THE PRESUMPTIONS OF RESULTING TRUSTS AND ADVANCEMENT AND THEIR APPLICABILITY TO THE KENYAN SOCIETY

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P R E F A C E

Firstly, I wish to tender my thanks to Mr. Isabirye who was my supervisor for his patience with my research, his challenging comments helped me a great deal towards the realisation of this dissertation. I also wish to thank those of my colleagues in the Faculty of Law with whom I discussed some of the things included here and who gave the lumbering plane a will to take off. Special thanks to go to Frank Situma, who helped me in the arrangement of the Chapters, and Tom Musyoki, who gave me some 'elan' with regard to this difficult area of equity Law.

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Despite these helping hands, I met some problems into the research of this work. This is an area which requires a comprehensive attention to the legal concepts, and it was not easy at some stage to go on without substantial compromises. This hardship was magnified by the fact that there were few decided and reported cases on the presumption of advancement, and those which were so decided and reported are on Islamic Law. Finally, I wish to submit that mistakes made here are entirely mine.

J. K. K.

NAIROBI

A B B R E V I A T I O N S

LAW REPORTS

All. E.R.	- All England Reports
Q.B.	- Queen's Bench
KB	- King's Bench
E.A.	- Eastern Africa Law Reports
KLR	- Kenya Law Reports
CRR	- Court of Review Reports
K.H.D.	- Kenya High Court Digest
WLR	- Weekly Law Reports
Ch	- Chancery Reports
T.L.R.	- Times Law Reports
A.L.J.R.	- Australian Law Journal Review
NLR	- Nigerial Law ~~Reports~~ Review

TABLE OF STATUTES

R.L.A. - Registered Land Act.

Married Womens Property Act, 1882.

Law of succession Act, 1972

I N T R O D U C T I O N

SCOPE AND AIM OF THE PAPER

Kenya is amongst those many African countries that were under the British Colonial Rule. When the British introduced their rule into Kenya, they did not only make sure that their citizens abroad had physical comforts, but also made sure that they were governed by a legal system that they were most familiar with. Hence it was clear that to ensure this the British colonial Government imported English Law, which was meant to apply to the English nationals abroad. This was effected through "orders-in-council."
The content of this imported Law was composed of Common Law, Statutes of general application and the Doctrines of Equity. Thus it is through this 'reception clause' that the doctrines of equity were brought to Kenya, later to be applied, on the attainment of independence, not only to the Europeans, but also to the indigenous peoples of th Kenya. The doctrines under trial are thus embodied in the reception clause, which first appeared in Article 7 of the 1921 Kenya Colony Order-in-Council, and appears in a modern fashion, with slight alterations of wording, in S. 3(i) of the Judicature Act, the specific words are:

> S. 3(i) "The jurisdiction of the High Court and all subordinate courts shall be exercised in conformity with the .....
>
> (b) Subject there to, all a other written laws, including the Acts of Parliament of the United Kingdom .....
>
> (c) Subject there to and so as the same do not extend or apply, the substance of the common Law, the Doctrines of equity and the statutes of general application in force in England on the 12th August, 1897,

> and the procedure and practise observed in courts of justice in England at that date".

The paper is going to examine only the doctrines of resulting trusts and pre sumption of advancement, and the Law of Equity. That will be the scope of the paper, and will also pay attention to the reception date, which means that all cases decided after the reception date will not be binding, but will form a wealthy material of persuasive authorities, in so far as those authorities are in comformity with the local conditions, social and economic. It can thus be stated that the aim of the paper is to discuss how these concepts of resulting trusts and presumption of advancement have been introduced in Kenya, and under what circumstances they ought to have been applied. The paper will then discuss the limiting factor either provided by the legislature, or implied in the social economic and cultural developments of the Kenyan communities.

The argument that there are limiting factors that restrict the application of the two doctrines is taken out of the Act - the Judicature Act[2] - which has a proviso to sub-section (i) of section 3., which provides thus:

> "Provided that the said common law, doctrines of equity and statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualification as those circumstances may render necessary."

The paper will also examine both English and Kenyan decisions that are in point. The sub-heading "English Divisions", which appear in chapters two and three will, for the purpose of this paper include divisions of other older common law systems, noteworthy amongst these being Australia. By the same token, reference in chapters two and three to "Kenyan Devisions" will also include decisions from other black African countries, notably those which were subject to British rule, particulary Ghana and Nigeria and to some extend Sudan. Some of these countries share the same ~~frustration~~ framework in

terms of social and economic development and cultural prejudices now manifested by the western colonial scholars. These decisions will be resorted to elucidate on issues which do not appear to be sufficiently covered by Kenyan reported cases, to give some legal strength to the practise as it obtains in Kenya.

When the colonial government applied the doctrines of equity to Kenya, it did this on the strength of certain basic assumptions, which related to the Kenyan communities and their cultural development. These assumptions in my view deserve some mention and explanation, as they form the basic reasons and justifications for the enactment of S. 3 (i) of the Judicature Act[3].

THE BASIC ASSUMPTIONS MADE BY THE COLONIAL ADMINISTRATION

There are at least five basic arguments that explain the prejudice with which the English doctrines of equity were applied into Kenya. Firstly, the colonial government seemed to have assumed that Kenya was at the same social and economic stage of development. This assumption was wholly unsound and unfounded, as the social stratifications of the Kenyan communities were different, which stratifications reflected the economic organisations. Basically, the economic mainstay was subsistence agriculture, with some defined pastoral groups.

Secondly, it appears that the application of the doctrines, just like any other law, pre-suppose that the recipient is proficient in the English language. This, of course, was not the case in Kenya, but I will not pursue this issue further as it will be discussed in greater detail in chapter three of this paper. However, it may be said that when the colonialists established themselves in Kenya, they set up different

schools for all races, but the Africans were deprived of educational facilities, as this is reflected in the absence of mass education, which the reception clause assumes. This is the reality with which those who assumed political leadership after independence were faced with. There was not even any one language or dialect that could be said to have been known by all the communities. This should have been clear to the British Government, but they chose not to see the obstacles.

Thirdly, the British adminstration made the assumption that there were present in Kenya ~~avalogous Broal~~ analogous social Institutuions, which then, in their view, made it easier to apply the concepts of resulting trusts and presumption of advancement. I will not attemtp to dispute the fact that there were institutions akin to the resulting trust, but I will resolutely resist any assumptions to the effect that the presumption of advancement was known to customary law. I caution the readers that this is not a coperative comparative paper. This question of the concept of presumption of advancement rests squarely on the question whether or not the women were elegible to acquire and own property under customary law. If the answer is in the affirmative, then the presumption of advancement is suitable to the circumstances but if in the negative, then it is clear that the doctrine cannot be applied to Kenya and its inhabitants. I may as well point out at this juncture that it will be necessary for a sound explanation of the two doctrines to examine the proprietary status of the women under customary Law and also the Islamic Law, which applies to a great portion of the population, particulary at the coast and in the large urban centres. This will also necessarily involve the discussion of "benamic transactions" whose counterpart is the English resulting trust.

Fourthly, it was assumed that under customary law and Islamic law women could own property, and did our own property,

hence a husband who purchases property wholly with his own money and registers it in the name of his wife intends to confer a benefit to her. This, as it will appear from the substance of the paper was not the position under both customary and Islamic laws. Women, under customary law, were, and still are - mostly in the majority of rural districts - only allowed to exploit the land by exercising a right of 'use' and the right to alienate was vested in the head of the family - the husband. This is reflected in the provisions of the Registered Land Act,[4] which when closely examined, discloses the fact that it was the rights of allocation which were registered, and these were vested in the man. Hence on registration, the women still continued to exercise their rights of use. However, the Act - Registered Land Act - does not prevent women from being title holders. This seems to have been true when at the time of registration the husband was not living, and where the brothers or uncles of the deceased husband did not object to the wife being the registered holder; in such a case the land was registered in her name and she became, in law, the proprietor. This is disputable under the customary rules of inheritance, where it could be argued that the wife was only a kind of caretaker for those entitled in inheritance.

Fifthly, it was assumed that customary Law was static and as such could not meet the demands of the numerous proliferation of properties, which was ~~endured~~ evidenced in the Creation of Companies, which gave rise to shares and stocks- then Insurance Companies and Insurance policies, Banks and Bank Deposits and Cars. It was argued that it was only reasonable to apply English Law so that the Africans could dispose of those properties. The rationale was that English Law was more elastic and the Law of the civilised man, but to me this is a demonstration of cultural arrogance.

Sixthly, it was assumed that Kenya was a secular society, hence the

doctrines of equity were appropriately applied, and are so still applied. This claim cannot be justified at all.

In the final analysis, it can be argued that all these assumptions were questionable because the colonial society was an apartheid one and as such these cannot be said to have been any meaningful social integration, and any integration that took place was for political and commercial purposes, and is clearly characterised in the post-independence era, where the new ruling class was 'co-opted' into the free enterprise economy. The assumptions can also be disposed of by saying that there was no true representation during the colonial rule, in so far as the Africans were represented through missionaries, who were considered impartial and honest. But one may not lose track of the fact that they belonged to the ruling class and were very keen to see the success of the 'civilising mission' which the British Government took upon itself in 1897. The clearest area to demonstrate this desire is the area of marriage, where it is seen that the missionaries objected to widow inheritance and all the other institutions that sought to protect the widow. Hence, socialogically, Kenya was composed of four groups - the Africans, the Moslems, the Hindus and the Europeans, and these had hierachical stratifications in social and economic organisations. Hence there was no equality.

It is also clear that the application of English doctrines of equity was a way of rejecting the philosophees of life as seen by the Kenyan communities. Thus it can be seen that the ambition was great. This is illustrated by examining the family Law Cases on Conversion of marriages, where the colonial courts have persistently held that the change is from polygamous or potentially polygamous marriages into a monogamous marriage as understood in christendom.

I will not delve into the area of family law as there is sufficient auth-

rity in the a rea under consideration to support this proposition.

