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Effect of will on those subject to customary Law in Nigeria

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Abstract
The word "Will" either refers in a metaphysical sense to all that a person wishes to happen on his or her death. Under the customary law, a Will is unwritten, but with the different traditions in the Nigerian system of customary law, succession; inheritance are the bedrock of passing property to a testator's next of inheritance. Wills under this nature are done based on the laid down rules and regulations or rather the customs and traditions of a particular tribe in practicing the devolution of one's property after the death of a testator. With the received English law of the Wills Act of 1837, the Customary Law of Succession began to face problems. People began to make choices of which law to follow, and by so doing the customary law of the indigenous Nigeria subject to customary law was greatly affected. Nevertheless, this Essay will discuss the concepts of the Wills Act and that of the Customary Law with reference to those subject to customary law. It will also analyze the mode or ways in making a will and the requirements for the creation of a will. In the concluding part of this Essay, the problems and effects will be discussed with a view to suggesting, where necessary.

Keywords: will, customary Law, metaphysics, Nigeria, wills Act

1. Introduction
The Wills Act of 1837 is a statute of general application which was introduced into West Africa by the British administration. It gives every Nigerian a right to make testamentary disposition in writing provided he has the requisite capacity, with regard to age [1] and soundness of mind, and complies with the form [2] required for a valid Will. Any part of the Testator's property may be given away by Will. A Will, being the "Will" [3] of the testator.
But in African culture and Law, no person is permitted to give away all that he has, for that would amount to disinheriting those who should have been entitled to succeed to his property under Customary Law. There is no known record of any African Customary Law in which such disinheritance is permitted. Even a Will made by virtue of the Wills Act of 1837 may be faulted on the ground that it fails to recognize the rights of potential beneficiaries under customary Law" [4].

2. Definition of the Concepts of Will
In defining what a Will is, it is pertinent to see all ether relative to a will such as succession and inheritance. There is a big difference between succession and 1heritance.
According to A. A. Kolajo, succession is the devolution of title to land or a rise or ascension to an office. t is the transmission of property vested in a person at his death to some other person or persons. Succession may be testate or intestate. Testate succession occurs when there is a will, while intestate succession takes place when there is no Wi1l [5].

On the other hand inheritance is something that falls on you, it can also be described or defined as something that is transferrable or something acquired.
Narrowing down to what a Will is, it is defined therein.
"A Will is used for succession. It can be defined as an instrument containing a voluntary declaration as to the disposition of properties both real and personal before death."
A Will is a written statement of how one wishes one's property to be dealt with after one's death. It is a document [6], Written Wills are unknown to customary law. There may be nuncupative Wills, that is, oral wills declared publicly and solemnly by a testator before a sufficient number of witnesses. There are also death-bed dispositions. Both nuncupative Wills and death-bed dispositions are recognized and known to customary law. The fact that written Wills are unknown to customary law does not preclude persons governed by customary law-making will in English form. By their Wills they can create family property, but they cannot alter the settled customary law of interactive. Customary law Wills provides for the creation, maintenance and perpetuation of family property and other rights.
The Black's Law Dictionary defined a Will as:
An instrument by which a person makes a disposition of his real and personal property, to take effect after his death and which by its own nature is ambulatory and revocable during his lifetime.
Furthermore, it is the legal expression or declaration of a person's mind or wishes as to thedisposition of his property, to be performed or take effect after his death. A revocable instrument by which a person makes disposition of his property to take effect after his a disposition of his property (real or personal) to take death. It is also a written

[1] S. 7 Wills Act (1837)
[2] S. 9 Wills Act (1837)
[3] Will as used in this context means "deliberate and fixed intentions: Concise Oxford Dictionary, 5th ed. P. 1494
[4] The principle of African Customary Law-AkintundeEmiola (1997)
[5] Customary Law in Nigeria through the cases (2000)
[6] The New Lexicon Webster's Encyclopedic Dictionary, (1993) p. 1125

instrument executed with the formalities required by statutes, whereby a person makes effect after his death [7].
There are, however limitations to power of testamentary disposition by a testator. S.3 (1) provides that

"Subject to any customary Law relating thereto, it shall be lawful for every person to devise, *bequeath or dispose* of, *by his Will executed in manner hereinafter required, all real estate and all personal estate which he shall be entitled to, either in law or in equity, at the time* of *his death and which if not* so *devised, bequeathed or disposed* of *would devolve upon the heir at law* of *him, or if he became entitled by descent,* of *his ancestor or upon his executor administrator"* [8].

