

POLYGAMY IN THE CONFLICT
OF LAWS

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Polygamy in the Conflict of Laws

By

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C O N T E N T S

	Page
SUPERVISOR'S CERTIFICATE	i
TITLE	ii
ACKNOWLEDGEMENT	iii
DEDICATION	iv
ABSTRACT	1
CHAPTER ONE	3
The Relationship Between Polygamy and English Criminal Law - A Historical Perspective	
CHAPTER TWO	18
Legislative History of Marriage Law in British Colonial Africa	
CHAPTER THREE	33
Introduction and Application of Marriage Laws to Zambia	
CHAPTER FOUR	42
Conclusion	
SELECT BIBLIOGRAPHY	44

ABSTRACT

Since the close of the first World War, there has been great intensification of modern influences among African peoples. They have experienced the impact of alien political, religious and economic organisations and of various other factors which have shaken the foundation of community life. This has resulted in a wide spread disintegration of the bonds and sanctions of African society before the people have been able to adjust themselves to the new order.

Many factors in this process of culture have already engaged the attention of sociological enquiries, but there is one particular field of investigation which has not as yet received the special study it demands, namely, the effect of modern contacts on African marriage customs and the family system. The family is the most significant feature of African society, and the process of disintegration is nowhere more apparent than in this central institution. The orderly development of African life will depend in large measure upon the successful maintenance of the solidarity of the family unit in the course of the modification of its role under modern conditions.

Within this general setting of the problem, it is important to note that colonial statutory law is sometimes ill-adjusted to African customary law in relation to marriage and kindred matters and that there is great divergence in the rules made by Native Authorities and in the practice of Native Courts in respect of matrimonial issues.

The large Native Christian population and the Christian Churches themselves suffer exceptional difficulty owing

to the fact that the law regulating the status of persons contracting marriages under Christian rites, often pays insufficient regard to the conditions of African social life.

For an adequate understanding of the urgency and character of practical steps desirable to secure the orderly development of African family life, a comprehensive appraisal of the present position is required. It is accordingly proposed that an investigation be undertaken of the effect of modern contacts on African marriage custom, and this should include a particular study of the influence exerted by the statutory law, the practice of Native Authorities and courts and Church law on the relationship between polygamy and the law.

Achieving these aims will entail first and foremost the nature of the conflict resulting out of an attempt to reconcile polygamy with English Criminal Law. Secondly, it will be necessary to trace the history of the application of alien influence on the African people and finally the effects of this influence in present day Africa.

CHAPTER ONE

THE RELATIONSHIP BETWEEN POLYGAMY AND ENGLISH CRIMINAL LAW - A HISTORICAL PERSPECTIVE

Before the advent of the European, Africans were basically polygamous. Under customary law a man might acquire a plural number of wives, the limitation being determined by social status, economics, taste, local practices and other factors. Polygamy was, in a sense, the basis of family life and fortified by the philosophy that every woman belonged to some man's home. The unmarried woman was, if not an unthinkable, at least a highly undesirable phenomenon.

The arrival of the European in Africa brought with it a lot of problems, one being the fact that in the field of matrimony, and sex relations, African custom and European law collided forcibly. With the institution of polygamy, the white man had to proceed with greater caution because it was apparent to all, but the more provincial, that polygamy was so intimately entwined with the life of the African from birth to death, that it could not possibly be eliminated without violent revolutionary repercussions - if indeed then.

This position was even made more difficult by the relationship or lack of it between polygamous marriages and bigamy, an inquiry which is complicated by the uncertainties in the law of bigamy itself. The problem there centred upon the interpretation of the Offences against The Person Act, 1861, S.57 which reads:

"Whosoever being married, shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in England or Ireland or elsewhere shall be guilty of a felony ..."

The main dispute turns upon the interpretation of the terms "being married" and "shall marry" or "second marriage", that is, the requirements pertaining to the first and second marriages respectively. [1]

Regarding the former, it is well established that, to constitute the offence of bigamy, the first marriage must be one that will be recognised as a valid marriage by the English courts. [2] The first problem is whether a valid potentially polygamous marriage constitutes a sufficient first marriage to support an indictment for bigamy. There are at least two judicial dicta to the effect that such marriages are not sufficient. In Harvey v Farnie, [3] Lush C J stated, obiter

"If one of the numerous wives of a Mohammedan was to come to this country and marry in this country, she could not be indicted for bigamy, because our laws do not recognise a marriage solemnised in that country, a union falsely called marriage, as a marriage to be recognised in our Christian country." [4]

In R v Naguib [5], an Egyptian domiciled in Egypt, who had married two women in England was indicted for bigamy. He pleaded that his first English marriage was invalid because at the time of its celebration he was already married to a woman in Egypt, a marriage which he had dissolved before the celebration of his second marriage. He was

found guilty on the ground that he had not adduced sufficient evidence to convince the court of the existence of his Egyptian marriage. Avory J, in passing judgement stated that: [6]

"Even if it had been properly provided that this marriage was solemnised in a country where polygamy is lawful according to the law of that country, I should still have held that it was not a valid marriage in England which could be recognised for the purpose of indictment."

Finally, even in Baindail v Baindail, Lord Greene M. R. stated that: [7]

"I must not be taken as suggesting that for every purpose and in every context an Indian marriage such as this would be regarded as a valid marriage in this country. Mr Poitt in his reply drew an alarming picture of the effect of our decision on the law of bigamy if we were to decide against him. I think it is right therefore to say that, so far as I am concerned, nothing that I have said must be taken as having the slightest bearing on the question of the law of bigamy. On the question of whether a person is "married" within the meaning of the statute when he has entered into a Hindu marriage in India I am not going to express any opinion whatever. It seems to me a different question in which other considerations may well come into play. I hope sincerely that nobody will endeavour to spell out of what I have said anything to cover such a question."

The result of these cases is a position where on the one hand potentially polygamous marriages are recognised as sufficient for the purposes of the law of nullity, while on the other hand they are not sufficient for the law of bigamy. Thus it is a little difficult to see the justification for holding that an Indian Muslim or Hindu, who having been married according to his personal law in India, could 'marry' again in England without being subject to the English law of bigamy, whereas an Indian Christian, who, having been married in India, attempted to 'marry' again in England would be guilty of bigamy, whilst in both cases their Indian marriages would have the effect of rendering null their English 'marriage'. In both cases a man, being married, is attempting to marry again and whether their personal law sanctions polygamy or not hardly affects the question from the point of view of English Criminal Law.