Lastly, it is clear that according to legal theory or jurisprudence, law is a reflection of man's understanding of his own nature and Law seeks to give effect to that nature ~~thorugh~~ through the philosophy ~~while~~ which man has chosen to give meaning to life during the period he is alive. For Kenya, this moral philosophy is contained in chapter five of the constitution. Therefore, it would seem that if the ~~contrines~~ doctrines of resulting trusts and presumption of advancement are to pass the test of good law, then it must be shown that they are based on the true nature of the Africans in Kenya, as they are today. This is what the paper seeks to ~~find~~ discuss in chapters two and three. The paper will also examine the efficacy of the 'mode of life test' which ~~has~~ has been utilised to hold that Africans have opted out of the operation of their personal law, whether customary or Islamic.

The foregoing paragraphs have furnished us with some ground on which we can proceed to discuss the substantive objects of the paper.

CHAPTER ONE

A HISTORICAL PERSPECTIVE

Development of the Trust Institution

1. The Judges of the Court of Chancery

Under the English law, i.e. legal system, the trust forms one of the most important and flexible units of the content of English Law. The trust ~~constitution~~ institution developed a number of ~~distructive~~ distinctive qualities that was not possessed by its earlier form - the use, between 1483 and 1535, during which time there was in existence the 'statute of uses". Basically, the trust represented a ~~Government~~ Convenient method whereby a limited number of persons could hold property on behalf of other persons, who may be a large or fluctuating body, or who may even have included persons not yet born. This; was the old fashion of the present concept of resulting trusts. In this section, we will examine the contributions that were made by the judges of the chancery court in an attempt to develop the trust institution, then embodied in the concept of uses, so as to meet the changing, dynamic demands of the society.

The statute of uses of 1535[1] went a long way in extirpating equitable estates in land. The equitable estates were, however, ~~reviewed~~ revived later by way of trusts. There were certain legal reasons for this revival, the reasons which go to justify their application at that time. That reasoning, it would appear, turns to a

large degree on a restrictive interpretation of the first section of the 1535 Act[2], which was as follows:

> " ..... where any person or persons ..... at any time hereafter shall .... be seized; of and in any ... hereditaments, to the use, confidence or trust of any person or persons or of any body-politic by ... any .... means whatsoever ..... in every such case, all and every such person or persons and bodies politic that ..... shall have any such use, confidence or turst . ..... shall ..... be deemed and adjudged in lawful estate seisin and possession of and in the source ..... hereditaments, ... to all intents, constructions and purposes in the Law, of and in such like estates as they had or shall have in use, trust or confidence of or in the same ..... "

This quotation simply means that after 1535 where freehold land had been or was in the future conveyed to B and his heirs to the use of C and his heirs, then C took the legal estate and B nothing. But eventually, it was made possible to confer an equitable interest to C. This; interpretation, however, is also depended upon the assertion that the above development depends upon a dogmatic rule of Law, that a valid 'use' could not be limited upon 'use' and that the second ~~be~~ 'use' in "C's" favour was therefore void and consequently unaffected by the statute, but later the chancellor intervened to enforce the ~~figt~~ right to C as a trust. This ~~is~~ point is the one that interests us for the purposes of this paper. The chancellor intervened to ensure that C was not deprived of a benefit that could be made to him.

Therefore, it is clear, that the chancellor ~~recognised~~ recognised the second 'use' though it was usually labelled a trust. Calling it a trust was a way of distinguishing an interest not affected by the 1535 statute from one so affected. Otherwise 'uses' and trusts were substantially the same.

Beneficiaries to whose use ~~cards~~ lands were held were vested with a power

to convey the legal estate. This reflects the early form of the ~~ritht~~ right to confer only the legal estate in a property retaining the equitable interest, hence in essence creating a resulting trust. The 1535 Act gave one ~~the~~ power to dispose of property and also the ritht to be recongnised as an owner.

But there was a salient characteristic of the jurisdictions. There were some eguitable interests which were not affected by the statute of 1483, and these were put under the jurisdiction of the ~~chamber~~ Chancellor, who was given exclusive jurisdiction to exercise his ~~discrtionart~~ discretionary powers and as a resutl created a general equitable jurisdiction over trusts and equitable interests of a character not present under the 1483 Act. Thus it was clear that the 'statute of uses' was designed to cut away the disadvantages to purchasers of land generally, and to the royal reverence in particular, which flowed from the separation of seisin and beneficial interest in land subject to a use. In effect, this execution of the 'use' as a legal esate threw a great body of real property law into the common law courts which in the course of time digested the 'use' and turned it into a legal interest of some flexibility and complexity, and this created an opportune atmosphere for the chancellor to intervene. The chancellor intervened to give relief to appressed persons. This task required the duties of judges of temper minds. The exercise of jurisdiction was on the grounds of natural justice or in accordance with the conscience of the judges. But it must be admitted that the origin of the 'use' is still one of the controversial topics of jurisprudence but despite this defect, it is an accepted fact that the development of the trust by the English Courts of Chancery has excited the admiration and envy of many civil lawyers.

Tha nature of the judges seems to have had considerable influence on the kind of cases that came before them - most of these chancery judges were ~~clercs~~ clerics, and as I have just stated above, it is clear that

they based their judgments on conscience rather than what the parties to the suits alleged. Thus, on a priori, it is also clear that equity was founded on reason and conscience, as being, in fact, the means through which the principles of natural and divine laws were applied to particular cases, to correct unjustices over which the common law abducted jurisdiction. Through this process, a great wealth of cases was created, and subsequently judges appointed to the court of chancery were able to resort to these ~~deaded~~ decided cases, which ~~from~~ form a source of law referred to as precedent. They could then apply those past ~~division~~ decisions in subsequent cases which bore almost the same facts, or invoke them in a ~~mode fad~~ modified form, to do justice.

From these procedures, a rule of ~~kind~~ law is extracted by quoting the facts and the decisions in an abstract form. Thus most of the equity law, and particulary the doctrines of resulting trusts and presumptions of advancement are merely maxims of equity. But as time moved on, the parliament came into being in England and deprived the judges of their extensive discretionary powers. But this has not taken away the creativeness of the judges, as is demonstrated in most of the decisions of ~~land~~ Lord Denning, who is a prominent judge and jurist, and one of enormous experience. Thus it is clear that the judges did alot in the creation of the law of trusts, which has been developed to meet the demands of the modern society.

Besides the judges, there are other factors which necessitated the laws of resulting trusts and presumtpions of advancement to adjust to meet the demands of new properties, which I now proceed to examine.

2. A New Mode of Production

It has been universally accepted that the mode of production determines all the other organisations of the society and the relationships between the individuals. In medieval England, the type of economy

that persisted was not the present one, but was rather characterised by feudalism, which had at its disposal, the ~~Serifs~~ Serfs, who did most of the work for the benefit of nobility and the clergy. Hence the ~~social~~ society was stratified on social lines. People mostly depended on the produce of land as at that time trade and commerce a was not yet advanced.

With the introduction of industries and factories, most of the male population went to work, leaving their wives to do the domestic works. Thus a new role for women was defined, and ~~confirmed~~ confined to the kitchen and the children. It was the men who played the significant role in economic activities. It was the man who controlled and monopolised the means of production. At that time, women had not yet taken up paid up jobs, and were generally not considered capable of holding property. But as the age of industrial revolution set in, it was clear that women were to be needed to do most of the delicate jobs, like watch making and radios and other jobs, This was also highlighted by the passing of the Married Women's Property Act, 1882 of England, which under S. 17 provided that women could acquire and own her own separate property. Thus it was this development in economic organisations and relationships that clothed the married woman with proprietary rights. This then meant that it was only logical to apply the presumptions of advancement to their favour as they were capable, in Law, of ~~widing~~ holding property. Resulting trusts, were equally suitable for application.

Under the English Law of Property Act, 1925, it was also clear that the Act was not discriminative, and women could acquire property and dispose of it as ~~she~~ they thought fit. The new mode of production demanded that the Law of ~~trusts~~ trusts be changed to accomodate the disposition of the new forms of property. There were things like shares and stocks which were incidental to the creation of companies; Banks, which necessitated the introduction of Banks Accounts thus the claim that where a husband deposits money in the name of his lawful wife he is presumed to have intended a benefit to her, because she is eligible to property

holding. Insurance Companies and the consequent Insurance Policies; cars and businesses. All these things meant that the concepts of resulting trusts and presumption of advancement were to be revitalised. Men became unusually so much engaged in economic activites that most of the family management was left to the women. To do this it was necessary to have at least cash hence the husbands deposited credits in the names of their lawful wives. The ideal conditions for the application of the concept of presumption of advancement was established.

Women, on the other hand, were now able to work in factories and other places, and thus capable of purchasing shares in companies or buying cars and other items. So the question arose whether they could make gifts to their husbands and or children. This was cunningly and unconvincingly explained by alleging that they were not under any moral obligation to provide the husband or and the children. So, their ability to acquire and own separate property enabled them to claim anything they may have purchased in the name of their husbands, by relying on resulting trusts.

Lastly, I wish to submit that the transformation of the mode of production to one which recognises individual ownership has surely strengthened the doctrines of resulting trusts and presumption of advancement.

THE INADEQUACY OF THE COMMON LAW COURTS

Equity as a source of law developed side by side with the principles of common law which was the stronger of the two. These two laws were also different in that they were administered by different courts - equity by the courts of chancery and common law in the common law courts. This aspect added to their diversities. But one may ask how they operated when the issue was similar before both courts. The situation was that equity intervened where the common law shoe pinched. Thus where a complainant filed a suit in a common law court based on the law of contract, and was not satisfied with the award of ~~savages~~ damages, or was not interested in ~~savages~~ damages, he could summon the court of chancery, which would then grant an order for specific ~~imputation~~ injunction, or an ~~imputation~~ injunction, depending on the merits of the case and also the nature of the claim.