The opening words of 5.3(1) Wills Law, to wit, "subject to any customary law relating thereto" clearly render the capacity to make, devise, bequeath or disposition by Will, subject to customary law relating thereto. It implies that what the section or subsection is "subject to" shall govern, control and prevail over what follows in that section or subsection of the enactment. In otherworld, the expression governs the words "it shall belawful for every person to devise, bequeath or dispose of by his Will" which is concerned with testamentary capacity; and the expression also governs the word "all real estate and personal estate which he shall be entitled to either in law or in equity, at the time of his death" which covers the property to be devised. The phrase is thus a qualification of the testator's capacity to make a will and also gratification of the property to be devised. In the case of Taiwo v. Lawani [9], the plaintiff brought this action for partition or sale of the property; an account of rents unlawfully collected by the defendants for the period April, 1957 to March, 1960 and payment over to her of the same amount found to be due to her. Alternatively, she sought a declaration that she was entitled to a half share of the property under native law and custom. She relied on this law known as "Igikankan" and alleged that it was applicable to the Yoruba people of Lagos. She contended that by virtue of "Igkankan", her mother was entitled to a half share of the property and she, the plaintiff, was entitled to her mother's share under the same custom by right of representation.
The defendant contended that there was no nature law and custom among the Yoruba people of Lagos known as "Igikankan" that even if court should find that such custom existed, it should declared the custom to be repugnant to natural justice, equity and good conscience, on the principle that "equity is equity" and that in any case, Marian Omolara Lawani had surrounded her share and interest in the property in 1955 in consideration of defendants for-bearing to bring an action against her for the maladministration of their father's estate.
It was the decision of the court that
(1). According to native Law and custom of *the Yoruba people* of *Lagos known* as *"Igikankan" or "Idi-Igi", the property* of a *deceased intestate is distributed among his children according to the number* of *the mothers (wives* of *the deceased). Each mother is regarded* as *constituting* a *branch* of *the family for the purpose* of *succession. An only child* of a *wife will get equal share with many children together* of *another wife.*
(2). *The rule* of *succession known* as *"Igikankan, or Idi-Igi", which regulates the distribution* of *the customary estate of deceased intestate. Yoruba people of Lagos, is well recognized and established native law and custom.*
(3) "Igikankan or Idi-Igi", is not repugnant to natural justice, equity or good conscience.

In another dimension in a recent case of Anusiem v. Anusiem [10] one of the issues for determination in the appealof this case is whether the trial judge was right to have decided that since the appellants base their claim solely on the non-proved oral Will of Peter Anusiem (deceased) and that of Christiana Anusiem, the appellant's case should fail. It was unanimously held that by allowing the appeal and ordering a retrial, that in the absence of proof of a Will or Wills, the presumption is that the deceased died testate. All his property would, by the operation of the native law and custom practiced in the area, devolution on those entitled.

2.1. What can be willed?
Assets can be willed, real or personal. For example, Cars, land, clothes and all examples of chooses in possession. Chooses in action, for example, debts, shares and all other invisible assets that are actionable in court. For the purpose of clarity, it is pertinent todiscuss them as follows.

a. Personal Estate
This consists of all moveable property of a deceased. The distribution of this posses no problem as the articles or personal effects comprising the estate are normally distributed per capita, that is, among the children individually. In these, daughters may share [11], specifically, all the personal effects of a mother - such as, wrappers headties ear-rings etc. and other ornaments, cooking utensils are shared among the daughters exclusively, though it is not uncommon for the women to give some of these to the wives of her sons or other female members of the extended family.
The distribution of the estate of a member of the family is the responsibility of the head and other members of the family. Although, it has been noticed that testamentary disposition other than customary "Will" is unknown to customary Law [12], it was also noted that property may be given away by death-bed declaration [13], It was held in Coker v. Coker [14] that close relatives may also be given a share in a deceased's personal estate.

b. Distribution of Immovables
The distribution of the Immovable assets of a deceased under customary law is governed entirely by different rules.
The established rule under customary law is that immovable property of a Nigerian vests in his male children as family property after his death. There are two broad exceptions to the rule. The first is that the Edos where the rules of primogeniture applies, the first soninherit the property of the departed father known as "Igiogbo" exclusively but the

[7] Page. 1598
[8] Wills Law od Bendel State
[9] (1961) ANLR, 733
[10] (1993) 2 NWLR (pt. 276) 485
[11] Adedoyin v. Simecon&Ors. (1928) 9 NLR, 76
[12] Lawal-Osula v. Lawal-Osula (1993) 2 NWLR (pt. 274) 158
[13] Ä declaration made voluntarily in the presence of responsible and disinterested persons by a testate in good condition of health is a customary will. it is known to Roman Ofold and still repeated among African.
[14] (1938) 14 NLR, 83

other property may be shared with other children or given away by a Will [15]. The second exception is really not an exception because it was predicted on the deceased not having male children to inherit his property. In such a case, it is the brothers who are entitled under the Igbo customary law. This was the position of the court in the case of Nazianya v. Okagbue [16]. Apart from the singular exception pertaining to female children, all male children, irrespective of age or number, are entitled to the immovable property of their father as joint-heirs. The property that come within this range are the family house, the groves and shrines and such other property of which the children must, by law succeed as a single corporate unit as was held in Shelle v. Asajon [17].

2.2. The creation of a valid will

Haven seen the definition of the concepts of a will in chapter one above, the things that can be willed and the general introduction of this Will, it is pertinent to go further and discuss the creation of this Will. How it can be valid and the formal requirement for the creation of a Will. Chapter Two of this Essay will try to simplify to simplicity the various ways to make a valid will and see those that can make a Will. This chapter will discuss the following: (a) capacity to make a valid will, (b) formal requirements for the creation of a will and the administration of estates.

