particular moment and to say that some developments have taken place and others have not".⁶¹ Putting it more clearly he added:

"... to regard them [Nigerian courts] as bound by pre – 1900 cases but not by those decided after that date would result in the worst of all possible worlds. It would produce all the difficulties of attempting to crystallise a developing system of case law at a particular moment and furthermore might well compel the courts to observe outdated rules which are inapplicable to the second half of the twentieth century and have been abandoned by the court of England"⁶²

What can all these assertions mean?

Surely, Nigerian judges are between the devil and the deep sea. To be bound by post-1900 decisions is a "retrograde measure" we are told, but not to be bound by them will result in the worst of all possible worlds.

It is pertinent to observe that the statutory provisions in the Northern States does not include the phrase "of England" yet for some unexplained reasons, Park did not exclude these statutes from his sweeping statement that the current common law and equity of England is in force in Nigeria and surely the ambiguity has been resolved under this statute too in favour of his interpretation.

⁶⁰ Park op. cit. p. 69.

⁶¹ Park op. cit. p. 22.

⁶² Ibid P. 23.

Perhaps, the least convincing part of Park's argument is his deduction from the decision of the Privy Council in *U.A.C. v. Saka Owoade*⁶³ from the decision of the Privy Council in *U.A.C. v. Saka Owoade*, The Board adopted, in the instant case, the principle laid down in the English case of *Lloyd v. Grace Smith & Co.*⁶⁴ From the fact that the Board did not enquire whether the latter case was decided before or after 1900, Park deduced that it is surely conclusive that the limiting date applies only to the English statute of general application, and not, the common law and doctrine of equity ...⁶⁵

The Privy Council does not operate on the assumption that it is bound by the decisions of English appellate courts. It can pray in aid the decision of any common law court that appears to it satisfactory on any point of law.

Indeed if the Board were bound to apply the current English common law, it would logically be bound not only by the decision of the House of Lords and Court of Appeal, but also by those of the High Court where such decisions are the only authorities in English law on the particular points in question.

Lastly, while it may be true as suggested by Park that in deciding issues on points of common law and equity they [Nigerian courts] base themselves on English case without any attempt to discriminate between those decided before and after 1900,⁶⁶ surely it does not necessarily follow that they consider themselves bound by such decisions. Nigerian courts are doing no more than what the courts in other common law countries are doing even though the "plain meaning" approach may leave no one in doubt that there is a limiting date governing the application of English common law in those jurisdictions.⁶⁷

⁶³ [1955] A.C. 130.

⁶⁴ [1912] A.C. 716. In which it was held that a master is vicariously liable for the tort of his servant even if the act complained of is also a crime.

⁶⁵ Park, op. cit. p. 23.

⁶⁶ Ibid P. 22.

⁶⁷ For example, Ordinance No. 2 of 1846 (Hong Kong) provided: "... only such of the laws of England as existed when the colony obtained a local legislature, that is to say, on the fifth of April, 1843 should be in force..."

DECLARATORY THEORY OF COMMON LAW

The Controversy as to whether the common law received into Nigeria is limited to particular date or not has not been helped by the declaratory theory of common law. By this theory any change in common law rules is deemed to have existed from the distant past but merely beclouded by the incorrect rule that has just been displaced. Under this assumption, any recent change in the common law rule would be deemed to have been in existence before 1900, and therefore part of Nigerian law. Of course, it must be frankly admitted that this is a mere fiction devised to give some consistency and resilience to the common law system. If it were to be universally accepted, all countries that have received the English common law would perpetually be bound to apply the current common law rules developed in England as part of the laws in force in their countries. It requires no demonstration to show that no common law country worth its salt has accepted such a view.

NIGERIAN COMMON LAW?

The history of reception of foreign law (whether imposed or voluntarily imported) is as old as the history of human law itself. It is said that a good deal of Hebrew law was derived from Egyptian law. Indeed the modern civil law system was built on the Roman – Germanic legal system. Practically all the modern African and most Asiatic countries build their modern legal system on received European laws. Indeed Turkey, a European Country, itself built its modern legal system on Swedish law.

Is it evident therefore, that the motivation for legal transplant is to provide a basic law for the receiving country on which the court and the legislature can build their distinctively national law?

It is contrary to the philosophy of legal transplant to tie the development of the received law to the donor country. Consequently, the argument that common law rules as "declared" from time to time in England take automatic effect in Nigeria flies in the face of reality judging by the situation in all other jurisdictions with similar experience.

The situation therefore is that the received English common law, decision of Nigerian courts the customary law and the Islamic law constitute the non-statutory law of Nigeria. As the customary and Islamic laws have limited application as to person and territory we can therefore refer to the received English law together with the decision of Nigerian courts as the common law of Nigeria. Its development will be largely influenced by our social, economic, cultural, moral and religious imperatives. The relationship of the common law, customary law and Islamic law must be one of mutual interdependence. For example, the customary rule of legitimation by acknowledgment of paternity should be absorbed into the common law to apply to all Nigerians and everyone domiciled in Nigeria. It may indeed be added that the time is ripe for the integration of customary, Islamic and common law rules by legislative process.