The other aspect is that the judgments were based on discretinary powers vested in the judges. But it has been said that equity - ~~at~~ or the doctrines of equity - were developed as a gloss upon the common laws - and formed part of the judge - made law. Thus on this basis it would appear that equity operates as a residual source of rules where no express rules are provided for any matter in controversy. The rules of equity were mostly invoked in the realm of property transactions and its most valuable creation was the trust. This brings us to the relevancy of the discussion of the development of the law of trusts, which embodies the doctrines we are about to examine in chapters two and three - namely resulting trusts and presumptions of advancement. This institution, which was not known to the common law courts, has proved a regularly adaptable institution. Under it, the management of property could be separated from its enjoyment by regarding as owner, in equity, someone other than the person in whom the legal title vested. This was the essence and the unique characteristic feature of the trust concept. Gradually, this concept was influenced by the spirit of English law in its development. Equitable ~~prisdiction~~ jurisdiction started to be excercised in accordance with settled principles and its boundaries became reasonably clearly defined.

What was the basis for the development and intervention of equity? There are two basic arguments here. Firstly, where common law became ~~degative~~ defective and or archaic, this set the stage for the appearance of the doctrines of equity to do natural justice to the party concerned.

This statement assumes that equity was ~~general~~ quick in changing so as to keep abreast of the demands of the society as the society adopted new styles of living and providing itself. It is also assumed that common law was not very fast in meeting the ever growing needs of the society, and this is ~~interested~~ witnessed by the current proliferation of equitable principles like the equitable doctrine of estoppel in the law of contract. This still seems to be the position, although the courts are no longer separate as they were at the inception of the doctrines of equity.

Secondly, equity was extensively concerned with procedure and remedies, and it is this aspect which gives it its distinctive character. How was this effected? It is clear that certainty is a virtue in the law, for people regulate their affairs by what they think the law is. Sometimes the rules are so strict that they call for an ~~interfearance~~ interference by equity, which is an embodiment of natural justice. This means that where the common law rules were too sophisticated for the citizens, then equity intervened to do justice to the oppressed persons. This tempering took two forms: Firstly, the dissatisfied citizens sought alternative adjudicative machinery by lobbying the sovereign to change the rules. The sovereign wielded a lot of power - almost absolute - and it was to his pleasure, for this is a human weakness, to ~~show~~ bow to the demands of his loyal citizens as a gesture of kindness. The sovereign also took this as an excusable chance to act as a reformer. Secondly, the citizens promoted a revolution, but only in extreme cases.

Through these devices, gradually the court of chancery emerged as a distinct tribunal in which equity, which was no longer available in the common law courts, was obtainable. In this way equity also gained a special meaning in English - legal system as:

> "The body of rules applied in the courts of equity so as to achieve results different from those which have ensued in trials of the same cases in a common law court."

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CHAPTER TWO

RESULTING TRUSTS

1. DEFINATION AND NATURE

Every concept of Law has arisen as a result of the growth of the society and to meet the newly created needs of that society. The concept of resulting trusts is no exception to this phenomenon. This concept is embodied in the wider institution of trust, which, as was indicated in Chapter one, was a creation by the chancellor. Therefore, it is necessary to define what this concept means and to explain its nature because there are also other concepts, which come under the broad concept of 'trust'. Several scholars, have made an attempt in defining a resulting trust, also indicating the circumstances under which it arises. . But before we get into these definations we must bear in mind that there is no hard and fast definition of a trust, which is both comprehensive and exact. Lewin has submitted that the word trust

> 'refers to the duty or aggregate accumulation of obligations that rest upon a person described as a trustee.'[1]

and Sir Arthur Underhill writes:

> ' A trust is an equitable obligation, binding aperson (who is called a trustee) to deal with property) for the benefit of persons (who are called the beneficiaries or Cestui que trust) of whom he may be himself one, and any of whom may be enforce the obligation.'

From these two definitions of a trust, we can now look at the definitions which have been enunciated to explain the meaning of a resulting trust. Like that of a 'trust' the definitions of a resulting trust are not generally accepted for they have been given under different benefi backgrounds. We will therefore look at the definitions of popular and astute equity authors,=like Pettitt and Hanbury. Pettitt gives a comprehensive definition

which we will employ for the purposes of this paper, being more adaptable whe compared with those of SNELL and HANBURY.

HANBURY says that:

> " a resulting trust occurs where equity regards property which is held by a trustee as belonging in equity to the person who has transferred it ti, or caused it to be vested in the trustee. "[2]

SNELL submits that:

> "apart from mutual will, a trust ~~founded~~ upon the unexpressed but presumed intention of the ~~selter~~ settlor is 'resulting' because the beneficial interest in the property comes back to the person who produced the property or to his estate."

But PETTITT says, more aptly, that

> ' where a settlor conveys or transfers property to trustees, but fails to declare the trusts, upon which it is to be held, or where the expressed trust fails altogether on the ground of uncertainty, or where they fail particulary on similar grounds, or because the trusts expressed dispose of onl a part of the equitable interest or such part thereof as has not been effectively disposed of, remains vested in the settlor in technical language, it is said to 'revert' to him and the property is accordingly said to be held by the trustees upon a resulting trust.'

From this passage, it is clear that PETTITT was more concerned with situatio where the ~~turs~~ trust has been completely constitued. We will not discuss those resulting trusts which arise as a result of the equitable interest not being completely disposed of because this would plunge us into a discusion of the charitable trusts. We are more interested in those situations where there has been a complete disposition of the

property, but then it is not clear what the settlor intended to be taken by the donee. Although it is not appropriate to discuss the presumption of advancement in this chapter, we must note that the learned authors do not attempt to give a definition of advancement. The Law of Resulting Trust was enunciated by EYRE, L. B. in DYER v DYER[3] when he stated:-

> "The clear result of all cases ..... is that the trust of a legal estate ..... results to the man who advanced the purchase-price. This is a general proposition supported by all cases ..... and goes on a strict analogy to the rule of common law, that where a feoffment is made without consideration, the use results to the feoffor."

This judge in essence is saying that a man cannot be expected to be so over generous where, on giving property to a second person without consideration it is held that he did not intend the other to hold the property on trust for him. This would be tantamount to unjust enrichment and would affront the conscience of equity, whose major object is to do justice in all cases. Surely a motive has to be established for men do not purchase property in the names of others without consideration for the fun of it. But there is one noticeable aspect of this concept of a resulting trust - it is rebultable by the adduction of evidence to the contrary. There are at least three categories of relationships which displace the presumption of a resulting trust. Firstly, where the nominal purchaser is the wife of the owner. Secondly, where the apparent purchaser is the child of the real purchaser and lastly where that person is the one in whom the purchaser stands in loco parentis. These situations will be discussed in detail in chapter three.

There are other factors which may disturb this presumption. These touch on the nature of the transaction, that is whether the purchaser purchased the property in the capacity of a purchaser or whether he was a mere lender, hence entitled only to due rights of a creditor, Therefore, he must have purchased the property as a 'purchaser'.

Concerning the nature of a resulting trust, we must note that it belongs to a class of trusts called " Implied Trsu Trusts" which arise from a presumed intention, in which case they are designated 'resulting trusts'. When they arise as a result of the operation of law, they are styled 'constructive tursts.' This has caused some problems because there has arose instances where a resulting trust is so closely related to a contructive trust, because both may arise as a result of the operation of law. But there are distinctions. Firstly, resulting trusts are ' presumed', where people, without expressly creating a trust, acts in a way which shows that they presumably intended to do so. Human activities being infinitely various , obviously no exhaustive list can be given of trusts which arise in this way, and random illustrations must suffice. On the other hand, a constructive trust arises independently of anyone's intention. This is the most salient aspect of differentiation.

A resulting trust is rebuttable and the principles under which it is presumed were neatly e xpressed by LORD DENNING, M. R in HUSSEY. V. PALMER[4] when he said:-

> "By whatever name it is described (that is a resulting trust) it is a trust imposed by law whenever justice and good consciecince require. It is a liberal process founded on the large principles of equity, to be applied in cases where the defendant cannot conscientiously keep the property for himself alone, but ought to allow the other to have the property or a share of it."

Where property is conveyed to a person who has notice of trust, that that person holds that property as a constructive trustee whether he consents or not. But he does not even have to be a trustee, thus where he gets in information which he uses to make personal profits, then the result is that he will hold that profit constructively on trust for the beneficiaries.[5]

A resulting trust also applies to both realty and personality, and the equitable interest to the person from whom the consideration moved in accordance to the general rule in DYER, unless there is an express provision to the contrary. In REGORDON[6] it was held that bonds, shares and Insurance policies are capable of creating resulting trusts. In this case, officers of a Royal Regiment formed a society with the object of helping their widows. This was also entered in their wills. Annuities were allocated to the widows, in addition to the testamentary interest. The question here was whether the plainfiff was to keep for her benefit payments that she had received from the society, or whether she held them on trust for her husbands estate. It was held that she was entitled to the capital sum, which is clearly a share which was payable to the testator by virtue of his subscriptions. In LAKE v GIBSON[7] it was held that for there to be a resulting trust, where there were more than one purchaser, there contributions must be in unequal shares because of ~~their equality~~ they are equal, then they will take the property jointly.

The standard of proof required to rebut a resulting trust is not as strong, as that needed to establish it, and it need not be replaced in toto, for if the ~~noman~~ nominal purchaser establishes that he was to ~~enjure~~ enjoy the property beneficially for life, then he will have ~~related~~ rebutted the presumption.

Finally, this presumption is an appraisal of the idea of private property and is meant to guard the ~~surety~~ sanctity of private property.

IMPLEMENTATION BY THE COURTS.

In any given society which is striving to attain an orderly arrangement of the habits of its members and their institutions, the courts have been instrumental in effecting this desire. The courts in most legal systems have also been instrumetal in the inception of

concepts, like the doctrines of equity which are creations of the judges. The courts have created the resulting trust and have effected it where it h arose for determination. The courts have been very much concerned with the circumstances in which the presumption arises, always looking at the intentions of the settlor or the purchaser, and where the endurance in rebutted has not displaced it. The most important aspect which the courts look at is the question of who advanced the purchase money. These presumptions have also been applied against the social and economic background of the particular society. First, we will examine the English decisions, which will cover cases from ~~hte~~ other old and developed Common Law Systems, like Anstralia.