A Will is only valid if it is made in the proper form, by a person of sufficient age, and certain things are established about the mind of the testator at the time the will was made. As regards the mind of the testator it must be established that:

1. they had testamentary capacity;
2. they had knowledge of, and approved the contents of their will and
3. the making of the will was not induced by force, fear, fraud, or undue influence

2.3. Capacity to make a valid will

a. Age: A person under the age of eighteen has no capacity to make a will unless he or she is of privileged status [18]. Consequently, if a minor die, his estate will passin accordance with the rules of intestacy.

b. Testamentary Capacity Apart from the age restriction, a testator must be mentally capable of making a will; that is to say, the testator must have testamentary capacity to make a will. The test of mental capacity to make a will is not directly linked to the concept of "mental disorder" under the Mental Health Act [19]. A person suffering from a 'mental disorder' under the Act may in some circumstances have capacity to make a will. Conversely, a person who has never been adjudged to be suffering from a 'mental disorder; may lack capacity to make a will. In Banks v. Good-Fellow [20], Cockburn CJ saidof the capacity of a testator to make a will: inter alia

"he must have a sound and disposing mind and memory. In other words, he ought to be capable of *making his will with an understanding* of *the nature* of *the business in which he is engaged*, a *recollection* of *the property he means to dispose, and* of *the person who are the objects* of *his bounty and the manner in which it is to be distributed between them.....*

The above assertion requires three things of a testator; that he should have a sound mind; a sound memory and sound understanding. Also, in Harwood v. Baker [21], a testator who was executing a will on his death bed while suffering from a disease affecting his brain left all of his estate to his second wife to the exclusion of other family members. It was held that as a result of the disease affecting this brain, he did not have sufficient recollection of other family members. In other words, he did not have a testamentary capacity.

c. Insane Delusions A testator may be said to be sufferings from an insane delusion if he holds a belief on a particular matter which no rational person could hold and the belief cannot be eradicated from their mind by reasoning with him as in the case of Dew v Clarks [22]. An insane delusion is a good example of a form of mental illness which may not affect the testator's ability to make the will. It will only affect the testator's capacity to make a will, if it in some way affects the way in which he disposes of his property. In Dew v. Clark [23], the testator made a will which was perfectly rationalon the face of it, but which excluded his daughter from benefit. The daughter was able to show that her father lacked testamentary capacity by bringing extrinsic evidence of his insane aversion to her.

d. The time at which a testator must have testamentary capacity. As a general rule it must be established that testator had testamentary capacity at the time he executed the will. However, under the rule in Parker v. Felgate [24], where a testator dies leaving a professionally drawn will, he can be regarded as having sufficient testamentary capacity if he had such capacity at the time when he gave instructions to a solicitor for the preparation of the will, and the will was prepared in accordance with his instructions; and at the time of executing the will, he was capable of understanding, and did in fact understand that he was executing a will for which he gave instructions.

e. Statutory Wills: Where a person lacks testamentary capacity, it may be possible for a 'statutory Will' to be executed on their behalf so as to enable them to die testate. In S. 96(1) of the Act [25], the court of protection has power to order that a will be executed for an adult who is mentally disordered within the meaning of the Act, where the court believes that the person does not have sufficient mental capacity to execute a will for themselves. A statutory will has to be executed in accordance with the special formalities set out in S. 103 A of the Mental Health act of 1983.

2.4. Formal requirements for the creation of a valid will under the Statute Law and Customary Law.

The law governing a will is contained in the Wills Acts (1837), Wills Law (1852) and they are statutes of general

[15] Lawal-Osula v. Lawal-Osula (1993) 2 NWLR (pt. 274) 158
[16] (1962) ANLR, 358
[17] (1957) 2 FSC, 65
[18] S. 7 Wills Act 1837
[19] (1983)
[20] (1870) LR 5 QB 549
[21] (1840) 3 Moo PC 282
[22] (1820) 3 Add, 79
[23] Supra
[24] (1883) 8 PD 171
[25] Mental Health Act (1983)

application. The one that contains the prescribed format under the statute law is that of 1837.

2.5 The requirements of a valid will are

1. The will must conform to a certain format as prescribed in the Wills Act of 1837.
2. The person making the will, a testator must have a testamentary capacity as in the case of Harwood v. Baker [26] and Barks v. Good Fellow [27] that is, must be of age, (b) must be of sound mind and (c) must have sound understanding.
3. It must be made in the presence of at least two witnesses. They must also attest to it.
4. The will must contain the intention of the testator or must represent the intention of the testator.
5. The will is irrevocable. Before the death of one, the will can be revoked intentionally or unintentionally with the use of another will know as the CODICIL and it contains minuses or pluses. It could be revokedby marriage, burning or otherwise. Thus, in Cheese v. Lovejoy [28], Justice James has observed that;

"All these destroying in the world without the intention will not revoke a Will nor intention without destroying, the two go together".