Despite this logical dilemma the decisions in the Harvey case, Naguib case and the Baindail case were later confirmed in R v Sawan Singh. [8] The issue in this case was whether a marriage which took place according to Sikh law in India was a valid marriage for the purpose of constituting marriage within the words "being married" in S.58 of the Offences against The Person Act, 1861. The marriage took place in 1944 before the coming into force of the Hindu Marriage Act of 1955 under which a person married according to the Sikh law could marry only one wife. But prior to this a man could marry as many wives as he wished as long as the ceremonies were performed before a priest and Holy Book. So the question was whether a potentially polygamous marriage could constitute a valid first marriage for the purposes of bigamy. It was here held that a polygamous marriage could not constitute a valid marriage because the first marriage must be a monogamous one within the meaning of the Matrimonial Causes Act.

It is, therefore, settled that the marriage which is to be a foundation for bigamy must be a monogamous marriage. This means that a previous polygamous union is a sufficient marriage for the purposes of nullifying a later monogamous marriage, but it is not sufficient to ground a prosecution for bigamy.

Thus so far we have seen the position regarding the first marriage. It is now intended to consider the position of the 'second' marriage, distinguishing between a marriage celebrated in England and one celebrated abroad. Where the marriage in question has been celebrated in England, the first point that needs to be mentioned is the question as to whether the mere fact that a man's personal law sanctions polygamy, renders him immune from prosecution for bigamy if he marries a second time in England. It would appear to have been the opinion of Darling J in the Hammersmith Marriage [11] case, that such a person could not be convicted of bigamy. In this case, his Lordship stated that:

"Should Dr Mir-Anwarudin succeed in his contention here, he might demand of this registrar four certificates at once and with the sanction of them might proceed to marry as many English women of the Christian faith; yet it is plain that not one of such unions could give the woman espoused the status of wife according to English law, for if it did, those certificates would permit of polygamy, which our law forbids; they would indeed amount to licences to commit three separate felonies."

This view has respectfully been said to be erroneous. The offences against The Person Act, which admittedly applies

to all persons within the territorial jurisdiction of the English courts, simply provides that any person who 'being married, shall marry, is guilty of a felony and there is no exception in favour of those persons whose personal law sanctions polygamy. This is made quite clear by the decision in R v Naguib where the prisoner, although a Muslim domiciled in Egypt, was found guilty of bigamy, when he married in England, being already married. It would seem logical to follow that, for instance, a Hindu or Muslim, who having celebrated a valid, although potentially polygamous marriage, contracted a second marriage in England would be guilty of bigamy.

Morris [12], however, argues that the question where the second marriage is celebrated according to the normal English ceremonies,

"is academic, because he (the husband) would be unable to obtain a certificate for the English ceremony unless he stated in his notice of marriage that he was an unmarried man and that he knew of no impediment to the marriage; and if he made a false declaration, he could be convicted of an offence under Section 3 of the Perjury Act, 1911 since Baindail v Baindail the prior polygamous marriage would clearly be an impediment. (The punishment for this offence is the same as that for bigamy). It is one thing for a polygamist to marry two wives, and quite another for him to pose as an unmarried man. It is, therefore, immaterial in practice whether he would be convicted of bigamy in these circumstances, but it is submitted that he could not."

Morris is, therefore, of the opinion that no prosecution would lie in those cases where the second marriage is

celebrated in England in compliance with the provisions of the Marriage Act. But it has respectfully been submitted by other writers that a conviction for bigamy will lie in those cases where a Hindu or Muslim, who being married, marries again in England using the ordinary English Civil ceremonies.

This approach leaves untouched, however, the problem arising where the second marriage has been celebrated in England by religious rites in contravention of the formalities prescribed by the Marriage Act.

The earlier attitude of the courts towards this problem seems clearly to have been that the second marriage had, apart from its bigamous character, to be a valid marriage. In R v Drake [13], Parke J held that a second marriage could not be regarded as bigamous if there was insufficient evidence that the banns had been published with the correct name of the woman saying [14];

"if the banns had been published in a name that was not her own, and which she had never gone by, the marriage would be invalid."

Even as late as 1960 in Burt v Burt the court stated: [15]

"There must be proof of such a ceremony as, but for the former marriage, would have constituted a valid marriage."

In R v Fanning [16], the second marriage was celebrated in Ireland by a Roman Catholic Priest, contrary to 9 Ge. 2, C.13, which forbade the solemnisation by Roman Catholic Priests of marriage to which either party was a protestant, although one of the parties was a protestant. The Court of Criminal Appeal for Ireland held, by a majority,

that the second marriage was not bigamous, on the ground that it was not a valid marriage.

On the other hand, there is another line of decisions which is to the contrary. In R v Allison [17], Justice Chambre held a marriage to be bigamous although it had been celebrated in a false name, and although the only evidence of its celebration was that of a witness, there being no evidence of registration, licence, or publication of banns. Similarly in R v Penson [18], the second marriage had been celebrated in a false name but was nevertheless held to be bigamous. Again in R v Brown [19], the second marriage was between a woman and her deceased sister's husband, which at the time was an invalid marriage. Lord Denman C J, held that it was nevertheless bigamous, saying: [20]:

"I am of the opinion that the validity of the second marriage does not affect the question. It is the appearing to contract a second marriage, and the going through with the ceremony which constitutes the crime of bigamy, other-wise it could never exist in ordinary cases, as a previous marriage always renders null and void a marriage that is celebrated afterwards by either of the parties during the life time of the other. Whether, therefore, the marriage of the two prisoners was or was not in itself prohibited and therefore null and void, does not signify, for a woman having a husband then alive, has committed the crime of bigamy by doing all that in her power lay by entering into marriage with another man."

Finally, in R v Allen [21], the second marriage was celebrated between a man and the niece of his deceased

wife. The marriage was nevertheless held to be bigamous despite the impediment of affinity between the parties following R v Brown and R v Penson.

The manner in which these two lines of cases have been reconciled appears from the ground upon which Justice Christian distinguished R v Brown in R v Fanning, and Justice Cockburn distinguished R v Fanning in R v Allen.

Thus, in R v Fanning, Christian J stated that:

"In Brown's Case the ceremony was complete - perfect in everything which the law required: and the only thing which prevented it being a valid marriage was the circumstance that the parties were within the prohibited degrees; but in the case before us the defect is in the ceremony: there is no ceremony at all; or there is worse than no ceremony, because there is that which is condemned to nulling by a law of public policy."