I ENGLISH DECISIONS

In England the Industrial revolution left in its aftermath marked changes in the realm of property law. As new factories were erected, the quality of technology was also refined with new ideas being erected into it. The clear result of all this was the introduction of new forms of property, like j furnitures, motorcars etc. On the other hand the organisation of the society became more complex, so that the originally primitive economic organsations were replaced. This was reflected in the advance of commerce and new dimesnions in trade. The high water mark was the creation of Finance institutions, whose living embodiments are Banks and Insurance companies. People started organising themselves more economically to foster their fortunes. Shares were introduced in companies and pec purchased them since their were a form of property. The Law of resulting trusts also modified to meet these demands. This meant that there was an increase in the range of purchasable and disposable property. People started Bank deposits, which form quite a ppropotionate section of the resulting trusts case law.

We will now look at specific cases where resulting trusts have

been upheld. The basic ~~pull~~ rule is that "that trust of legal estate results to the man who advances the purchase money."[8] This may arise at three stages. Firstly, it may occur where the property is purchased in the joint names of the real and apparent purchasers, in which case the beneficial interest rests in the real purchaser. Secondly, it may take t place where the property is conveyed in the sole name of the stranger, where the true position is that the equitable interest vests in the real pechaser. Lastly, it may be the case that more than one person purhcased the property, but in unequal shares, but registered it in the name of only one of them. In that case, the one in ~~xxxx~~ whose name the property is registered holds on trust ~~for~~ all the others, in proportion to their contributions. In all those circumstances, the understanding is that the ~~purhcaer~~ purchaser or purchasers has/have not ~~enitered~~ evinced any ~~institutions~~ intentions to benefit the one; in whose name the property is taken. There is also something else to note. This is that the ~~person~~ on whose name the property was taken need not have contributed anything towards the purchase price, because the transfer or the conveyance ~~were~~ was voluntary. They are justified perhaps in that they are sometimes made for conveniece. If I may ~~reject~~ repeat, we are not ~~covered~~ cnamed with situations ~~hence~~ where the equitable interest has not been disposed of wholly, ee. i.e. discussion is outside case like RE GILLINGHAMS BUS DISASTER,[9] where there was a surplus after the purpose for which money was contributed was satisfied, and the question arose as to what should happen to this surplus. It was held that the money ~~which~~ went to the contibutors., on a resultin trust. These were not 'voluntary transfers' but chantable trusts.

In england, the presumption of a resutling trust is rebuttable where it is proved that there are ~~w~~ explanatory facts which tend to show that the ~~sittlor~~ settlor meant to benefit the party in whose name he took - the settlor - conveyance of the property. Thus where the settlor is the husband, father or one who stands in loco parentis, then the rule is th he is presummed to have intended a benefit to those persons. IN MARTIN v MARTIN,[10] a husband transferred certain pieces of land to his

wife by a memorandum of transfer, on the understanding that she would advance some consideration, which she never did., on the dissolution of the marriage, the husband took out summons under the Married Womans Property Act to determine the beneficial ~~membership~~ ownership of the land. It was held that the husband never intended to benefit his wife. This Australian case, marks a remakable departure from the general rule and indicates the courts willingness, to scorn its past reluctance to accept ex post facto declarations of intentions as conclusive. The court was also influenced by the use into which the property was being applied. Where it is a family asset, the courts will hesitate in holding that there was ~~one~~ advancement. The question of intent is like a 'very wide sea without certain guides'[11] where the transfer was made contrary to law or where it is against public policy, then the presumption fails, and that of advancement becomes operative. In GASCOIGNE v GASCOIGNE[12] a husband took a lease of land in his wife's name and built a house on it. It was established that he was desirous of ~~proper~~ protecting his property from creditors. In any action against his wife, he argued that she held it on trust for him. It was held that she could not be allowed to set up his own fraudulent design as rebutting the presumption of advancement. This was a situation where it would havebeen against the law to permit him to claim a resulting trust.

On the other hand in GROVES v GROVES[13] the plaintiff ~~produced~~ purchased an estate in the name of another with the sole object that he would get a vote at a parliamentary election. It was held that it would be against public policy to allow his claim that ~~of~~ there was a resulting trust. and advancement was favoured. These cases, illustrate the court's ~~Concean~~ concern. The court is not saying however, that here was an intention to benefit, but that the presence of illegality operates to forfeit the equitable interest in the property with respect to the real purchaser. So the resulting interest is not strictly one of advancement. In MARTIN[14] the court, when commenting on illegality said that if the illegality is nebulous and only arises in future possibilities or contingencies and not in present necessities

o r contiqencies and not in present necessities or imminent dangers, it should not dsable the ~~palintiff~~ plaintiff from succeeding in asserting that ~~that~~ that there was a resulting trust." This indicates a second de[illegible] divergence in Autralian Law from the English rule, which is that where the illegality exists even in intention, then that is sifficient to off-set the presumption. One would undoubtedly prefer the Australian position.

It would suffice to say that under English case Law it is clear that so long as there is no special ~~nexas~~ nexus between the parties to a transaction or illegality, then a resulting trust will stand, if the real purchaser did advance the whole or part of the purchase - price.

11 KENYAN DECISIONS

The courts in Kenya, both in their organisation and operation follow closely the English Law Courts. This is in accordance to the provisions of the Juicature Act[15] which provides that the High Court and all the Subordinate Courts will exercise their [illegible] jurisdiction in conformity with the :-

> S. 3(i) (a) Constitution and subject to
>
> (c) ..... the substance of the common Law the doctrines of equity and the statures of general application in force in England on the 12th August, 1897 and the procedure and practise of observed in the courts ..½... in England at that date."

But this section has a provision to at which outlines the framework within which the said doctrines of equity would apply. It reads.

> "..... provided that thesaid .... doctrines of equity and statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those cirmusmstances may render necessary."

So our task is to examine to what extend the implementations of the presumption has conformed to this provision. Most of the resulting trust cases were decided during the colonial period, and there was a total disregard of customary Law, where marriages were considered inferior and as a reflection of the primitivity of the Africans. This attitudes is succinctly stated by GRIFFITH in the Nigerian caseof COLE v COLE,[16] where he said :-

> " ..... a christian marrieage clothes the parties to such a marriage and their offspring with a status unknown to Native Law ..... "

This case marks the assumption that once an African contracts and enters a union under the statute, then he has opted out of the operation of his customary law, but this was refuted in the Ghanaian case of COLEMAN v SHANG[17] contrary to what was held in COLE v COLE[18]. The court said this:-

> " we are of the opinion that a person subject to customary law, who marries under the p Marriage Ordinance does not cease to be a native subject to customary law by reason only of his contracting that marriage. The customary law will be applied to him in all matters, a same and except those .½ ..... which are necessary consequences of the marrige under the ordinance Consequently, when such a person has a case in court, native law and custom would be deemed to be the law applicable to that cause or matter ..... we think it would be unreasonable and repugnant to natural justice to hold otherwise."

In Kenya, words almost to the same effect were uttered by Lord Denning in A.G v NAYLI LTD.[19], where Denning thought that the common Law was only applicable after 'considerable qualification" and that it was not 'suitable to other folk' because it was meant to apply to English only. The courts have assumed that the same free enterprise economy is suitable and applicable to the Kenyans. This is clear from the assumptions made by the statutes containing the Law of marriage, where the provision for a monogamous marrige goes together with religion, which in turn is taken to indicate, wrongly an acceptance of the English values. This is also illustrated by case Law, like the notorious case of I 'v' I[20] where it was held that the

Married Womens Property Act, 1882, was a statute of general application, on the basis that to apply customary law would amount to injustice and discrimination against the woman. This was carrying the assumptions that free enterprises economy applies too far.

;

Most of the resultingtrusts in Kenya are with respect to ~~card~~ land. These have ar arise on an interpretation of the provisions of the Registered Land Act[21] and the first in the series is MUGUTHU 'v' MUGUTHU[22] where a brother, who was ~~registed~~ registered ~~property~~ proprietor was held to hold the ~~card~~ Land on trust for his other brother. This decision was followed in KANAYANGI MACHARIA 'v' MACHARIA[23] where the defendant was the registered proprietor of a piece of land, which was purchased with money provided by the plaintiff. The defendant puported to borrow a sum of money on the security of ~~their~~ this land, and the plaintiff claimed half share of the loan. It was held that the plantiff could calim on a resulting trust.

There is also another ~~from~~ form of resulting trust, which appears in Moslem Law. This is what iscalled the benami transactions, which carry exactly the same consequences as a resulting trust. This is illustrated by BUSAIDI v BUSAIDI[24] Both parties were moslems. The facts were as follows. The plaintiff had ~~intended~~ inherited alot of property from her father and had vested all this into her husband. On his death, the brother took over the management and alleged that the palintfif had made a gift to her husband. The court held that the brother of the deceased held the property on deposit for the benefit of the plaintiff the court also went further and said:-

> "It would be wrong to apply the principle of equtiy ~~clonced~~ designed to suit a christian society in England in order to ~~order~~ gauge import a presumption whereby to ~~guess~~ the intention of a Muslim husband and wife, whose social and cultural background is very different."[25]

These words alone point our that Kenya is made up of no less than four different communities, and the courts have not wanted to realise this

fact, but have always been trying to create a homogenous law for a society which is not homogenous. This blindness arose again in BISHEN SINGH CHADHA v MOHINDER SINGH AND ANOTHER[26] In this case a father had purchased a plot of land with another person but had registered his share in the name of his son. Later, the sons purported to sell their share to the second defendant, and the father lodged a case against the second defendants claim, who was alleging a presumption of advancement was not part of the law of India, the law which applied to sikhs in Kenya. This was because the family organisation and social relations of the sikhs is different from that of the Africans as the cases ofESIROYO v ESIROYO [27] and OBIERO v OPIYO[28] show exempt perhaps the decison in MUGUTHU.[29]

In SHALLO v MARYAM[30] the plantiff husband bought premises in Mombasa in the name of his ex-wife soley with his own money, and in action against her alleged that thereit was a Islami transaction or alternatively that the wife held on trust for him. The court found as a fact that he had advanced all the purchase money, and that some the parties were Moslems, the property was Moslem Law. Hence there was a resulting trust. This case wh indicates the courts' consistency in giving effect to the moslems philosphy of life.