Under the customary law, the requirements of a valid will are as follows:

1. A will must be made during the testator's good health or in anticipation of death.
2. The declaration deals with the disposition of properties and direction as to the mode of burial and funeral ceremonies.
3. A will is not required or necessary under customary law, because writing is unknown to customary law.
4. The disposition is effective if the testator has full mental capacity as at the time the will was made as was held in Parker v. Felgate [29]
5. The identity of the subject matter must be fully identified and recognized.
6. The subject matter must be disposable, reason being that the testator cannot give that which he does not own.
7. It must be in the presence of disinterested witnesses, that is, those that will not benefit from the will.
8. Customary will take effect and is conditional upon death.

2.6. The Administration of Estates

The character which the administration of an estate assumes depends largely on whether the deceased leaves a will or not, and whether the rules of customary law or statutory law are to apply. Where the deceased leaves a will in the form provided by statute the administration of the estate is to be governed by the relevant statute for the administration of estate [30]. These provides for the appointment of executors or administrators whose duties are to call in all assets belonging to the estate, pay up all just debts, and distribute the remaining assets among the beneficiaries [31].

The position is completely different where the person did not make a will and the rules of customary law apply to him. Here the family, through its head of family or the family council, is the principal instrument for the administration of the estates. However, as the cases have shown, he may specify a particular member or members of the family - nuclear or extended - to tidy up his affairs after his death. This was the line taken by the deceased in Nelson v. Nelson [32]. In that case, a father appointed one of his sons to look after the interests of his other brothers and sisters. Such a person is constituted as a trustee of the interests of other beneficiaries and is, therefore, liable to account to them. The right to appoint an administrator is recognized by the Supreme Court in Idehen v. Idehen [33], wherein it was stated that a Bini is entitled to "appoint as head of his family a person other than his eldest son". All the cases on the status of the eldest son in Bini customary law which had reached the Supreme Court were fought strictly on the challenge of the capacity of the deceased of make a will disposing of his assets under the Wills Law. If a person subject to the rule of primogeniture dies without making a will, is it legitimate for the head of the family or the family council to proceed to distribute his estates on the basis of the decisions in thosecase? The answer is recondite but it seems as if that cannot be done, since the court had not made a definitive statement on the legality of succession by primogeniture rule.

Ogundare, JSC [34] said;

I do not want to proffer any view as to whether this custom is repugnant until such occasion when we are invited to reconsider on previous decisions on it"

However, Belgore, JSC [35] was firm as far as "Igiogbo" was concerned, that the Bini customary law of inheritance cannot be said to be repugnant, saying that "the inheritanceunder English law as relevant to succession to seat and estate of hereditary person like the Duke or Earl is not far different from Bini customary law"

The role of the head of the family in the administration of the estates under customary law is considerable. It has been settled in Visa Dawodu & Ors. V Suwebatu Danmole & Ors [36] that in the disputed distribution under Yoruba customary law the decision of the head of the family is final. In a situation where there is an infant or minor among the beneficiaries entitled to hold a distinct part of the estate or share in the revenues derivable there from, the head of the family stands in the position of a trustee for his interest as in the case of Salami v. Salami &. Ors [37].

2.7. Will disposition under Customary Law

This chapter will focus on how Wills are disposed under the customary law in the Nigerian Customary system. It is worthy to note that in discussing the disposition of will under the customary law, we shall discuss them in three categories namely (a) Nuncupative Wills (b) Written Wills

[26] (Supra)
[27] (Supra)
[28] (1877) 2 PD 251
[29] (Supra)
[30] Administration of Estates Law, Cap 1 (Laws of Western Nigeria) in the Old Western region and in the rest of Nigeria the statute of distribution, 1670-58.

[31] Williams on Will, 3rd Ed. Mallows, Law of Succession
[32] (1951) 13 WACA, 248
[33] (1991) 6 NWLR (pt. 198) 301
[34] Lydia Lawal-Osula v. Sakalawal-Osula (1995) 9 NWLR (pt. 4190 259) at p. 218
[35] Lydia Lawal-Osula v. Sakalawal-Osula (1995) 9 NWLR (pt. 4190 259) at p. 274
[36] (1958) 3 FSC 46 affirmed by the Privy Council in (1962) 1 All NLR 902; (1962) WLR 1053
[37]

and (c) Moslem Wills. The methods in which the disposition is carried out is of utmost importance to this chapter.

2.8. Nuncupative Wills

As earlier discussed in chapter one of this essay, nuncupative will refers to oral wills declared publicly and solemnly by a testator before sufficient number of witnesses. This will is known to customary law. This feature has led some writers [38] to conclude erroneously that there is no distinction between testate and intestate succession under customary law. It is submitted that as in English law, testate succession under customary law gives effect to the intention of the testator as expressed in the nuncupative will.

