Diagram showing the structure of courts in Lesotho

Judicial Committee*
of the Privy Council

Court of Appeal*

High Court

Subordinate Courts

Judicial Commissioners
Court

Central Courts

Local Courts

--- indicates channel of appeal
--- indicates channel of revisory jurisdiction

*Dealt with in this issue of CILSA. The balance of this article will appear in the next two issues of this journal.
The Judicial System of Lesotho

This article on the Judicial System of Lesotho was written before the recent constitutional developments in Lesotho. Editor

S. M. Poulter*
Lecturer in Law, Roma, Lesoto

I. THE COURTS

The structure of the judicial hierarchy appears from the diagram on the preceding page. At the base lie the Central and Local Courts administering customary law. Above them stand the High Court, the Court of Appeal and the Privy Council. In an intermediate position are the subordinate courts and the Judicial Commissioners' courts. The various courts will be discussed in turn.

1. THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

At the apex of the judicial system stands the Judicial Committee of the Privy Council. The tendency in recent years has been for former British dependencies to abolish appeals to the Judicial Committee either on independence or soon afterwards.1 One of the arguments for keeping such appeals is that the Committee can take, perhaps, a more detached view of the case, especially where, as in constitutional matters, local feelings may run high. On the other hand, it may equally be argued that the Committee, sitting in London, thousands of miles away from the country where the case originated, cannot hope to grasp the local issues and give a realistic decision which will take them into account.2

Whatever the respective merits of these arguments may be, Lesotho retained appeals to the Judicial Committee on independence and has at the time of writing taken no steps to abolish them.

*M.A. (Oxon.) Solicitor.

1The following countries abolished appeals to the Privy Council on independence or soon afterwards: Tanganyika, Ghana, Uganda, India, Pakistan, Cyprus, Kenya, Zambia, Malawi and Nigeria.

(i) **Regulation of Appeals**


Appeals may go to the Judicial Committee as a matter of right, or with the special leave of the Committee, or in pursuance of the leave of the Court of Appeal. These three avenues of appeal are treated in turn.

(A) **Appeals as of right**

The constitution provides for such appeals from decisions of the Court of Appeal in respect of:

(a) final decisions in any civil or criminal proceedings on questions as to the interpretation of the constitution;

(b) final decisions given in exercise of the jurisdiction conferred on the High Court by section 20 of the constitution (which relates to the enforcement of fundamental human rights and freedoms);

(c) final decisions of the High Court in the determination of any of the questions for the determination of which a right of access to the High Court is guaranteed by section 16 of the constitution (which relates to the right of persons whose property is compulsorily acquired);

(d) final decisions in any civil proceedings where the matter in dispute on the appeal is of the value of R1,000 or upwards or where the appeal involves directly or indirectly a claim to or question respecting property or a right to the value of R1,000 or upwards;

(e) final decisions in proceedings for dissolution or nullity of marriage;

(f) such other decisions in civil proceedings as may be prescribed by Parliament.

In an appeal from Nigeria in the case of *Adegbenro v Akintola*, the Privy Council had to interpret the expression "final decisions".

---

2S. I. 1954, No. 1370.
3No. 132 of 1965.
4S. I. 1966, No. 1172.
5Constitution, section 121(1).
6Ibid., section 122.
7[1963] 3 All ER 544.
used in a similar context in the Nigerian constitution.\textsuperscript{9} A case involving the interpretation of the constitution had come before the court of first instance which had referred various issues to the Federal Supreme Court for its determination. An appeal against the decision of the Federal Supreme Court came before the Privy Council and there it was contended for the respondent that the determination by the Supreme Court of issues referred to it by a lower court did not fall within the category of "final decisions". The argument was that the proceedings commenced in the lower courts had not yet been terminated by a final decision. The Privy Council held, however, that the Supreme Court had given its final decision and that therefore an appeal did lie to the Privy Council.