In BUSOGA MILLERS v CHANDUBHAI PATEL[31] a man purchased shares in the name of his nephew and the company dealt with them as if they belonged to him, and not his nephew. It was held that it was not noble an detinue, and that the nephew held theshares on trust for the real shareholder. In trancactions between a wife and a husband or mother and child, the property is purchased by the wife or mother will revert to her because in law and equity she is under no moral obligation to provide her children or maintain her husband. This English rule has been followed in Kenya in BUSAIDI, as we saw above.

We have seen that the Kenyan courts have not paid much respect to the proviso to S.3 of the Judicature Act, and that they have fallen English Law to be the residue Law, hence implying that our laws have gaps, which ca

can only be 'filled' by the received doctrine of resulting trust. But this would be justified if only the courts decided the cases against the social and cultural c backgrounds of Kenyan. Otherwise we had institutions akin to the resulting trusts, which makes it at least applicable.

B LIMITING FACTORS

The question of what Law to apply to a person in a given communtiy and that of whom the courts might exercise jurisdiction over which persons was often clear in the colonial period. Under the Native courts Regualtions of 1897, it was clearly provided that in matters where the parties were subject to or one of them was affected by customary, then ~~cu~~ customary, ~~then~~ Law ~~customary~~ was to be applied. This stipulation has been ~~carri~~ carried forward into the post - Independence era, and is contained in the ~~Judic~~ Judicature Act. S. 3(2) where it is provided that the courts shall be guided by customary Law. The Magistrates' Courts act also provides certain matters which are claims under customary Law and also the Registered Land Act incorporates the same proprietary rights which are held to be 'overriding interests.' These three enactments are are ~~inheators~~ indicators of what limitations are ~~bing~~ being placed upon resulting trusts.

But before discussing further what these limiting fact o rs are, I will attempt to explain what I think they mean. I take a limiting factor to be the presence of an element that would render any application of the presumption of a resulting trust as being unfair to ~~o~~ the people of Kenya. I will take it to include the local conditions and statutes, which are consistent with the policy of applying to the people what they have experienced and knowledge of, and also the fact that most of the wananchi are not proficient in the English Language. There is also another factor, and this is the technicalities that are involved in the presumption of resulting trusts.

Firstly, the local conditons in Kenya, do not seem to ~~wigh~~ weigh very much against the application of resulting trusts in that there were transuctions which resembled, in essence, a resulting trust. Thus It was not uncommon to give

for cows to a neighbour to keep and even have free use of the benefits which resulted thereof, but to be under an obligation to return that cow to its owner when he so desires. This can be explained as an anomaly of a resulting trust, which would carry the same meaning as in English Law, that is, the owner of the cow never intended to give it as a gift to that other. The same situation was also practised in the case of land. Hence strangers could be assigned pieces of land with a right to use that land, but also under an; obligation to return it, if the owner wished to have use of. These illustrations then show that at least resultingtrusts are adoptable, but are there, other factors which offset this proposition? There appears to be an off-setting fact, which only relates to married women. Under customary law, a married woman was not competent to acquire and own her own separate property, and consequently, she removed from those persons who can claim a resulting trust. Thus in so far as this aspect of a resulting trust affects married women, then the married women property Act of 1882, S. 17, cannot be applied to Kenyans, notwithstanding that this is contrary to what was decided in I v I[32], where it was held that the statute was a statute of general application and therefore could be applied into Kenya, as to make women able of owning separate property.

The other factor is that of the nature of the Kenyan Society, which refers to the way it is organised. The organisation seems to be on the basis of family life which is almost communalistic. This implies that even where a man registers or purchases property in his name, then he does not by so doing exclude all the other members of the family but holds on a trust for their benefit. Thus one hears of family land and not Mr. so and sos land. This is not the case in England, where private propeerty is highly valuable and protected.

In MUGUTHU v MUGUTHU[33] the court held that where a brother registers land in his name he does not become an absolute proprietor but holds that land on trust for the other members of the family, and in this case it was his brother. This was a recognition by the courts that even under customary Law a resulting trust has a

place. Although the presumption of a resulting trust involves some of a resulting technicalities, they do not appear to render their application impracticable, because they can be truncated by the ~~judges~~ judges or lawyers, where the parties can manage to hire one. Therefore my submission is that the presumption of a resultingtrust can be applied to the Kenyan society despite the proviso to S. 3(i) of the Judicature Act. Thus statements which are in direct conflict with the local conditions must be rejected, like those which have been made by ~~the~~ E. COTRAN[34], which appear to have been made on the assumption that the idea of private property has been accepted by all in Kenya. He writes:-

> "In the event of a dissolution of the marriage, the wife is entitled to take all the property whether acquired before or after the marriage. Property obtained through joint efforts of the husband and wife is divided between them".

Again:at page 21, paragraph 5, he writes:-

> "Modern development. Any of the wife's self-acquired property i.e. property which she acquires during the marriage through her own efforts, remains with her upon divorce."

It would appear that these statements are not correct because for most of the people the wife's property, if any vests in the husband. However, with respect to the secondone, it would seem to have some application to the ~~su~~ urban centres where people have adopted the western values. But even then, they try to identify themselves with their own tribes.

Therefore, apart from that aspect of resulting trusts which permits married women to claim property under the married women property act, 1882, the rest of it can be applied in Kenya.

CHAPTER THREE.

THE PRESUMPTION OF ADVANCEMENT.

DEFINITION AND NATURE.

All the authors on the law of trusts and equity generally have not attempted to give a functional definition and a meaning of the presumption of advancement. They have, however, been in agreement as to what circumstances give ~~use~~ rise to the presumption; here we can say that they have given a " circumstantial definition". It is never a problem to say whether there is advancement. We will, however, make an attempt to give a working definition. I submit that:

> a presumption of advancement is the ~~falling~~ taking cognizance of either a moral, parental or a legal[1] obligation, duty or ~~hatribity~~ liability to provide take care of maintain respectively, a person who is either ones wife, child, or one to whom that other stands in loco parentis, as to enable her, it to take ~~care finally~~ beneficially the trust property.

The presumption, like that of resulting trust, comes into exist as a result of presumed intention and secondly as a result of a special relationship between the parties and thirdly where a resulting trust can not be allowed to stand by virture of illegality in the transaction. This takes place in three cases. Firstly, where the ~~normal~~ nominal ~~procedure~~ purchaser is the wife of the real ~~purchaser~~ procedure, then the presumption in equity is that the wife is ~~interested~~ intended to take here ~~finally~~ beneficially. Secondly, ~~whether~~ where B is the ~~whole~~ child of A, B will also take ~~here finally~~ beneficially because in equity A is under a moral obligation to ~~produce~~ provide for B. But where A is the mother, the presumption does not exist. It also appears that the presumption will exist where the parties are intending to marry each other[2] Thirdly, If A stands in loco to ~~be parcel~~ B ~~the husband, who was an Army officer, and it was held that this was in ture with her stat~~ in life and that ~~the husband was liable~~. The rationale seems to be that the husband is under an obligation, which is partly legal and partly moral, to maintain his wife. This is also the dominant rationale in advancement. When examining the court ~~discoutions~~ decisions, we must bear in mind that the advancement greatly depends on and derives from the

existence of a marriage, and that illegitimacy may be a bar to a sucessful claim of advancement.

2. IMPLEMENTATION BY THE COURTS.

Every legal system presents the problem of relating its constituent forms to each other so as to form a coherent and harmonious whole. Some conflict does arise, however, due to the fact of human frailty even in the most of unified legal systems, where all the forms are laid down. The problem in Kenya arises due to pluralism, where the legal system encompasses not merely law derived from the former colonial power, now supplimented by post - Inde - pendence legislation and a system of courts to apply that Law, but also a body, or more precisely bodies of Indigenous or customary Laws. However there have been methods of inter-relating the compenent elements in this our plurilistic system. The standards of defining the relationship between English derived law and Customary law were clearly stated in the 1897 East Africa Order in Council. There general standards were posted by the Imperial power.

I ENGLISH DECISIONS.

The substance of English law is drawn from a tripartite source, its components being the doctrines of equity, the statutes of general application and the substance of common law. Two thirds of this substantive law "is judge-made law." In its endevour to implement the presumption, the courts have delivered their opinions by first addressing their minds to the nature of the society, whether it is Christian or secular, and also by having at the back of their minds the monogamous meaning of a marriage, hence delimiting the area of operation of the presumption by disregarding polygamous marriages. Here the courts have consistently delivered their judgments in accordance to the rule in Hyde-v-Hyde[4], that a marrige as understood in christendom is monogamous.

The circumstances in which the presumption arises were outlined by VISCOUNT SIMONDS in SHEPHARD-V-CARTWRIGHT[5] where he said-

...../3

"The law is clear that on the one hand, where a man purchases shares and they are registered in the name of a stranger, that is a resulting trust in favour of the purchaser. On the other hand if they are registered in the name of a child or one to whom the purchaser stood in loco parentis there is no such resulting trust but a presumption of advancement. Equally it is clear that the presumption may be rebutted but should not give way to slight circumstances."[6]

SIMONDS left out a married woman ~~belive~~ because it was so obvious that she would take ~~care finally~~ beneficially. For easy and comprehensive discussion, we will categorise the cases of advancement into three sub-headings, ~~normaly~~ namely advancement to a wife; to a child and lastly Instanes of Loco parentis.

ADVANCEMENT TO A WIFE

It would suffice to select cases randomly because there are so numerous such that an attempt to make a selection would be ~~futureless~~ fruitless. I may, however, at the outset point out that under English law of advancement, it has been a ~~selected~~ settled rule, in the nature of the marriad womans propery Act, 1882, that a married woman can own her separate property, during the subsistance of the marriage, ~~however~~ hence she can claim advancement because she can own property. It is also ~~selected~~ settled rule that a married woman can not make a gift to her husband or her child because she is under no moral obligation to do so. The cases of advancement in the case of wives appears in several forms. Firstly, it arises in cases where the ownership of the matrimonial home comes for ~~obtermiration~~ determination and secondly, in the case of bank deposits. These are the commonest cases of advancement.