A customary law will takes the form of an oral declaration made voluntarily by the testator during his life time. Such declaration may be made while the testator is in good health, or in anticipation of death [39]. However, the declaration deals not only with the disposition of property but also gives directions as to the mode of burial and funeral ceremonies to be performed for the testator. A nuncupative will is not the usual method of general disposition of the testator's entire estate. The subjectmatter of the will must be disposable as the testator cannot give that which he does not own. Thus, a person cannot dispose of undivided interest in family or communal land by will, as he has no individual property therein as was held in Johnson and Macaulay [40]. On the other hand, any otherproperty individually owned by the testator may be so disposed. The testator should also clearly identify the beneficiary.

For a nuncupative will to be *valid* it must be made in the presence of disinterested witnesses. In Ayinkev. Ibi- dunmi [41] it has been rightly painted out that the presence of disinterested witness is necessary, not for purposes of validity, but for purposes of proofof the declaration. No specific number of witnesses is laid down, but the Will is likely to be readily established by the evidenceof more them one witness, especially if these witnesses are not beneficiaries.

Finally, a testator is always free to dispose of his self-acquired property by a nuncupative will.

2.9. Written Wills

Haven discussed briefly written wills in chapter one and two above, we shall further discuss this subject matter in a broader sense.

Writing is obviously not an intrinsic feature of customary law. There are increasing instances of customary law wills being set down in writing. What is the effect of such a written document? Maybe, in order to be valid, comply with the provisions of the Wills Act of 1837 or the Wills Law of 1958? The Nigerian courts have repeatedly held that the reduction into writing of an essentially customary -law transaction does not alter its nature. In Rotibi v. Savage [42] and Nwabuoku v. Ottih [43] writing in such cases is no more than mere evidence of the transaction.

If a testator intends to make a will in accordance with the English form then the document must comply with the requirement of Wills Act of 1837. Where, on the other hand, the testator intends to make a customary law will but adopts the strict technical form prescribed by the Wills Act of 1837, the document will be treated by the courts as an English will. If, however, the will is written but does not comply with the requirement of the Wills Act it would be treated as valid under customary law.

In Apatira v. Akenke [44], the testator, a nature of Nigeria who was born and lived his entire life as a Moslem, died leaving a will in English form which did not comply with the requirements of the Wills Act as regards signature and attestation. It was argued in favour of granting probate of the will that in spite of the statutory deficiencies, it should be treated as a will in Moslem form which, like the one in question does not require any writing or attestation. Ames J. refused to grant probate of the will on the ground that the testator intended to make a will in accordance with English law has but failed to comply with the statutory requirements. Evidence was found of such intention in the fact that the testator purported to dispose of his estate contrary to the rules of Moslem law.

Another question that point our way forward is if, for instance, a native of Nigeria makes a will which is contended to be in English form but fails to comply with the requirements of the Wills Act, can the court consider the validity of such a document under customary law? A negative answer was given to this question in Apatira v. Akanke [45]. But there are no compelling reasons of policy why such a document should not be treated as a valid customary law disposition if it complies with the requirement of a valid nuncupative will,

2.10. Moslem Wills

A testator may dispose of part of his estate by will under the Maliki School of Moslem Law. Moslem law of succession derives its force from the Quran and what is called "hadith". The Quran provides that on approach of death a Moslem should consider living wealth for parent and near relatives as well as charity. One third of his wealth goes to charity. All other residual goes to the family. One quarter is given to his widow where there is one wife and one eight where there are children and grandchildren. If female Moslem dies testate half of her estate is given to her husband.

Islamic succession is automatic for heirs. A Moslem does not require a will to become a beneficiary as that could be tantamount to an annulment of the Quranic prescription. But a Moslem can decide to make a will under the Wills Act as any other Nigerian subject to customary law. Where they do, the Moslem law would no longer apply to the estate of the testator. In Rasaki Yunusa v. Adesubokan [46] where a Moslem testator disinherited one of his sons under the Wills Act. The court held that although he could not do so under the Moslem law of succession, it could do so if he opted to make a will under the Act.

3. Method of Disposition under the Customary Law

1. He can make a will inter vivos, that is, making a gift of his property while alive as was held in Salamotu Ayinke&. ors. V Ramotu Oladunni[47]

[38] Elias, T.O. Nigerian Land Laws Custom 3rd ed. (Routledge&Kegorn Paul, London 1962), 228; Lloyd, Pc. Yoruba Land Law (oxford University Press, London 1962)

[39] Meek, C.K. Land Tenure and Land Administration in Nig; Colonial Research Studies

[40] (1961) 1 All NLR, 743

[41] (1959) 4 FSC, 280

[42] (1944) 17 NLR, 77

[43] (1961) 1 All NLR, 487

[44] (1944) 17, NLR, 145

[45] (Supra)

[46] (1971) NMLR, 77; (1971) All NLR, 225

[47] (1959) 4 FSC, 137

2. He could make a "bed declaration" (death)
3. The disposition may take the form of denatio Mortios Causa. Thus, form of disposition is usually made in anticipation of death, by this, the maker of the will allots specific properties to certain persons or relatives.
4. Disposition could be made according to customary law. This is done by confiding on certain trusted members of his family, the property that should go to certain person especially children born outside wedlock. It does not have to conform to the provisions any statute.