COMMON JUDICIAL ASSUMPTION?

With the Nigerian common law in place, and a conscious effort on the part of Nigerian courts particularly the Supreme Court to develop the same in the spirit of a creative response to the interplay of social conditions and circumstances obtaining in Nigeria, we would be celebrating the birth of a Nigerian system separate and distinct (though of common stock) from that of Britain. It is indeed the time that was done. Beyond that, the relationship of Nigerian common law to that of Britain will be one of a common, judicial assumption. In any case, Nigerian courts are free to adopt any common law rule of any other common law jurisdiction. The present practice of copiously citing decisions of English Courts before Nigerian Courts should be discontinued. The appeal to Nigerian legal practitioners and judges is that the Nigerian legal system is ripe to assume the status of common judicial assumption to British law.

CONCLUSION

It is clear from our previous discussion that these authors appear to have assumed that there is only one rule of interpretation of statutes which is valid at all times and in all places. This is not so. There is no single set of rules of statutory interpretation.

We know of about three or more of such rules under the common law system.⁶⁸

⁶⁸ One may legitimately add "Brandeis brief" (an American concept) as a fourth approach. This approach is concerned with basing interpretation of statutes on the presentation of evidence derived from statistics reports, psychology, practice and the like. Brandeis (later a judge) evolved this method when he was a legal practitioner and hence the name "Brandeis brief". These other approaches may be roughly classified as (i) the literal rule (ii) the 'golden' rule and (iii) the mischief rule. In practice however the court attitude fall into two distinct categories. (a) The literal approach which is concerned with making the provision speak for itself and (b) the functional, which seeks to ascertain the main policy of a statute and which favours an interpretation that is consonant with that policy.

Quite frankly, statutory interpretation is not so much a matter of rules as it is a matter of attitude or approach. There is no "tightness" or wrongness" in taking whichever approach a person wishes. What is certain is that the ultimate result will depend on the particular approach adopted and there can hardly be a meeting point between the various approaches. That therefore explains the present deadlock.

All could have been well had each of these authors limited himself with enunciating the approach he would wish the Nigerian courts to take in interpreting the relevant statutes. On the contrary, each of them has claimed that his interpretation represents the law in Nigeria. These claims are not tenable without evidence to show that the particular approach is the only one known to Nigerian courts. Otherwise the claims can only be sustained at the expense of ignoring the role of Nigerian courts in interpreting Nigerian statutes.

However, nothing can be further from the truth than the notion that the legislature only has to express its intention in the appropriate word for the legal consequences to follow as a matter of course. Although one need not share the extreme view of Gray that a statute is not law until it is interpreted by the court as there are many statutes which have never been the subject of judicial interpretation but which are admittedly part of the law, yet it must be admitted that a great part of the operation of statute is unquestionably dependent on the function of the judges. "To ignore this intermediate stage between the 'will' of the sovereign and the 'obedience' of the subject is to falsify completely the actual operation of statutory law in society."⁶⁹

⁶⁹ K. C. Allen *Law in the Making* pp. 502–503.

It is pertinent to observe that none of these authors took steps to ascertain the prevailing attitude of statutory interpretation in Nigeria. It is hardly necessary to say that the prevailing attitude in England does not necessarily obtain in all other common law jurisdictions.⁷⁰

Even if we assume that the literal approach is (following the English practice)⁷¹ prevalent in Nigeria, such assumption should not, by itself, lead us to the conclusion that the literal approach will be adopted in the interpretation of a particular statute. To give just an example of the fluctuating minds of the judges we can mention Lord Blackburn. This judge, according to Allen, "was a party to a decision in favour of the literal approach in *Denis v. Towers*. In the second stage of *River Wear case*, he repented of *Denis v. Towers* and hoped that it would be over-ruled. In the House of Lords he again changed his mind and was inclined to give judgment in favour of the literal construction. Finally he delivered a judgment in the contrary sense".⁷²

The all-important practical question as to which of these approaches the court will adopt in a particular case is a question which does not admit of any definite answer. But in view of the fact that the wording of statutes is often the draftsman's own making, a grammatical construction of statutes to discover the "intent" of the legislature may prove illusory. A functional approach is particularly desirable in interpreting a statute whose effect is to bring within the jurisdiction rules of foreign law that are alien to the culture of the people.

It is these social consequences that should, in our view, be the paramount consideration in adoption one or the other of the possible interpretations of these ambiguous statutory provisions. Any approach, whether literal or otherwise, which ignores such consideration can only find its justification in mechanical jurisprudence.

⁷⁰ If we should accept Willis' view as representing the practice in Canada then the literal approach in that jurisdiction "is a comparatively unimportant factor, and never a controlling factor in decision today. Most cases are decided by either a guess of the 'object' of the Act or by the application of a presumption". See John Willis "Statutory interpretation" 16 Can. Bar Rev. 1 p. 11. Cardozo is of the view that "The law has overgrown its primitive stage of formalism when the precise word was the sovereign talisman and every word was fatal". See Cardozo *The Nature of Judicial Process*, p. 100 re-stating the dictum in *Wood v. Gordon* 222 N.Y. 88.