In SILVER-V-SILVER[7] a husband purchased houses in the name of his wife and in an action against her alleged that she held ~~than~~ them on a resulting trust. It was held that a presumption of advancement existed. On the authority of this case, it is also clear that the wife need not have made any contributions towards the ~~requisition~~ acquisition of the property, but the trend now seems to be otherwise. The wife must be shown to have made some contributions, direct or indirect, and if that is not established, then the courts will be ~~relevant~~ reluctant in ~~judging~~ finding a presumption of advancement. This fear was expressed by Denning in FALCONER.V. FALCONER.[8]

" If this case had come up for decision 20 years ago, there would undoubtedly have been a presumption of advancement. That presuption ~~ford~~ found its place in the law in Victorian days where a wife was utterly subordinate to her husband. It has "no place, or at any rate, very little place in our law today~~!!!~~"[9]

The nature of the marriage has some effects on the ~~valuability~~ validity of the presumption. In cases where the marriage was merely voidable, it was held in DUNBAR.V. DUNBAR[10] that the presumption still ~~formed~~ found place but in Re AMES SETTLEMENT[11]. It was held that where the marriage was void ab initio ~~than~~ in the presumption cannot exist. In TINKER V TINKER[12] it was held that where illegality is proved, for ~~custome~~ instance that the ~~down~~ donor wanted to defeat the claims of his creditors, then this results in the ~~reation~~ creation of a presumption of advancement. However the ~~presure~~ presence of illegality in a transaction which involves ~~presure of illegality in a transaction which involves~~ the transfer of property to a wife operates to the favour of advancement.

As we saw at the beginning of this chapter a wife cannot make a gift to her husband, ~~equity~~ because does not repose in her ~~and~~ an obligation to provide the husband, ~~wife~~ or to maintain him. Thus where a ~~relating~~ relatively ~~rule~~ rich wife transferred large sums of money to her husband, with the sole objects of equalising the ~~evidence~~ incidence of estate duty and enabling him to join a brokers society, it was held that the husband held the monies on trust for the wife.[12A]

In the case of joint accounts, if the husband has put money in the name of his wife, then the wife is the beneficial owner of the amount in the account. But it is also true that whenever a husband opens an account in the wifes name he does not always intend to benefit her. In the first place, he may be ill and as such just open the account for convenience.[13] We have seen that married women can acquire and own property and it may happen that the wife wants to get a loan. The husband may undertake to guarantee the payment of this loan. In those circumstances, the courts have held that there is no presumption of advancement in favour of the wife.[14]

The present situation is that the wife, where there is ~~alliged~~ alleged to be joint ownership, must have made some contributions, and not that she takes the whole of the property as a gift. In FALCONER V FALCONER[15] Denning commenting on this said:

> "It may be indirect, as when both go out to work, and one pays the the housekeeping and the other ~~marriage~~ Mortgage instalments. It does not matter which way round it is. It does not matter who pays what. So long as there is a substantial financial contribution to the family expenses, it raises the inference of a trust."

So long as the husband is relieved from expenditure which he would otherwise have had to bear, then that is sufficient. In HAZEL V HAZEL[16] it was

...../5

held that it was unnecessary to show that the husband would not have been able to carry out his payments towards the acquisition of the home. All the cases we have examined are indication of the strong position accorded to the woman and also the discrimination involved, ~~to the woman and also the~~ directed against men and children. This is not consonant with the Ideals of human equality.

ADVANCEMENT TO A CHILD.

The child of a purchaser is exactly in the same position as a wife, but is also subjected to certain requirements. Firstly, he must be the legitimate child of the purchaser for if he is not this may raise problems. Secondly, it appears that the child must not be an adult and well provided. Infancy appears to be of particular signficance as it attracts the presumption. Where the child is a stepson ~~on~~ or an illegitimate, the propos~~e~~er category is the phenomenon of Loco parentis. In RE ROBERTS[17] a father took out an Insurance policy on his son's life and paid the premiums on it, the father being expressed as a trustee. His estate claimed the premiums but it was held that there was a presumption of advancement to the Son. Like in the case of a wife, subsequent declarations by the father do not rebut the presumption. Thus in CRABB V CRABB[18] a father transferred his stock into the names of his son and a Broker and directed the Broker to deliver the dividends into his son's ~~amount~~ account. Later he ~~prepared~~ purported to bequeth the stock to another person but it was held that the son took absolutely, Lord BROUGHAM, L.C holding-

> " If the ~~t~~ransfer is not ambiguous, as I must take it to be, for explanation there is plainly no place. The transfer being held on advancement nothing ~~complained~~ Contained in the Codicil, ~~or~~ or any other matter ex post ~~facto~~ facto Can ever be allowed to alter what has already been done."

Again, like in the case of a wife, the presumption is rebuttable by either subsequent contemporaneous declarations or surrounding circumstances. In POLE. V. POLE[19] a father gave substantial advancement to his son upon his marriage (son) despite the fact that he had other younger children who were unprovided. Later he sold an estate and mortgaged the property with the son's knowledge and also received all the interests without his son's opposition. In these circumstances, it was held that the son took nothing. This was rebuttal by virtue of the surrouding circumstances.

In WARREN v GURNEY[20] the rebuttal refusal was by way of express declarations. The appellent then a spinister, was engaged to her present husband. In that year her father took conveyance of a house in her name and retained the title deeds up to the time he died. Before he died, he gave directions that the property be divided between histhree daughters. The appellant claimed ~~claired~~ possession of the title deeds. It was ~~felt~~ held that the document was admissible in evidence ~~endure~~ as a declaration against the father's interest and so contemporaneous as to rebut ~~relait~~ the presumption.

It appears to me that the court need not even have gone so far because of the father had intended to benefit the appellent, he would have given the title deeds to her or ~~as~~ to her husband.
Lastly, we have seen that a mother cannot advance ~~acheive~~ her children. The rationale of this stance is contained in two conflicting decisions ~~capliciting seasions~~.
The first is that of BENNET v BENNET[21] and SAYRE v HUGHES.[22]
In BENNET the rationable was based on moral ~~rural~~ obligation on the part of a father, which does not apply in the case of a mother, and in HUGHESit was founded on 'motive' which means that if there is f suffieient evidence ~~endue~~ to establish a motive to benefit, them a presumption of advancement will stand. There is much to be said in favour of the two views, but both agree on the point that legal obligation is out. However, in reason and custom there is much obligation on the par tof a mother who has command of money to benefit her children with it.

INSTANCES OF LOCO PARENTIS

One need not be illegitimate to attract this special category of advancement. These cases of loco parentis have not found much favour ~~form~~ from the English courts, perhaps due to the social stigma attached to illegitimated children and the corresponding respect accorded to monogamous marriages. The essential fact is that the one who stands in loco parentis must put himself in the office of a parent with

reference to those duties of the other as a member of the family,. This appears to endorse cases of adoption, because the "Adopter" are not the paternal parents, but are just "natural parents". An illustration of a loco parentis case is the PARADISE MOTOR CO. LTD[23] where a transfer of shares included the signature of a stepson, whose name was also entered into the compnay's Register of Shareholders. When the compnay was wound up, it was held that the stepson took the equitable interest in the shares, ~~Again~~ Again, in STANDING v BOWRING[24] the plaintiff transferred money into the joint names of herself and her ~~Gogon~~ Godson, stipulating that if he survived her, he would get the equitable interest in the shares, ~~Again~~ and, in ~~and~~ that she was to have the ~~dividn~~ divindends during her lifetime. Later she purported to revoke this but it was held that the Godson held beneficially.

But it is not every act of Kindness that amounts to ~~the~~ one electing himself as if he were in loco parentis, and the position was clarified in TUCKER v BURROW[25] per PAGE-WORD, V.C.

> "I cannot put the doctrine so high as to hold that if a person educated a child to whom he is under no obligation either morally or legally, the child is therefore to be provided for at his expense."

II KENYAN DECISIONS

The Ideal, no doubt, is for a state to have its own "home grown" legal system, but the organic development of any such system is a slow and gradual ~~prices~~ process and when a society chooses, or is forced by circumstances to undergo a radical change, it is most unlikely that its domestic law will be able to adopt itself rapidly enough to fit the altered situation. One solution for this problem is for that state to 'borrow' and apply for its own purposes the legal system of another country which has already developed to the stage to which it is hurrying. In the particular situation of Kenya the ~~decision~~ decisive events which made reception necessary where the ~~crowd~~ arrival of a comperatively large number of Europeans and the acquisition of political power by Britain. These events did not, however, change the Kenyan society overnight, but they did introduce certain new practises and institutuions, with which the traditional laws could not cope

with. Thus two totally different societies co-existed together.

The few decided cases on the presumption of advancement in Kenya are the Moslem community and the others are between Kenyans who are governed by statute law. At any rate, they are few. Perhaps there are some, but these are not reported. The a law of advancement must be seen as a reflection of the community's property relations and cultural and ~~socie~~ social developments. Most of the reported cases deal with cultural and social conditions which are outside Kenya, they are not trully Kenyan. The only difference is that they have been ~~de-divided~~ decided by a Kenyan court.

In this section, we will categorise the presumption into two ~~g~~ sub-headings only because I have not been able to find any case dealing with loco parentis. Thus we will discuss advancements to wife and child, and then explain why there has not been decided cases on loco parentis.

ADVANCEMENT TO WIFE

Unlike in Britain, the propertary status of married women has not been to the advantage of women. The men have dominated all the ~~n~~ rights which accrue from and which are ~~aputeran~~ appurtenant to property. This is found in the traditions and beliefs of most of the Kenyan older generation, who believe that a woman cannot own anything and that she is subordinate to the man, herself and her rights, if any ! However, this position has been changed by the involvement of commercial law. There are so many women in the rural areas who pledge the credits of their husbands who work in the towns. As we have seen earlier, this situation falls very neatly with the presumption of advancements. Therefore, I will deal with these cases between spouses who are governed by statute law, and we must also note that where advancement has arisen, it has been between parties who are educated, who know their rights.