In R v Allen, Chief Justice Cockburn dissented from the judgement in R v Fanning stating that:

"After giving our best consideration to the reasoning of the learned judges who constituted the majority of that court, we find ourselves unable to concur with them, being unanimously of the opinion that the view taken by the four dissentient judges was the right one."

Nevertheless he felt it necessary to distinguish it, saying that there was:

"this difference between the case of The Queen v Fanning and the present, that the form of marriage there resorted to was one which, independently of the bigamous character of the marriage, was, by reason the statutory prohibition, inapplicable to the special circumstances of the parties, and ineffectual to create a valid marriage, whereas in the case before us, independently of incapacity, the form would have been good and binding in law."

The method of reconciling the decisions leads to the conclusion that although the second marriage need not be a valid marriage, apart, of course, from its bigamous character, yet it must be celebrated by a form which the law of the place of celebration recognises as a ceremony of marriage.

In view of this one may inquire whether in those cases where the second marriage has been celebrated in England by Hindu or Islamic religious rites, in contravention of the provisions of the Marriage Act, it will nevertheless be capable of being bigamous.

It may be argued that the consent necessary to the creation of a valid marriage must be the creation of the status of husband and wife, as understood in English law since according to some writers the status of husband and wife in a polygamous marriage differs from that as understood in English law, consent to such status cannot be regarded as sufficient to constitute the crime of bigamy. It may further be remarked that if it be admitted that a potentially or de jure polygamous marriage be a sufficient first marriage for this purpose, then there is little justification for holding that consent to such a marriage is not sufficient as a second marriage. [22].

In R v Rahman [23], the defendant was charged with an offence under the English Marriage Act, 1836, S.39, which provided that any person who shall:

"Knowingly and willingly solemnise any marriage in England, except by special licence, in any other place than a Church or Chapel in which marriages may be solemnised according to the rites of the church of England, or than the registered building or office specified in the notice and certificate as aforesaid shall be guilty of a felony"

The defendant was a Muslim, and the marriage that he purported to solemnise was between a Muslim, who was already married to another woman in India, and an English-woman who had become converted to Islam. The ceremony took place in a private house and was performed according to Islamic rites. The defence raised was that the marriage was a Muslim marriage, and therefore being potentially polygamous was not recognised in the English courts. Justice Streatsfield held that the performance in England of the usual Muslim rites was a solemnisation of "marriage" within the meaning of the Marriage Act. The grounds upon which he reached this decision are very significant. His Lordship stated that: [24]

"I construe the word '**marriage**' in accordance with S.39 of the Act of 1836 as having the same meaning as it does in the Offences against The Person Act, 1861, S.57."

Further, after citing the terms of S.57 of the Offences against the Person Act, he argued:

"Clearly, the words 'being married' means 'being lawfully married' and the words 'shall marry' and 'second marriage' refer to a marriage which is not only unlawful and void but which in itself gives rise to a criminal offence, and therefore must mean a purported marriage or form of marriage. It matters not whether the bigamous marriage takes place in a registry office or whether it takes place in a Church or synagogue or other place of worship. It seems clear, therefore, that in that Penal Act the word 'marriage' means purported marriage and although that Act is of late date than the one I am construing, that is of assistance in determining the meaning of the words 'solemnise any marriage in England' in the Act of 1836."

Thus his Lordship was already of the opinion that the celebration of a marriage in England in accordance with the usual Islamic rites would be sufficient second marriage for the purposes of the law of bigamy, despite the fact that as a ceremony it would have been totally ineffective to create the status of marriage.

Authority may also be found in Re Ullee [25], in which a Muslim, domiciled in India who had already contracted at least one marriage there, went to England and married two English wives by Islamic ceremonies. The first wife claimed custody of the children she had borne him. She argued that her marriage was invalid and that therefore, the children were illegitimate. Justice Chitty stated in passing judgement that: [26]

"The marriage was undoubtedly invalid according to English law. The Nawab was already married, and had already, at least, one wife in his own country, when the ceremony of marriage according to Mohammedan rites was performed with the appellant in this country."

This clearly means that his Lordship was of opinion, not only that the Indian marriage was a '**marriage**' within the meaning of English Law, but also that the second ceremony was equally a purported marriage so far as English law was concerned.

The decisions in the above two cases necessitate a conclusion that any ceremony, whether defective as a ceremony to create the status of marriage or not, is a sufficient second marriage for the purposes of the law of bigamy.

Having laboured to show the problems raised by relationship between polygamy and the law relating to bigamy, one cannot help but come to the conclusion that the two are irreconcilable. This is seen in the fact that an attempt to reconcile the two has resulted in a position where on the one hand a valid potentially polygamous marriage will be a sufficient first marriage for the purposes of the law of nulling, while on the other hand only a valid monogamous first marriage can support a conviction for bigamy. However, this cannot be said to be finality on the issue. The field of law is always a battleground of opinions and as such there is bound to be further controversy pertaining to this topic.

Endnotes

- [1] Bartholomew G.W. 'Polygamous Marriages and English Criminal Law', Modern Law Review, (1954) Vol.17 p.344
- [2] Smith J. C. and Hogan B., Smith and Hogan Criminal Law, 6th Edition, pp.708
- [3] (1880) 6 P.D.35
- [4] at page 53
- [5] (1917) 1 K.B. 359
- [6] at p.360
- [7] (1946) p.122 at p.130
- [8] (1962) 3 All E.R. 612
- [9] (1965) 2. W.L.R.
- [10] (1975) Q.B. 885
- [11] (1971) 1 K.B. 634
- [12] Opcit at p.330
- [13] (1830) 1 Lewin 25
- [14] at p.26
- [15] (1860) 2 L.T. 439
- [16] (1866) 17 ir C.L.R. 289
- [17] (1866) R. & R. 109
- [18] (1832) 5 C. & P. 412
- [19] (1843) 1 C. & K. 144
- [20] at p.145
- [21] (1872) 41 L. J. M. C. 97
- [22] The Rapid Results College, 'Criminal Law', p.70
- [23] (1949) 2 All E. R. 165
- [24] at p.167
- [25] (1885) L.T. 711
- [26] at p.712

CHAPTER TWO

LEGISLATIVE HISTORY OF MARRIAGE LAW IN BRITISH COLONIAL AFRICA

In order to understand the legal framework of any given country, it is only logical to first trace the historical evolution of its legal system. Much of Africa's present legal system is as a direct or indirect result of its colonial occupation. In the area of marriage law especially, much of it is as a result of the colonial legislative policy-making. It is proposed, therefore, in this chapter to trace the legislative source of the marriage laws in Zambia.