⁷¹ Nine out of every ten English cases appear to favour the literal approach.

⁷² K. C. Allen op. cit. pp 505-506.

The idea of legal transplant is to provide a residual law on which the local legislature and court can build a distinctively national law. For purposes of illustration, let it be assumed that the quantum of common law received into Nigeria is C and that of statute of general application is Y while the indigenous law (customary and Islamic) together with local statutes and local judicial decisions as at 1900 can be quantified as Z.. The totality of Nigerian law would be $X + Y + Z$ as at 1900. The content of X is made up of 'common law' of England. It has nothing to do with judicial precedent which only occurs where courts are within the same judicial hierarchy. Therefore specific decisions of English courts constituting X are part of Nigerian law not by way of judicial precedent but through its reception into Nigeria. X cannot factually or logically include judicial decisions that were to be taken *in futuro* as at 1900 whether of English High Court or through to the House of Lord. X must be specific decisions of English courts as at that date. These decisions are subject to the overall review of the appellate courts in order to attune them to the needs and requirement of Nigerian society, Nigerian courts therefore apply English law not by way of judicial precedent but because it is part of Nigerian law.

It must be absurd indeed if the legislature were to be deemed to have limited the application of English statutes of general application to a particular date and to have gone further to say that whatever decision the English courts take in the future on any question not provided for by statutes must have automatic effect in Nigeria.

May it be pointed out that the "Common law of England" means, in plain language, the judicial solution of social problems obtaining in English society but different circumstances and different conditions obtain, to a certain extent, in Nigeria. To attempt to tie down eternally the judicial solution of social problems in Nigeria to the solutions devised by English judges to cope with English situation is to produce legal absurdities and social injustices.

It must be accepted that Perrides J. correctly interpreted the law when he said that:

"... the statutes of general application which were in force in the date 1st January, 1900 are, together with the common law and doctrines of equity which were in force in England on that same date, in force within the jurisdiction..."

If any new provision has brought about a change to the contrary, such a change may properly be considered a "retrograde measure" which can be ascribed to the "unskillfulness" of the draftsmen.

"It is a very serious matter" says Lord Hobhouse "to hold that, when the main object of a statute is clear, it should be reduced to a nullity by the draftsman's unskillfulness or ignorance of law"⁷³

The States' legislature should be presumed to have intended to adopt in their respective states the common law of England already received into Nigeria in 1900 instead of undertaking a further reception of English common law.

In view of the erratic character of judicial approach to statutory interpretation, it is hoped that an attempt will soon be made to give these provisions greater precision, nonetheless, in spite of the present ambiguity, it is submitted that nothing contained in the current enactments should have the effect of preventing Nigerian courts from developing a uniquely Nigerian common law. As Williams has rightly pointed out "common-law decision of courts in England are now in the same category in Nigeria as judicial decisions from other Commonwealth countries or a common law country such as the United States"⁷⁴

Our broad conclusions may be stated as follows:

⁷³ Salmon v. Duncombe [1886] 11 App. Cas at P. 634.

⁷⁴ F.R.A. Williams [1967] J.A.L. 77 at P. 82.

First, a writer is at liberty to express his view as to how a particular statute should be interpreted but his proposition can be no more than a statement as to what the law "ought" to be. Such a proposition may however carry some weight where the particular statutes has not been judicially interpreted or where the courts have adopted the writer's view.

Secondly, the suggestion that no specific rules of English common law have been received into Nigerian law is contradicted by judicial practice in Nigeria and contrary to the philosophy of legal transplant. Consequently, it may be properly dismissed as untenable.

Thirdly, judicial approach to the application of rules of English common law in Nigeria is somewhat unclear. Judges do not often call attention to the dates of particular common law decisions of English courts when adopting them. One cannot, however, deduce from this practice that the courts regard post-1900 common law rules as absolutely "binding" on them as they sometime adopt decisions of other common law jurisdictions in preference to the decisions of English courts.

Fourthly, it has already been judicially held that the rules of English common law received into Nigeria were those in force in 1900.⁷⁵

Lastly, Nigerian courts can, in our view, modify the pre-1900 common law rules to suit Nigerian local conditions. Furthermore, post-1900 common law decisions of the superior English courts (though not binding on the courts) enjoy, in practice, strong persuasive authority in Nigeria. The result is that common law decisions of the superior English courts of whatever date tend, in practice, to enjoy equal authority. Although judicial practice appears to render the present controversy somewhat academic nonetheless it is important to bear in mind that only such common law rules as are in force on the date of reception are part of the law of the receiving state. Any contrary view will be difficult to support under the existing canons of statutory interpretation.

⁷⁵ Solomon v. African Steamship Co. *Supra*.

Finally it should be stressed that English common law applies in Nigeria not by way of judicial precedent but because it was statutorily received into Nigeria and that date was January 1 1900.