3.1. Those to share intestate succession under customary law with reference to the Yoruba, Ibo Benin and Urhobo custom

In delving into this subject matter, it is pertinent to define what custom and customary law is in the Nigerian context.

Custom can be defined as a rule or body of rules or usages accepted and recognized by people of a particularlocality as binding on them in their relationship with one another. Any usage or habits, the breach of which does not attract sanction is "custom".

Customary law on the other hand is defined according to Hon. Justice Andrew Obaseki Rtd. (Supreme Court) In the case of Oyewunmi v. Ogunosan [48] as

The organic and living law of *the indigenous people* of *Nigeria regulating their Jives and transactions. It is regulatory in that it controls the Jives and transactions* of *the communities subject to it.*

His Lordship continued

It is said that custom is the mirror of *the culture* of *the people. I would say that customary law goes further and imports justice to the Jives* of *all those subject to it.*

Haven seen the definition or meaning of custom and customary law, the discussion of the subject matter will have a focus in terms of the customs of the Yoruba, Ibo, Benin and Urhobo people of Nigeria.

Persons entitled to share in intestate succession under customary law are:

1. Children

In Africa, children include offsprings born in and out of wedlock. Thus, in Bassilv. Honger [49] it was held that a child born to a freeman by his female slave had a right to inheritance on equal basis as if the child's mother were a freeborn.

The right of female children depends on the society whether the society is patrilineal or matrilineal.

2. Relatives

The relatives of a member of a deceased person or family succeeds the property. The Onisha customary law which permits a brother to succeed to the property of a man who dies without a child.

3. Spouses:

As a general rule, spouses to each other do not succeed each other under customary law. See the case of Oloko v. Giwa [50] where the court firmly declared that the land allocated to each of the wives by the intestate still belongs to the family because, the allocation conferred no title on the women. They are however, entitled to remain in the house if they choose, subject to good behaviour.

We shall now briefly discuss the four customs mentioned above.

The Yoruba Custom

Under Yoruba custom, when a man dies without a will, family property is created as a form of trust under the head of the family for the children of the deceased who have equal share in the property.

Here, the wives have no right of inheritance to any of the property of the husband. They can only claim a right to live in a house left behind by the deceased in their life-time provided they remain of good behaviour, that is, they do not take another or other husband outside the family. The presumption is that the wife of a deceased husband would be taken care of by her children from their share of the estate.

In Yoruba land, real properties are inherited by the children of the inestate to the exclusion of all the other relations.

The female children share equally with the male children. The landed property devolve as family to which all the children have a right.

The control of property is usually by the eldestsurviving son of the deceased (Daudu) where no male child, the eldest daughter shall succeed to the property. The landed properties are shared among the children legitimate or illegitimate, that is, mere acknowledgement of paternity in the life time of the deceased. A surviving spouse cannot succeed where no children, property devolve on the members of the family or it would go to the surviving next of kin. Another point to note here is where children is from one-woman distribution is on equal basis or where it is a polygamous set-up, distribution is perstripes (Idi-Igi).

Normally, where there is a dispute as regards distribution, the eldest son normally resolves such dispute. Thus, in Dawodu v. Danmol [51] e. the deceased, Suberu Dawodu, was survived by nine children born of four wives. The question before the court was whether the intestate's estate should be divided into four parts (per stripes) or into nine parts (per capita) Jibowu, J in the court of first instance, held that distribution on the basis of Idi-Igi was contrary to natural justice, equity and good conscience. The Privy Council upheld the Supreme Court's rejection of Jibowu's Judgment and decided that the estate should be divided into four parts. In the opinion of the board, Idi-Igiwas prevalent custom of the Yorubas. The Board also concludes that distribution in accordance with the Idi-Igisystem is not contrary to natural justice, equity and good conscience [52].

The Ibo Custom

In Ibo land, the eldest son or as it is called "Okpala" "Diokpala", on "Diokpa" succeed to the estate. He is entitled to occupy his father's immediate devilling house and surrounding farms and premises. The remainder of the landed property of inestate, will be held by the eldest child,in trust for the younger one.

Female children have no share in the landed property. Where no male children, his brothers of half-brothers takes priority. Thus, in the case of Ejiamike v. Ejiamike [53], the plaintiff was the eldest male issue (Okpala) of his late father at Onitsha. The defendants were members of the deceased's household. In the action, the plaintiff claimed that the

48 (1990) NWLR, 182, p.8. 202
49 (1954) 14 WACA, 569
50 (1939) 15 NLR, 31

51 (1958) 3 FSC 46; (1962) 1 All NLR, 720
52 (supra); Taiwo v. Lawani (1961) 1 All NLR, 703, Reis v. Mosana (1962) CCR, 19
53

defendants were jointly managing the estate of their late father in utter disregard of his rights and duties as the Okpala. The estate included some houses which the defendants let to tenants and collected rents therefrom. The plaintiff sued the defendants claiming an account of the management of the estate, payment over to him of his own share of the proceeds and an injunction to restrain the defendants from further interference and management of the estate. The learned trial judge found on evidence that in accordance with Onitsha customary law, the eldest son has the right to manage and administer the real estate of his deceased father for the benefit of himself and his brothers.