The creation of a marriage law for the Island of St Helena was destined to become the model for marriage ordinances throughout the British Empire. Celebration, upon certificate from the Registrar either before the Registrar or in a licensed place of worship by an authorised minister in accord with the "Rogers formula", was to become the standard for marriages in the colonies. The St Helena model was applied to Ceylon with embellishments and further refinements were made in the use of the model for Hong Kong.

In Africa and specifically the Gold Coast, a new prototype was created, namely, the venerable 1884 Gold Coast Marriage Ordinance which in turn became the parent of marriage laws throughout Commonwealth Africa. Its origins can be traced through the archives to St Helena, Ceylon and Hong Kong marriage laws. [1] Contrary to the widely held assumption that African marriage laws were inspired by missionary zeal, the genesis of the 1884 Gold Coast Ordinance was

an official inquiry concerning the marriage of German nationals there.

On July 29, 1878, a Mr Buhl, on behalf of Basal Mission wrote to the Lieutenant Governor, Captain C. C. Lees, requesting information as to certification of marriages concluded between German nationals in the Gold Coast in accord with English Law, which Mr Buhl assumed was also the law of the Gold Coast. At that time there was no local legislation on marriage and it was far from clear that English Law would apply, especially where German nationals were involved. [2].

Lees consulted Y. W. Jackson, the acting Chief Justice, who advised that local legislation was necessary. Whereupon Lees wrote to the Colonial Office proposing to adopt Mr Jackson's suggestion and to pass an Ordinance on the subject. In turn, the Colonial Office referred the Governor's proposal to Sir David Chalmer's, a distinguished former Chief Justice of the Gold Coast, for his opinion. The opinions of Jackson and Chalmers reflected the unsettled state of the law and confirmed that considerable doubts existed concerning the validity of marriages celebrated in West Africa in the absence of local legislation. Both opinions recognised the need for a marriage ordinance, thereby setting in motion the colonial machinery for its creation and what is perhaps even more important, the Hong Kong Ordinance was proposed as a suitable model for adoption.[3]

What was to follow was a parade of drafts and revisions and letters shuttling back and forth between Downing Street and the Gold Coast for a period of more than five years. For the purposes of this study the history of the ordinance will start in May 1882, when the Governor of the Gold Coast, Sir Samuel Rowe forwarded for approval a marriage bill introduced into the Legislative Council. [4]

This Bill was entitled, "An Ordinance to Declare Legal All Marriages solemnised in accordance with any Christian Ritual in the Gold Coast", hereinafter referred to as the Rowe Bill of 1882. It provided that all marriages in accord with christian rites were valid and designated ministers were authorised to perform ceremonies of marriage as Registrars. This arrangement was patently contrary to precedents set in respect to marriage policy in St Helena, Ceylon, Hong Kong, for it delegated the matter of celebration entirely to religious authorities.

The Colonial Office forwarded the Rowe Bill for comment to Sir James Marshall, who had just retired as Chief Justice of the Gold Coast. He pointed out that no less than three drafts had already been prepared in the Gold Coast as a result of Colonial Office instructions some five years earlier. One draft had been prepared by Marshall himself in 1879 after consideration of an effort by Jackson (when acting Chief Justice) (hereinafter referred to as the "Jackson Draft of 1879"). Despite repeated reminders from Marshall no action was apparently taken in Accra until 1881, when yet another draft was prepared, this time by Thomas Woodcock, the Queen's Advocate, (hereinafter referred to as "the Woodcock draft 1881"). Whatever the reason for past delays and apparent official resistance to the passage of marriage legislation - which may be accounted for by the apathy of life in the tropics and appalling death rate among British staff there - Marshall's revelations led to the institution of a search which eventually produced the missing papers from Accra. These were forwarded to London with an expression of a preference for a simplified version of the Hong Kong model commended by the Colonial Office.

The original Jackson draft did not follow the Hong Kong precedent in that Jackson proposed to leave celebration as a purely religious matter. His reasoning is of particular

interest as it is based on an attitude towards marriage and native custom perhaps typical of his day. The very term "native marriage" he regarded as "vicious", as marriage connoted exclusiveness and indissolubility. As such, marriage was, in Jackson's view, the foundation of social progress. If the law was to regard marriage as a mere civil contract, so that the religious ceremony was not of its essence, the effect would be to discourage christian marriage among Africans whose enthusiasm had been kindled by lively descriptions by the Missionaries of the torments which awaited those who cohabited without marrying. Jackson's draft therefore, provided for the solemnisation in any licensed place of worship by any competent member of the church or denomination and according to the rites in usage of the church, denomination or body. There was no provision for marriage before a registrar, nor was there a requirement of a certificate from the Registrar for religious celebrations. By leaving marriage as a purely religious ceremony, Jackson hoped to encourage or at least not to discourage christian marriages among the "natives". This was a departure from legislation and it was therefore not surprising that the Jackson draft did not prevail in the face of what had come to be well established Colonial Office policy in reference to marriage.

The Woodcock draft of 1881, when it eventually reached the Colonial Office, generally did meet with official approval there. It was based upon the Hong Kong and Ceylon precedents, in that the parties were given the option of being married either by an authorised minister in a licensed place of worship or before the registrar. [5] Thus, the "Rogers formula" survived, perhaps, because it was superior. It struck a skilful balance in accommodating the interest of all concerned. Anyone could marry under such an ordinance, whatever his or her religion or lack thereof. Religious authorities might continue to perform their

traditional functions, yet the role of the State as a secular authority over marriage was preserved. If there was discontent attending the finalisation of the Gold Coast Ordinance, it was because there was anxiety over the troublesome question of the effect of marriage under the Ordinance on native custom and succession.