The first case is I V I [26]. In this case, a husband purchased houses and registered them in the joint names of himself and his wife. On dissolution

of the marriage, he wanted to know what he was entitled to. It was held that the presumption of advancement ~~proceided~~ prevailed over that of a resulting trust, which would not have succeeded because there was illegality. This case is indicative of the fact that we follow English decisions, because the presence of illegality operates to create advancement. Strongly related to I v I was K v K[27] where the Married Women's Property Act, 1882, was interpreted. It was held that it was a statute of general application, and that the wife could claim for separate property under it. This case ~~is~~ was wrongly decided because it did not pay any attention to the proviso to S. 3(i) of the Judicature Act and because it did not examine the parties' way of life as a means of discovering what law was applicable. After all S. 17 of the Married Women's Property Act is a ~~periodical~~ procedural provision, and does not confer a power upon the judges to pass proprietary rights from one spouse to the other. It gives ~~men~~ them power to 'declare' the rights which exist during the subsistence of the marriage.

I submit that the courts must first ensure that the problem of the proprietary status of married women is settled first before they pass judgement as to the parties' rights to a certain property.

ADVANCEMENT TO CHILDREN

I must confess that I have not found any case on this point where the parties are Africans, but those which have been decided c are definitely under muslim Law. The reason for this dearth is perhaps that the Africans are not very ~~litigons~~ litigators, as between themselves and their children, except for a few cases which have come under the presumption of resultingtrusts. However, the practise is that fathers can advance their children. There are many instances of this. It is the practise nowadsys to pruchase shares and even pieces of land int~~o~~ the names of ones children, particularly in the case of senior and government officers. They may be doing this to avoid procedure of

income or capital gains tax, but if they were to turn against their children, they would be met with the defence of illegality whose effect is to create an advancement.

In JACOB v A.G.[28] a father transfered four buses to his son to defeat his creditors. on his death, his personal representative alleged that the son was trusted, but it was held that he took the buses absultutely.

On the matter of loco parentis, I submit that if any case were to appear, it would be decided on the principles of English law, because there is no local legislation on the matter.

1. LIMITING FACTORS

Kenya's historical experinces and developments are different from those of Britain. Capitalism, which has its roots in Britain has also found its way into Kenya through the arrival of the European settlers. The impact of it has not affected the majority of the population, but has greatly influenced the mode of production and the subsequent growth of private property. The laws that govern a society must, of neccessity, reflect that society's way of life, and stage of development. Hence the application of the presumption of advancement was to be fitted into that frame work. For kenya, the framework is embodied in the Judicature Act. S. 3(i). We shall discuss the limitations imposed by this enactment.

When we talk of limiting factors we mean those peculiarities which make it impossible to apply the presumption of advancement either wholly or in part. In the case of advancement, these factors are the nature of the Kenyan society and the attitude of the Judges and lastly the historical experiences of Kenya. Hence where society has been organised in such a way as to fit in a certain cultural and economic framework, it cannot be strained to adopt a different cultural and social fabric, which is alien to it. Thus in BUSAIDI v BUSAIDI[29] it was held that:-

> "It would be wrong to apply principles of equity designed to suit a ~~d~~christian society in Engl and in order o to import a presumption whereby to gaurge the intetion of a Muslim husband and wife whose social and cultural background is very different.";

In this case, the defendant was alleging that the doctrine of advancement which is an English doctrine, was applicable to transactions between Moslem spouses, but the Judge upheld the Moslem doctrine of Benami transaction, which provides that where a husband or father transfers property to his wife or child respectively, then the presumption of advancement does not arise. Therefore, it can be seen that the presence of a rule under Moslem Law, ~~ehich~~ which a was to the contr was taken as a factor which limited the application of the English doctrine of advancement.

This case also illustrates the fact that in Kenya there are no less than ~~foru~~ four different communities, each having its own philosophy of life, which isreflected in its particular rules. Thus it was in accordance to the proviso in S. 3(i) of the Judicature Act to disapply the presumption of advancement, which was not recognised by Moslem Law. The case was also recognition that every ~~socity~~ society has its legal conceptions which are hardly less precise than the English conceptions and that once they are understood, they give rise to rights which are no less enforceable than rights arising under English doctrine of advancement. The case also demostrates that the doctrine of advancement is peculiar to the historical experience of the English people only, it is such peculiarities which are not for export and which are to be avoided when introducing the essential elements of advancement which are necessary for the attainment of justice.

On the other hand, it is a good thing to emulate progress of another society but only where some emulation does not result in disgard of the people's cultural and economic development. Thus for Kenya,

modernisation should not, as has been assumed equated with the adoption of western values. The absense of this realisation has sometimes resulted in a tenstion between traditional beliefs and western values, but in some cases the judges have shown an understanding of the effect of accepting christianity as not implying the acceptance of English values. This was clearly indicated in OMWOYO v BOSIRE ANGIDA[30], which was a family law case, but which serves to illustrate the point that accepting christiantity is not accepting English values, hence African christians would continue to live like the others, notwithstanding their religion. The case also serves to demostrate that every society has its own mode of life. In that case, it was held that:-

> "It is quite clear that ~~neti~~ neither the appellant nor ~~pa~~ Paulina intended to or did observe the obligations imposed upon them by the christian ordinance but have preferred to conduct their domestic lives according to customary law. ~~Since~~ that is so, this court will deal with the present application according to that law ....."

This quotation is an indication that it would have been exercising paternalism if the court had sought to apply English law to the parties. Thus in essence the jJudge was saying that the African society is organised on different lines from the English. In the case of Hindus, it is settled Law that the presumption of advancement is excluded from the English doctrines of equity which are applieable to them, in Kenya. Thus where a father purchases property with another but registers his share in his son's name the result will be that the son ~~s~~ takes that property on a resulting trust in favour of the father. This rule was applied in BISHEN SINGH CHANDHA v MOHINDER SINGH AND ANOTHER[31] where it was held that the son was trustee of the father. Thus as far as the hindus, just like for the Moslems, the presumption of advancement has no place. This is a realisation by the courts that these people's philosophy of life is different and that to apply those English doctrines would be a negation of these peoples' humanity and legal cenceptions. This is also in accordance with the proviso to the Judicature Act.

Tfhe foregoing discussion has indicated instances where the presumption of advancement has been reflected on the basis that it would not conform to societies' conceptions and cultural and c ~~social~~ social backgrounds.

It would also appear that the presumption was designed for a christian

society, and since Kenya is not one, then the presumption is further restricted in its applicability. Another factor which seems to operate against the application of the presumption of advancement is the status which is accorded to the married women in all the communites' except perhaps for the Moslem. Under most tribes, women are not permitted to own separate property, and even where they ~~acqire~~ acquire it, it is regarded as the property of the husband, who can actually dispose of it. One cannot, however, deny the fact that there has been some change towards an ~~ardioration~~ amelioration of the proprietary position of the woman and now women have acquired property in their names. This would seem to suggest that as of now it would be proper to presume an advancement in their favour. This may be so, but it would apply to a small section of married women, and notably those who are in salaried employment. But the majority are still housewives and are still regarded as being ~~incapable~~ incapable of ~~holding~~ holding property separately from their husbands. Therefore the present nature of the Kenyan society has yet not reached a stage which is comparable to the English as to warrant the application of the presumption of advancement.

Finally, I would like to submit that it is the presumption of advancement t which is subject to qualifications by the local conditions, and not vice versa. This bears support from the words of Lord Denning in the Case of A. G. v NYALI LTD.[32] Where he said, when commenting on the conditions in which common law, which would also appear to be ~~ture~~ true of the presumption of advancment, may be applied in a foreign country.

> "It is a recognition that common law cannot be applied in a foreign c land without considerable qualification Just as with an English Oak, so with the common Law. You cannot transplant it to the African continent and expect it to retain the tough character which it has in England. It will flourish indeed, but it needs careful tending. So with the Common law. It has many principles of manifest justice and good sense which can be applied to all ~~ep~~ peoples of every race and colour all the jworld over. But it has also many refinements, subtleties and technicalities which are not suited to other folk. These off-shoots must be cut-away. In these

far off lands the people must have a law which they understand and which they will respect. The common law cannot fulfil this role except with considerable qualifications."

This task of making qualifications is entrusted to the Judges and it is not an easy one. The passage quoted is a clear reflection of the content of the proviso to S. 3(i) of the Judicature Act. I therefore submit that the presumption of advancement ~~should~~ would not be applied to the Kenyan society.

It is clear that those two paragraphs are contradictory and one has to give way to the other. I would rather we retain paragraph 12, which recognises the realities of the Kenyan people.

However, when the ~~Thadrecatence~~ Judicature Act was being enacted, it would appear that the dominating feeling was that experienced by Lugard in his "Dual Mandate" where he put his thoughts about the African. To him an African was a child, and his law a child's law which has to be changed as he becomes an adult with development and then became the adults law, on his acceptance of the western values. The English concept of law is essentially materialistic.

On a close examination of the doctrines of resulting trust and advancement, one is likely to notice some flaws. As ~~for~~ as resulting trusts, I would submit that we can adopt this concept because we have had some experience in it for there were arrangements which are ~~abein~~ akin to the basic tenets of a resulting trust. These are contained in the case of MUGUTHU v. MUGUTHU [1] which introduced a new form of trust in Kenya. On the other hand, I object to any application of the presumption of advancement because its operation follows on the concepts of a ~~pomage~~ marriage and the assumption that women are capable of holding proprietary rights. As this is not the case, its application would cause problems and call for fundamental reorganisation of the proprietory relations. It also assumes that the Married Women's Property Act, 1882, is a statute of general application. To give a comprehensive picture of the inapplicability of the docrine of advancement, we will first examine its inadequacies within English law, and then its place in Kenya. Lastly I will attempt to make some suggestions and policy recommendations.

Under Englsih Law, it has been the ~~race~~ rule that a married woman cannot make a gift to her husband or her children. The rationale is that she is not under any moral obligation to provide, as the father ~~this~~s. If , then, the English law is a great respector of equality, then why should this be the position? I submit that in the light of modern conditions the married woman must be treated like the father, particularly where she is ~~insd~~ in a ~~lar~~ salaried employment, so that she can be allowed to make gifts to her children and husband. In 1923, the position was stated in CALLOT v NASH[2] with respect to why women should not make advancements.