The Benin Custom

Under Benin custom, the strict rule of primogeniture applies. According to this rule, the eldest son succeeds to all the landed property of his father to the exclusion of the others provided he has performed the funeral rites of his deceased father as in the case of Ehighie v. Ehighie [54] and Ogiamen v ogiamen [55]. But in Osula v. Osula [56] the eldest son succeeded absolutely only to the deceased main house. Other property such as farm land, houses belongs to all children who took part in the funeral ceremony of their father. Under the Benin custom daughters have no right to succession.

The Urhobo Custom

Among the Urhobos after the funeral ceremony of the husband, his wives are shared among the children and close relations. The family usually gives the eldest son hischoice among his late father's wives. In addition, the eldest son is given his late father's house (ughe) as well as some of his father's personal effects. After the funeral rites, a family meeting takes place to apportion and to share the deceased real and personal property.

The per stripe method is often preferred. Thus, in the case of Okotie Okpakpo family of Agbasav, Madam Otoputu &. Ors [57]. It was held that by the Urhobo custom, land and houses are not distributable on the death of the father, personal properties are distributable. Land and houses pass on to the eldest male child. The only right a female child has is to occupy part of her late father's land to farm or to build a house of her own. But the eldest male child is in every case the person to make the decision. If he decides against the female child, that is to say, if he refuses to allot any part of the land to her there is nothing, she can do about it. This position, has been held to be contrary to natural justice, equity and good conscience. The Court of Appeal (NikjTobitlCA) of Enugu Division observed that;

"Almighty God who created an eldest male child or an eldest female child did not contemplate any discrimination between them"

Furthermore, in Oke v Oke [58]. the case concerns the right of a widow to inherit property of her deceased husband who died testate haven made a will. The mother of the plaintiff was the wife of the deceased. She allowed her late husband to errect a house in question on her own family land so that they could both live there for the remaining part of their lives. The land had not been partitioned. The husband died testate. The court held that the testamentary capacity of the man belongs to the family of the wife.

3. Summary and Conclusions, Criticisms and Suggestions

3.1. Summary

In Summarizing this essay, the various chapters will be summarily reviewed to see how the statutory will has greatly affected the customary will of a Nigerian subject to the customs and traditions of his or her tribe.

Anything borrowed for use has its own inherent problems because the environments and social climates in which it would operate in both places are bound to be different. In chapter one above the Wills Act of 1837 is said to be a statute of general application which was introduced into West Africa by the British administration. It is made clear that a Nigerian making a will with the Act must do that in writing which is known to the Act [59]. In the African context generally, a testator is not permitted to give away all that he has, for such act would account to disinheriting those that are supposed to be entitled by the custom and tradition governing it. It is pertinent to note that a will under the Wills Act that does not recognise the rights of potential beneficiaries under customary law will be faulted [60].

It is reasonable to conclude here, that a will must conform to the requirements of either under the Wills Act or of the customary law before it can be declared valid. But one can create a valid will if a testator has the capacity to make the will either of age [61] or has a testamentary capacity, that is, must be of sound and disposing mind and memory as in the case of Banks v Good fellows [62] and Harwood v. Baker [63]. Furthermore, the mind of the testator making a will must be that he is making that will to be governed by the rules of customary law or statutory law. In a case of the statute will, the administration of the estate is to be governed by the relevant statute [64] which provided for the appointment of executors or administrators. But if the testator makes his will to be governed by the rules of customary law, the relevant procedures will be followed that is, the family, through its head of family or the family council, is the principal instrument for the administration of the estates. However, the customary law of the Yoruba man, Benin man, Ibo man and Urhobo man varies. Under the Yoruba custom, it is said that only the deceased children, both male and female share equally the properties of their late father while in Ibo land it is the eldest son that holds the landed property of the inestate in trust for the younger ones. Also, under the Benin custom, only the eldest son succeeds to all the landed property of his father to the exclusion of the others provided he has performed the funeral rites of his deceased father [65]. The Urhobo custom is quite different. After the funeral ceremonies of the husband, his wives are shared among the children and close relations by giving the eldest son the choice to choose among his late father's wives. In addition, the eldest son is given his late father's house as well as some of his father's personal effects.

54 (1961) All NLR, 842
55 (1967) NMLR, 245
56 (1995) 9 NWLR, pt. 419
57 Unreported suit No. w/48/71
58 (1974) 1 All NLR, 443

59 S. 7 Wills Act (1837)
60 The Principles of African Customary Law
61 S. 7 Wills Act 1837
62 (Supra)
63 (Supra)
64 Administration of Estates Law Cap 1 (LWN)
65 Ehigie v. Ehigie (1961) All NLR, 842; Ogiamen v Ogiamen (1967) NMLR, 245