The Colonial Office did propose certain minor detailed amendments to the Woodcock draft, and eventually these were incorporated into a fresh draft, (hereinafter referred to as "the Quayle Jones Draft of 1883") prepared by the new Queen's Advocate, W. H. Quayle Jones, after further consultation in Executive Council and with local religious leaders. This draft was sent to London in March 1884. Further amendments were made there with the assistance of Quayle Jones, and eventually the amended draft (hereinafter to be referred to as "the Quayle Jones Amendment Draft of 1884") was returned once more to the Gold Coast for consideration by Rowe's successor, William Young. Although the Ordinance was then passed by the Legislative Council, Young was unhappy about the effect of the Ordinance on native custom and succession, and procured a delay in confirmation while additional material on these points was transmitted to London. Eventually, however, confirmation of the Ordinance, with instructions to bring it into immediate effect, was conveyed to Accra in June 1885. The undesirability of further delay outweighed other considerations, although the Colonial Office admitted that experience might suggest improvements and it might also prove necessary to deal separately with the question of succession to property.

These were the stages in the birth of the grandfather of African marriage laws, the Ordinance enacted in 1884 for the Gold Coast and Lagos. One might say that this 1884 carefully formulated Ordinance represents a triumph of

the colonial legislative process. The Ordinance had its defects, but the miracle is that there were not more. And the defects, if they can be so described, arose out of judgements made about native custom. Whatever its shortcomings, the Ordinance remained in force in the Gold Coast and, via Lagos, became the basis of the marriage laws in Nigeria and elsewhere.

It now remains to look in more detail at the changes in the Woodcock draft as it proceeds through two further drafts and finally emerges as the Ordinance enacted in 1884. The voluminous correspondence is itself a tribute to the thoroughness of the Colonial Office, which was meticulous in picking up points requiring further local consideration.

The Colonial Office, however, was not infallible. In one remarkable instance, it was left to the Gold Coast Executive Council to preserve one of the major features of the Roger's Formula. It was suggested in London that publication of banns be allowed as a substitute for notice to and a certificate by the registrar. The effect of this question would have been to allow celebration, at least, in some respects, to remain a purely religious matter under the control of religious authorities. However, the views of the Executive Council, conveyed by Sr Samuel Rowe, prevailed: notice to and certificate by registrar should in all cases be compulsory, though the publication of the banns could be optional and left to be arranged in accordance with the relevant religious custom.

The question of the age below which consent should be necessary was one on which the draftsmen received conflicting advice. Both the Jackson and Woodcock drafts followed the Ceylon, Hong Kong and St Helena precedents in requiring parental consent for marriage under 21 years of age. However, there was some doubt as to whether this provision

was appropriate to Gold Coast conditions. The local Roman Catholic community favoured a reduction in the age of females to 17 years as early marriages were often the rule and the lower age would help to check concubinage. Sir James Marshall favoured an even lower age, 16, on the basis that parents, unlike those in a "christian and civilized country" would misuse their authority for the satisfaction of malice and extortion. There was also support for 18, a suggestion which commended itself to the Colonial Office. The Gold Coast Executive Council, however, was unanimously in favour of the retention of 21 as the age below which consent would be required, a view which was apparently shared by local Methodist opinion. It is relevant to note that according to African customary view of marriage as a union of two families, parental consent is usually required, irrespective of the age of the parties.

Another matter the Gold Coast was invited to consider further was the controversial question of prohibited degrees. In Ceylon, marriage with a deceased wife's sister came to be allowed at a time when Colonial Office policy appeared to be otherwise. The subsequent Hong Kong Ordinance reverted to the conventional formula of reference to the law of England and Wales, which at that time did not permit such unions. By the time the Gold Coast Ordinance was under consideration, Colonial Office policy had changed and the door was open to liberalisation of impediments of kindred and affinity, it desired.

The Jackson draft of 1879 and the Quayle Jones draft of 1883 followed the Hong Kong formula of reference to the law of England and Wales without the proviso in the Ceylon legislation permitting marriage to a deceased wife's sister. A leading Wesleyan minister in the Gold Coast pointed out that such a marriage was in accordance with local laws and customs, was not repugnant to the teachings of the

scripture and was already permitted by law in several British colonies. Eventually both the Colonial Office and Governor Rowe agreed on the desirability of departing from English law in this respect, and the amended Quayle Jones draft of 1884 and the Ordinance as enacted contained the following provision:

"A marriage may be lawfully celebrated under this Ordinance between a man and the sister or niece of his deceased wife, but save as aforesaid, no marriage in the Colony shall be valid, which, if celebrated in England, would be null and void on the ground of kindred and affinity."[6]

Perhaps the most difficult problem which confronted the draftsmen of the Gold Coast legislation was that of the relationship between marriage under the Ordinance and marriage and succession under native law and custom. In the correspondence leading to the enactment of the Gold Coast Ordinance, there are frequent references to customary marriage and succession and queries about the effect thereon of the proposed legislation. These questions could arise only if the Ordinance being formulated was to be applicable to Africans as well as expatriates. It has already been pointed out that initial requirement for an ordinance had arisen from an apparent lack of a procedure for Europeans living in West Africa to contract a valid marriage. But the goal of the Ordinance was much broader. It was for all for christians whatever their denomination or origin. The Rowe Bill of 1882 sought to legalise all marriages celebrated in accord with christian rites. Moreover, the Rowe Bill was drafted specifically with the African in mind, so that those who had been married by christian ministers, but who had gone through the customary forms, would not be at a disadvantage for having neglected them.

Once it was envisaged that the African might celebrate christian marriage under the Ordinance a dual marriage system was the result. In other words, what was contemplated was the co-existence of two marriage systems, one which was a western christian monogamous model and the other (preserved to the African by Section 19 of the Supreme Court Ordinance No 4 of 1876) which provided for the application of custom to native marriage and succession.

Although technically speaking Section 19 of the Supreme Court Ordinance could be repealed by subsequent legislation it was unthinkable to abolish customary marriage and substitute a western model. The eventual outcome was that custom was preserved and the African was left free to choose between widely different marriage systems - his own traditional polygamous one or the western so-called christian institution.

It is precisely this area of choice which brings about the interplay between the two systems producing some of the more interesting internal conflicts problems in African Jurisprudence. In the drafting of the Marriage Ordinance three questions had to be dealt with:

1. The capacity or lack thereof of a person married under custom to another, to contract a valid marriage under the ordinance
2. The capacity or lack thereof of a person married under the ordinance to contract a valid customary marriage with another, and the consequences thereof
3. The effect of marriage under the Ordinance on choice of law governing succession.