> "The law draws no distintion between a wife with a large income and a wife with no income ..... The wife may accumulate all her income and throw the whole burden of her keep on her husband."

And then in 1952 Lord Denning hand the following to say in BIBERFELD v BERENS[3]

> "At the present day, when a wife is in nearly all respects equal to her husband, she has to bear the respnsibilities which attach to her freedom. If she is a rich woman, I see no reason why her own means should not come into the family pool just as his do."

BIBERFELD is not a very old case, and surely the conditions have changed even further with an increased freedom of the woman. Therefore she should be put in the same position with her husband.

On the other hand, the presumption of resulting trusts presents its shortcoming This is with respect to the matter of illegality. Under English Law, the ~~preserve~~ presence of illegality need not be ~~overdeemed~~ endenied by an overty act. If it is proved, even if in intention only, then that person will lose the entitlement to the property. I therefore think that this is too heavey a burden, and the law should be a made to appear more realistc by looking at real illegality. Thus the position is Australia can be emulated with, out any reservations, which was stated in MARTIN v MARTIN[4] where it was held that the illegal ~~catentions~~ inlentions must not be 'nebulous and

only possible in the future without manifesting any "imminent danger". This would ensure a balanced treatment of the real and apparent purchaser.

The position in Kenya requires some reveal. As I said earlier, I think that we can adopt the presumptions of resulting trust but int the case of illegality adopt the Australian position. This work has been entrusted to the ~~count~~ courts. The courts will then have to work out a new set of legal principles, but it appears that they have not been competent in discharging this onerous task, and it is the same they were relieved of / legislature, and we cannot ~~have~~ blame it because it has discharged its duties by providing limiting factors in S. 3(i) of the Judicature Act. Therefore the task of the judges is, not to alter the material of which the Act is woven - i.e. the social conditons - but is to iron out the creases, but not causing ~~chos~~ chaos of contradictions. They should therefore not pull the language of the Judicature Act and make nonsense of it, by opening it up to destructive analysis. What has happened is that there has been a naked usurpation of the legislative function under the disquise of interpretation. However, where the legislature has expressed itself elliptically, the Judges are justified in filling up the gaps, which refers to the state of ~~af~~ affairs, and not actual words. This argument is directed to the Married Women's Property Act 1882. The judges have interpreted the 'actual words' instead of examinging it in its contextual meaning.

The tide rose when the British attained political power, and since then this tide has been washing away the foundation upon which our state and social structures rests, and strong props are required to save them. Hence it is with apprehension rather than pleasure that one ~~vies~~ views the presumption of advancement. It is a part of the neo-colonial legislation that goes a long way to support the absurd proposition that the white-man is superior to the ~~balck~~ black man and that the latter will attain manhood by aping the former. This is a proposition that denies that the African has much that should be preserved. This also runs conter to the goal of building an authentica

lly Kenyan Law.

I recommend that the application of presumptions of advancement be repealed, with a view to creating a structure that meets the needs of the African as he ~~sew~~ sees himself and life. Secondly, I recommend that we shift the emphasis of educational and commercial patterns that emphasise the individuals' accomplishments, to the needs of the rural population, and an establishement of a socialist society based on Africans' ideas to enable everyone to lead a truly good life.

If we are to adopt anything it must be those doctines which are in line with our societal means.

In chapter two, I had submitted that the ~~coru~~ courts in their application of resulting trusts had done so perhaps on the basis that in Kenya there were instituions which were akin to the English resutling trust. This is an indication that customary Law was not disregarded. However, there are ~~fory~~ very few decided cases on resulting trusts, and those which are there are on Islamic law, where the presumption of advancement is alleged to exist. Then the resulting trust in that case arises because the courtjs have examined the local conditions, and have i given effect to them.

Another thing is that the limiting factors which have been involved to do not appear to include the intentions of the colonial Government, because these would have on the converse, have resulted in an enhanchement of the english law, relating to the presumptios of resulting trust and advancement being applied. Thus it was actually customary Law which was limited, particularly in the area of advancement. Thus in so far as the specific areas of resulting trusts and advancement were concerned, at least customary law and Moslem Law were taken into account.

In the question f of illegality in so far s as it affects the presumption of advancement, its effect is that it ~~has~~ does not mean that the transferor intended benefit the transferee, t but that since the former's intention was to avoid

law and since it would be against public policy to permit him to claim the property, then it is said that the law gives the other the property absolutely, despite the explanation that thetransfer or did not intend ~~explanation~~ that to be the result. That appears to be the effect of illegality.

On the other hand, the English law gives the elements of an advancement as the existenxe of a special relationship, illegality and the absence of facts to explain the contrary, that is, the transfer or meant the transferee to take the property as a trustee. This is to say that the presumption ~~tru~~ of an advancement is exercised by the court, and not an body else. This matter does not appear very clear under the law. It would also appear that it is not contrary to law for a wife to make a gift but rather that she will not be presumed to intend to make a gift to her husband or her children, and the cour reason for not so presuming is that she is not ~~fo~~ under a moral obligation to make a gift ot the two named classes of persons. Lastly, I would like to submit that in the case of advancement any subsequent declarations by a donor do not change his intention where it was proved to be to benefit the person in whose name the transfer was made, unless those declarations were made contemporaneously. But in the case of resulting trusts, such declarations do not appear to make any difference at all.

Finally, it is a truism that in any given society there is an underlying philosophy of life which gives coherence and direction to that ~~society's~~ Society's thoughts and action. This philosophy of life is an outcome of inherited instincts, traditional beliefs and acquired convictions; what that society may consider just and equitable or in accordance with good conscience necessarily depends on the above elements. Hence any equation of English e presumption of advancement with justice is a unrealistic exercise. It is my contention that we must revert to a more African Law relying on the Indigenous cultural and moral values. The legislature and the judiciary must realise that there are existing differences between the conditions of life here in Kenya and in England

and that there is just no room for comparisons.

FOOT NOTES

CHAPTER ONE

1. The Statute of uses was the basis on which the institution of trusts started.

2. Cap 8, Laws of Kenya.

3. Supra.

CHAPTER TWO

1. LEWIN, "LEWIN ON TRUSTS"

2. HANBURY, "An introduction to the Law of Equity"

3. (1788) 2 Cox 92
(

4. (1972) 3 AU. E.R. 744

5. BOARDMAN v PHIPPS (1967) AC 46
The defendant was a solicitor and he used some information he had acquired from the general meeting and with it entered into a contract and made some profits out of it, and it was held that sum inc since he was in a fiduciary relationship with the Phipp's family he should account for those profits.

6. (1940) Ch. 851.

7. (1729) 1 Eq c C Ab 290, at 291

8. DYER V DYER, supra, at p 93

9. (1958) Ch. 308

10. (1959 - 60) 33 A. L.J.R. 362 in SYDNEY LAW REVIEW, VOL. 4 (1961) at p 126

11. DYER v DYER, Supra at p 94

12. (1918) IKB 223

13. (1829) 3 Y & J 163 , at p 175

14. Supra, at p 428

15. 5.3(i), cap 8, Laws of Kenya

16. (1898) INLR 15, at 22

17. (1959) GLR 390 at 401

18 Supra

19. (1956) IQBI, at page 16

20. (1971) EA 278

21. Registered Land Act, Cap 300

22 1971 K HD 16

24 (1962) EA 248

23 Civil case No. 1410 of 1974

25. Supra, at p 255, per HORSFALL, J

26. (1956) KLR 20

27

28

29 Muguthu 'v' Muguthu, supra;

30. (1967) EA 409

31

32 (1971) EA 278

34 E. COTRAN: "Law of Marriage and Divorce"

CHAPTER THREE

1. Although a married woman is not under a moral obligation to provide for her husband or children, it would appear that she is under a legal obligation to maintain her children by virtue of the National Assistance Act, of England and the Married Women's Property Act, 1973.

2. MOATE v MOATE (1948) 2 ALL.ER.486

3. (1948) 15 EACA 28(CA)

4. (1866) 15 CR I.P.&D 130

5. (1955) AC 431

6. SHEPAHRD v CARTWRIGHT, supra, at 435

7. (1958) I. WLr 259

8. (1970) IWLR 1333

9. Supra, at 1335-1336

10 (1909) 2 Ch. 639

11. (1946) Ch. 217

12. (1970) P.136

12A (1971) IWL 342

13 MARSHALLv M CUTWELL (1875) LR 20 Eq. 328

14. ANSON v ANSON (1953) IQB 636

15. (1970) 3 AU.E.R.449, at 452

16. (1972) I AU_E.R. 923

17. (1946) Ch. 1

18 (1834) 1 MYL & K 51 1

19. (1748) 1 Ves. Gen 76

20 (1944) 2 All.E.R. 472

21 (1879) 10Ch D. 474

22. (1868) LR. 5 Eq. 376

23. 1968 * 1 WLR 1125

24. 1886 27 Ch. 341

25. 1865 2 H M & M 515

26. (1971) EA 278

27. Unreported. In the High Court of Kenya, Nairobi. Civil Case No. 124 of 1975.

28. 1974 KLR 38

29. (1971) EA 278

30 6 CRR 4

31. 1956 KLR 20

32. (1956) 1 QB1

CHAPTER FOUR

1. 1971 KHD 16

2. 1923 39 TLR 292

3. 1952 3 All. E.R. 237

4. (1959 - 60) 33 A. L. J. R. 362, in SYDNEY LAW REVIEW. VOL. 4 (1962) at p 126.

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2. A. ALLOT, m'New Essays in African Law" (Butterworths, 1970.)

3. G. W. KEETON "The Law of Trusts" (Professional books Ltd. 19

4. R. T. OERTON? "Underhill's Law relating to trusts and trustees. (Butherworths, 1970)

5. D. B. PARKER & A. R. MELLOWS "The modern Law of trusts" (Sweet & Maxwell, 1976).