3.2. Conclusion

The right of an individual subject to customary in the distribution of properties has been greatly affected due to the fact the Wills Act of 1837 makes an alternative for an individual or a testator who wants to disinherit a member of his family. This happened in the case of Yunusa v. Adesubokon [66] where a Moslem testator made a will under the Wills Act, 1837 by which he bequeathed N10.00 to his son, the plaintiff. He also gave two other sons one ploteach. A third plot and the residual estate were also bequeathed to them. The plaintiff who was the eldest son of the deceased brought this action against the defendant who is the executor of the will of his deceased father challenging that the testator being a Moslem was not entitled to dispose of his properties under the Wills Act of 1837 in a manner contrary to Moslem law. The learned judge in considering 5.34 [67] found that the Moslem law was not repugnant to natural justice, equity and good conscience. He was of the view that although there was an apparent incompatibility between the rules of Moslem law and 5.34(1), the situation was saved by the last sentence of the subsection which provides that;

"nothing in this law shall deprive any person of *the benefit* of *such native law and custom"* [68]

He therefore, concluded that the Wills Act shall notdeprive the plaintiff of the benefit of Moslem law. Lastly, the judge found that as the testator was domiciled in Northern Nigeria and the two houses disposed by the Will were located in Zaria, Maliki law applied. That law does not permit discrimination between the sons of a testator. He concluded that though a Moslem is entitled to make a will under the Wills Act of 1837 he has no right to deprive by such will any of his heirs who are entitled to share his estate under Moslem law any of the respective shares granted them by Moslem law [69].

On appeal [70] the Supreme Court reversed the court of first instance. On the construction put on S. 34(1) of the High Court Law, the Supreme Court observed that:

We differ with respect, with the construction the learned judge placed on these words and considering the other section to which we *have referred with subsection* 34 (1) we *are* of *the view that this sub-section could only mean the exact opposite* of *the construction placed on it by the learned judge. In other words, it means that nothing in the High Court Law shall deprive any person* of *the benefit of any native law or custom including Moslem law which is not incompatible directly or by implication with any law for the time being in force, and in the present case the Wills Act, 1837… Thus, the legislature, having provided for the type of native law or custom when the High Court when the High Court should enforce in the exercise of its jurisdiction, went on to provide, for the avoidance of doubt that no person should be deprived of the benefit of that particular type of native law or custom* [71].

The court found that the Moslem law which the learned judge applied was incompatible with the Wills Act. It concluded that when a Moslem exercised his testamentary powers the Act, he was not bound by the limitations imposed by Moslem law.

3.3. Criticisms

Foreign laws grafted on to the Nigerian legal system cannot possibly operate as smoothly as they would be in their homes of origin due to social difference. This has been the major problem of the reception of the English law through the Gold Coast Supreme Court Ordinance 1874 the provisions of which have been re-enacted in the High Court Laws of the various states in Nigeria.

There foreign laws are sometime taken, adapted and re-enacted by the local legislatures and made an integral part of the Nigerian law. The Wills Law of the states of the western part of Nigeria is an adaptation and reenactment of the wills Act of 1837 of England. But it has been so adapted that none of the children of a testator can be deprived of his entitlement under customary law of the areas except where the Wills Act is followed strictustensu. This method of reception makes the products essentially Nigerian statutes and has been employed to introduce foreign laws in the post-independence era.

There are problems inherent in this modern mode of reception. In many cases the reception is implied rather than explicit. It is this implicit reception that has created the initial problem as to the quantum of the foreign law received in each case. Any reception at all creates its own problems, such as to the binding force of the decisions of the courts in its country of origin. As we have said, the received law cannot fit precisely into the legal system of this country as to its suitability hence solution has to be proper integration of such laws into the Nigerian legal sought in modification of the foreign law to suit local circumstances. As the received laws will be part only of the Nigerian Corpus, means have to be devised for the proper integration of such laws into the Nigerian legal system [72].

It is obvious to make that from the tenor of the Act that wherever there is no superior court of record for instance, we cannot be talking of applying such statute as the Wills Act of 1837.

3.4. Suggestions

In the sense of criticism, it will be wise to proffer some suggestions as to the, effectiveness of customary will in a way that it will not affect a beneficiary when making a will under the Wills Act. The following are some suggestions:

1. That where an individual's right to inheritance has been deprived using the Wills Act in a situation where by he/she is entitled to inheritance under the custom and tradition governing it, the court should declare the rights of the affected individual.
2. That the 5. 34(1) of the High Court Law which the last sentence of the subsection provides that;

"nothing in this law shall deprive any person of *the benefit* of *such native law and custom"*

be interpreted and made clear of ambiguity and conflict

3. That the said Wills Act is contrary to 5.34(1) of the High Court Law and, therefore, be reviewed to the benefit of an individual subject to customary law.

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66 (1971) NNLR, 77; (1971) 1 All NLR, 225

67 High Court Law of Northern Nigeria

68 High Court Law

69 (1968) NNLR, 97

70 (1977) NNLR Adesanya, J.A "Capacity of Moslem Nature of Nigeria to dispose of property in accordance with the English Wills Act" Journal of Islamic and Comparative law. Vol. 4, (1972) 29

71 At page 82

72 The Principles otAfrkan Customary Law (1991) p. 125-126

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