The colonial Office's view in commenting upon the Jackson and Woodcock drafts in March, 1883, was that in relation to the first question, the legislation should be based on the proposition that:

"A native who had contracted a marriage valid by native law or custom should not be allowed to marry any other person under the Ordinance." [7]

In relation to the second question, the proposition should be that:

"A native married under the Ordinance should not be allowed during the continuance of that marriage to contract a marriage according to native law with any other person, but in all other respects the Ordinance should not affect marriages according to native law or custom." [8]

Since English law did not in effect recognise potentially polygamous marriages, it was necessary to be explicit about both of these questions, otherwise, the contention could have been advanced that customary unions were neither bars to, nor were they barred by marriage under the Ordinance. For, under Section 14 of the Supreme Court Ordinance, 1876, the Common Law, the doctrines of equity and statutes of general application in force in 1874 were to be applied. Without official foresight in this matter, Africans might have been left free to slide in and out of monogamy at will thereby undermining the western institution of marriage as we know it.

As to the first question, this was handled in terms of the validity of the Ordinance marriage, In response to the Colonial Office suggestion, Section 37 of the Quayle Jones draft provided that:

"No marriage shall be valid where either of the parties thereto at the time of celebration of such marriage is married by native law or custom to any person other than the person with whom such marriage is had."

This section was retained as Section 35 of the amended Quayle Jones draft and in the final version of No. 14 of 1884.

As for the second question, that is, the capacity of one married under the Ordinance to marry another under custom, this too, was handled in terms of validity, this time of the customary marriage. Section 37 of the amended Quayle Jones draft and section 37 of 1884 as enacted provided as follows:

"Any person who is married under this Ordinance ... shall be incapable during the continuance of such marriage of contracting a valid marriage under any native law or custom; but save as aforesaid, nothing in this Ordinance contained shall effect the validity of any marriage contracted under or in accordance with any native law or custom or in any manner apply to marriages so contracted."

Young had objected to this provision on the basis that it was not yet appropriate to legislate in respect of marriage contracts between "heathen natives" amongst whom polygamy prevailed. The Colonial Office agreed that it was not expedient to supplant the native laws and customs on marriage contracts and the devolution of property by a law adopted to a "civilised" community, except in the case of those Africans who preferred to bring themselves within the operation of the latter law by entering into

the contract of marriage in accordance with its provisions. However, it was considered that natives who thus accepted the status of marriage recognised by civilised communities should be precluded from violating the contract by contracting polygamous marriages though sanctioned by native custom, and that their widows and children should enjoy the rights of succession ad intestate to the property which were recognised by the laws of civilised nationss, and that to this extent the law might properly, as the proposed Ordinance would, interfere with native law. It was not supposed, however, that any but christian natives would contract marriages under the ordinance.

To reinforce even further the monogamous character of marriage under the Ordinance, Section 42 of the amended Quayle Jones draft declared the offence of marrying under the Ordinance when already married under custom to be bigamy, but with a maximum term of imprisonment at five years. In a separate sub-Section (42(8)) a person married under the Ordinance who contracted a marriage in accord with custom during the continuance of the marriage was declared guilty of an offence and liable to be imprisoned for any term not exceeding two years. In this case the reference to bigamy in the original Quayle Jones draft was omitted. Both of these provisions were present in the Ordinance as finally enacted.

Yet another measure was adopted to insure that the monogamous character of christian marriage under the Ordinance was preserved, this time by way of affidavit and notice. The Colonial Office proposed that any African party to an intended marriage under the Ordinance should swear an affidavit that he or she was not married according to native law to any other person other than his or her intended spouse. A provision adopting this proposal, originally found in Section 11 of the Quayle Jones draft, duly appeared in the Ordinance as enacted. Also, in a ceremony before

the Registrar, the latter was directed (Section 29 of the Ordinance) to deliver the following admonition:

"Know ye that by the public taking of each other as man and wife in my presence and in the presence of the persons now here, and by the subsequent attestation thereof by signing your names to that effect, you become legally married to each other, although no other rite of a civil or religious nature shall take place, and that this marriage cannot be dissolved during your lifetime, except by a valid judgement of divorce, and if either of you before the death of the other, shall contract another marriage while this remains undissolved, you will be thereby guilty of bigamy, and liable to the punishment inflicted for that offence."

It is interesting that there is no express reference in this clause to customary marriage, and that the offence referred to is bigamy. This seems curious since the reference to the bigamy in the offence provided by the Ordinance, was, as we have seen above, deleted in the amended Quayle Jones draft and from the final version.

On paper, the result of all these provisions was to give the African an informed choice between custom and the christian mode of life. Whether he understood or complied was quite another matter.

One of the points which worried Young in his request for postponement of confirmation of the Ordinance was the difficulty in determining what constituted a "native

marriage" for the purposes of the penal provisions. Young understood that custom in this matter differed from tribe to tribe. One of the Gold Coast District Commissioners, in a report on what constitutes native marriage, stated that it was not uncommon in his district "for a man married in Church to have another wife married under the custom of the country". But whatever the position, no one can contract a valid marriage under custom without being aware that he has done so, and the affidavit and explanation of the consequences of an ordinary marriage at the ceremony give adequate notice of the risk of criminal penalties for concurrent ordinance and customary unions.

This is not to say that the law should not have been drafted as it was. The question of the effectiveness and fairness of the criminal sanctions is one question upon which opinions differ then and now. The question of the validity of a marriage or marriages under the customary scheme is quite another matter, which becomes important in the context of the choice of law for succession.

However, as has been previously mentioned, despite strong official opposition to the provisions of the Ordinance, the Colonial Office issued instructions for the Ordinance as it stood to be brought into immediate effect, though it was submitted that further legislation might be necessary in the future. Thus the Gold Coast Ordinance became the basis of marriage laws in Commonwealth Africa.

Endnotes

- [1] Shirley Zabel, 'Legislative History of the Gold Coast and Lagos Marriage Ordinance: III', J.A.L., (1979), Vol.23. No.1 p.10
- [2] *ibid* pp.11
- [3] *ibid* pp.11
- [4] Rowe to Colonial Office, 13 and 23 May, 1882 C.10 879/20 Nos. 8 and 9.
- [5] Shirley Zabel, 'The Legislative History of the Gold Coast and Nigeiran Marriage Ordinances II', J.A.L., (1969), Vol.12, No.3
- [6] Colonial Office to Rowe, 22 March 1883, loc. Cit. Rowe to Colonial Office 29, March, 1884 loc. cit
- [7] Colonial Office to Rowe, 22 March, 1883 loc. cit.
- [8] *ibid*

CHAPTER THREE

INTRODUCTION AND APPLICATION OF MARRIAGE LAWS TO ZAMBIA

The Gold Coast/Lagos Marriage Ordinance of 1884, as we have said, can be seen as the beginning of statutory marriage reforms to all British Territories between the Sahara and Zambezi with the exception of the Gambia. This legislation was not imposed upon the territories as part of any formulated policy for the introduction of English-based marriage law to replace the indigenous customary law, nor was it brought in at the request of the missionaries in their desire to eradicate polygamy. Indeed in some territories missionaries were highly critical of its introduction, fearing that it would deter Africans from christian marriage. In fact, the initial force for its introduction came from the administrator in East and West Africa who merely wanted legislation which would get over shortcomings received in the English Law, which in particular did not appear to cover marriages between non-Africans who were not British subjects.

Once the Ordinance had been introduced into the Gold Coast and Lagos, the Colonial Office had a blue-print to which they turned, when, during the first decade of this century, the question of legislation arose elsewhere. However, there was little thought as to whether an enactment which

might be suitable for the coastal areas of West Africa where conditions were very different, with a considerable westernised population, would be suitable for the rest of Africa.

When an African married under the Ordinance, radical changes took place in the applicability of his personal law. He could no longer practise polygamy, as he would be liable to a term of imprisonment if he did so; he could only obtain a divorce under English-based law; and succession to his property was governed by English law. The Ordinance, of course, only provided facilities for monogamous marriage; Africans were not compelled to marry under it, having the alternative of marriage under customary law. But, in practice, an African christian was so compelled, since his Church insisted on christian marriage, on pain of expulsion from the christian community and, christian marriage meant an Ordinance marriage.

Local administrators, and as has been mentioned, many missionaries, with their knowledge of local circumstances were dubious of the wisdom of applying statutory law to Africans. But, until the First World War, the Colonial Officials and in particular the Secretary of State's Legal Advisors, persisted in considering the Statute of 1884 model, as the best available. It is true that certain modifications to it had to be accepted in the light of local objections. In particular, the provision for the application of the English Law of Succession was deleted from the East African Ordinance. In Nigeria, its operation was confined to Lagos and was restricted in its application in the Gold Coast, to two thirds of the region. It was never introduced into Sierra Leone. [1]

No major changes in the marriage laws were made in any of the territories during the colonial period following the Second World War. The independent government of each

to marry under the Proclamation on divorcing his other wives, this would strike at the system of 'lobola' which is of such value as a factor in native management, since he could demand back the lobola which he paid for them. The Colonial Office were highly indignant at such a proposal which, it was felt, no doubt currently, was motivated by a determination to preserve the lobola system as a means of forcing young men to go out and work. It was realised too that if the proposals were approved, the missionaries would be up in arms. It was therefore, thought best to postpone any legislation affecting the marriage of natives and to make the Proclamation apply to Europeans only. The Proclamation, with application to Europeans only, was accordingly enacted in 1906.

In 1911 the Protectorates of North-Western and North-Eastern Rhodesia were amalgamated as the Protectorate of Northern Rhodesia and the anomalous position then existed that in the eastern part of the territory there was marriage legislation which applied to Africans and in the western part legislation which did not. In 1916 the Colonial Office was asked to approve the consolidation of the two laws, the resulting legislation applying throughout the territory to Europeans only. It was pointed out that that would, of course, mean depriving Africans in the East of facilities to enter into statutory marriages which they had enjoyed since 1903. The Colonial Office, not surprisingly, disliked the proposal. The recommendation in 1906 that the North-Western Proclamation should be confined to Europeans had been made, not because it was not suitable for Africans to be given marriage facilities, but merely to give time for consideration of how to overcome the difficulty which had been raised in respect of customary law wives. The High Commissioner was thereupon invited to consider the extension of these facilities to all Africans in the Protectorate. In his reply, the latter reiterated his

view that this should not be done and enclosed the opinions of some of the officials in the territory, the gist of which was that the Africans of the Protectorate were not yet sufficiently advanced for the application to them of the legislation and that, in fact, by 1913 only two African couples had availed themselves of the facilities for marriage offered by the North-Eastern Regulations. These arguments convinced the Colonial Office that, although theoretically it is a retrograde measure to deprive the natives in North-Eastern Rhodesia of the facilities which have hitherto existed, no injustice would be caused since the facilities were almost never made use of. The Northern Rhodesia Marriage Proclamation was accordingly enacted in 1971, replacing the existing enactments. It followed the 1906 North-Western Proclamation, that is to say, it was of the standard type, except that it did not apply to members of 'an aboriginal tribe of Africa' and accordingly the sections dealing with customary law, for instance, those covering the offences of combining customary and statutory marriage and the section regulating succession by English law were absent, as they were in the 1906 Proclamation.

The position in the whole territory became that christian marriages between Africans would be celebrated in Church, but would have no legal consequences, the only legal consequences flowing under customary law from the customary marriage contract into which the parties would have already entered. This was to be made clear to the parties by the clergyman celebrating the marriage. [2]

In 1963, however, the Northern Rhodesia Marriage Ordinance, as the Proclamation had been renamed, was amended by the deletion of the clause omitting its application to Africans. At the same time the familiar provisions making it an offence for a person during the subsistence of an Ordinance marriage to contract a customary law marriage with another person and vice versa were added. [3]

Upon the attainment of independence on 24 October 1964, much of the laws existing prior to independence continued to be in force, with only the names of the ordinances being changed. The provisions relating to polygamy and bigamy were also adopted and are now to be found in the Penal Code and Marriage Act of Zambia.

The offence of bigamy is found in Section 166 of the Penal Code. [4] This section provides that:

"Any person who having a husband or wife living goes through a ceremony of marriage which is void by reason of its having taken place during the life of such husband or wife is guilty of a felony and is liable to imprisonment for five years."

Apart from this provision, there is another provision which creates an offence, which is found in Section 38 of the Marriage Act. [5] The section provides that;

"Any person who,

- (a) contracts a marriage under this Act being at the time married in accordance with African customary law to any person other than the person with whom such marriage is contracted;
- (b) having contracted a marriage under this Act, during the continuance of such marriage contracts a marriage in accordance with African customary law

shall be guilty of an offence and liable on conviction to imprisonment for a period not exceeding five years."

This provision was introduced by the colonial government as a way of curbing natives from combining statutory and customary marriages. However, the automatic adoption of pre-colonial law into post-independent Zambia without any consideration to applicability was to lead to conflict in the adjudication of marital cases. This was to be so because of an attempt either to reconcile the provisions in the Penal Code with those in the Marriage Act or due to misunderstanding of either. This can best be seen in the cases of The People v Katongo [6] and The People v Nkhoma [7].

In the 1974 case, Albina Florence Katongo was charged with bigamy contrary to Section 166 of the Penal Code because, while having a husband, Alfred Chibesa, she went through a ceremony of marriage with Dennis Siwale, the second marriage being a customary union. The learned judge in passing judgement brought the attention of the court to Section 38 of the Marriage Act, saying that this would have been the appropriate section to charge the accused under. This, he argued, was so because to constitute a crime of bigamy both the first and second marriage must purport to be valid christian or statutory marriages. But because Florence Katongo's second marriage was customary it was not recognised as a valid second marriage to constitute bigamy. As a result the accused was acquitted of the crime of bigamy.

In the People v Nkhoma the accused was charged with bigamy contrary to Section 166 of the Penal Code, having gone through a ceremony of marriage to Juliet Kamanga, when his first wife Dorothy Mulenga was still living. Commissioner J Ngulube in passing judgement argued that since English Law did not recognise polygamous marriage,

a polygamous marriage could not constitute a valid first marriage for the purposes of bigamy. But here in Zambia polygamy is considered to be a lawful union and therefore, a polygamous first marriage is enough to constitute a valid first marriage for the purposes of bigamy. To him therefore Section 166 of the Penal Code and Section 38 of the Marriage Act were one and the same and as such he found the accused guilty.

An examination of the two cases will probably meet with the results that the judge in the Katongo Case directed himself properly in his application of the law to the given set of facts, while Commissioner Ngulube misdirected himself. However, there is a lot to be learnt from the way the Nkhoma Case was decided. Commissioner Ngulube was correct in saying that the English Law of bigamy was brought to Zambia obviously with the intention that it should regulate the marital affairs of white settlers. It was for this reason that up until 1963, this law did not apply to indigenous Zambians who were not at liberty to marry under the Act. This law did not apply to the indigenous Zambian for the simple reason that polygamy is a well established institution which is governed by the various customs or customary laws of the parties concerned. He argued further that to this day a plurality of wives is still lawful provided that the person concerned steers well clear of the Marriage Act and those Christian Churches which recognise only monogamy. Therefore, although the Katongo Case was correctly decided, Commissioner Ngulube more importantly addressed himself to the problem arising out of the presence of English Law in an African setting, and the misunderstanding arising out of the same.

Endnotes

- [1] Morris, H.F., 'The Development of Statutory
Marriage Law in Twentieth Century British
Colonial Africa', J.A.L. (1979) Vol.23,
No.1 p.38
- [2] ibid pp.57
- [3] Amendment No. 48 of 1963 for Sections 34
and 38 of the Marriage Act
- [4] Chapter 146 of the Laws of Zambia
- [5] Chapter 211 of the Laws of Zambia
- [6] (1974) Z.R. 280
- [7] (1978) Z.R. 4

CHAPTER FOUR

CONCLUSION

Having attempted to trace the legislative history of the introduction of polygamy in the legal framework, one feature which stands out is the fact that polygamy has created chaos wherever an attempt has been made to include it in legislation. This can be seen from the amount of casework involving the same going as far back as the 1800's in England. As a result of the problems related to polygamy in the light especially of bigamy, the English judicial system finally decided not to relate polygamy to bigamy in any way whatsoever. They decided instead to entertain polygamy only in cases of nullity. This has probably made life easier for the British legal system, at least as far as bigamy is concerned.

The problem was more difficult or impossible to solve when it came to the colonies because the white settlers were living in a society where polygamy was a recognised way of life. It might be argued here that the problem faced by the Colonial Office regarding polygamy was one which was self-imposed, because initially the Colonial Office wanted legislation which would accommodate non-British settlers. Had they confined themselves to this area of law only, they might have had less problems. But this attempt to provide what they saw as a solution to polygamy led to more harm than good, this is felt even today.

Africans have been introduced to a way of life which is alien to them and which they, more often than not, do not

understand, and their desire to become 'modern' has left them probably more ignorant as to who they are than they ever were before the coming of the white man. However upon the attainment of independence Africans were given a chance to go back to their roots, especially in the areas of social life and culture. But this was not to be so for the seeds of colonialisation had been sown and taken root. The African had already been introduced to a 'superior' way of life and preferred to become as 'civilised' as her colonisers.

It was as a result of this desire that probably almost all pre-colonial laws were adopted without any regard to their applicability to the African setting. The marriage laws are specifically alien because they demand a way of life which is foreign to Africa. Although more people now choose to marry under statutory law, the implications are not fully understood or appreciated because a man might marry one woman by statute and thereafter proceed to take one or two extra wives by customary law, while the first marriage is still subsisting. More often than not such cases do not reach the courts because in Zambia polygamy is a way of life. But even where the cases do reach court, the provisions of the law are not always easy to interpret and apply as was seen in the Nkhoma Case.

The automatic adoption of the pre-colonial marriage laws to post-independence Zambia is a definite minus on the part of the government. There is need to appoint a commission in Zambia to consider laws and customs regulating marriage, divorce and the status of women, bearing in mind the need to ensure that those laws and customs while preserving existing traditions and practices as far as possible, should be consonant with justice and morality, and appropriate to the position of Zambia as an independent nation.

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2. Marriage Act : Chapter Two Hundred and Eleven of the Laws of Zambia
3. Offences Against the Person Act, 1861
4. Penal Code : Chapter One Hundred and Forty-Six of the Laws of Zambia

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1. Andrews J.A., 'A Licence for Bigamnty?', Criminal Law Review, (1963), p.261
2. Bartholomew G.W., 'Polygamous Marriages', Modern Law Review, (1952), Vol.15, p.35
3. Bartholomew G.W., 'Polygamous Marriages and English Criminal Law', Modern Law Review, (1954), Vol.17, p.344.
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13. Zabel S., 'The Legislative History of the Gold Coast and Nigerian Marriage Ordinances : II', Journal of African Law, (1969), Vol.13, No.3, p.158