The Lesotho constitution provides for references by a lower court to the High Court of questions involving the interpretation of the constitution in terms similar to the provisions in the 1960 Nigerian constitution.\textsuperscript{10} Moreover the draftsmen of the Lesotho constitution seem to have been apprised of the point raised in \textit{Adegbenro v. Akintola}, for the constitution expressly provides that decisions given in pursuance of these references are included within the meaning of the expression "final decisions".\textsuperscript{11}

It is appropriate at this juncture to mention briefly Rule 2 of the Judicial Committee Rules\textsuperscript{12} which might appear to affect appeals as of right. The rule reads:

"All appeals shall be brought either in pursuance of leave obtained from the courts appealed from, or, in the absence of such leave, in pursuance of special leave to appeal granted by Her Majesty-in-Council upon a petition in that behalf presented by the intending applicant."

At first glance this provision would seem to outlaw appeals as of right, but it was held in \textit{Chikwakwata v. Attorney-General},\textsuperscript{13} a Rhodesian case, that appeals as of right still lie, but that it is necessary to go through the formality of obtaining the "leave" of the court appealed from. "Leave" here does not mean that this court has any discretion in the matter, and thus it is really a misleading use of the word. The court merely has to confirm that an appeal does lie as of right so as to relieve the Privy Council of the burden of reaching this decision.

\textsuperscript{10}Lesotho Constitution, section 114.
\textsuperscript{11}\textit{Ibid.}, section 121(2).
\textsuperscript{12}1957 RLR 324.
\textsuperscript{13}S. I. 1957, No. 2224 (reprinted in Volume X of the Laws of Basutoland, 1965, at 137).
(B) Appeals with the special leave of the Judicial Committee

The constitution provides that such appeals shall lie from the decision of the Court of Appeal in any civil or criminal matter. The only exceptions relate to succession to the throne and to the appointment of a Regent.

Special leave of the Judicial Committee will always be necessary in criminal cases (except those involving questions as to the interpretation of the constitution) since the Court of Appeal has no right to grant leave in such cases and such appeals do not lie as of right. In addition special leave will be needed in civil cases if the Court of Appeal has refused its leave to appeal.

(C) Appeals with the leave of the Court of Appeal

The constitution provides that such appeals shall lie in two classes of cases:

(a) decisions in any civil proceedings where, in the opinion of the Court of Appeal, the question involved in the appeal is one that, by reason of its great general or public importance or otherwise ought to be submitted to the Privy Council; and

(b) such other decisions in civil proceedings as may be prescribed by Parliament.

A cursory perusal of Rule 2 of the Judicial Committee Rules might leave one with the impression that the Court of Appeal has the power in all cases to give leave to appeal. However, that this is not the true position is clear from a communication from the Lord Chancellor of England to Beadle C.J., adopted by the Appellate Division of Southern Rhodesia in *Chikwakwata v. Attorney-General.*

The Court of Appeal only has power to give leave where provision is made for the granting of such leave by a Lesotho statute. Since no Lesotho statute, including the constitution, gives the Court this power in criminal cases, such cases can only reach the Privy Council pursuant to the grant of special leave. The Rules are only procedural and do not give a right to appeal where none exists independently.

(ii) The present legal position of the Judicial Committee

It is not correct to speak of the Judicial Committee as an English judicial body since its English jurisdiction is limited to a few extremely
specialized fields. Nowadays it is almost exclusively concerned with hearing appeals from independent Commonwealth countries, although it does indeed have its roots in the colonial past. Its jurisdiction originated in the royal prerogative, i.e. the fact that the British sovereign had the special right of being the supreme tribunal of justice in the British Empire. The Judicial Committee was, therefore, in theory at least, merely a body of men who had the function of advising the British monarch on those judicial matters which were submitted to them. In reality the Committee's proceedings were, and still are, strictly judicial proceedings, and the Committee is made up of persons who presently hold or have held high judicial office in the United Kingdom or Commonwealth. It is current practice for a majority of "the Board" (which is the expression used to describe a session of the Committee) to consist of judges who presently sit in the House of Lords. However, even its theoretical foundation, being based on the concept of Empire, is now no longer acceptable, and, as a result, appeals from Lesotho go to the Judicial Committee as a court in its own right - indeed as the highest appellate court for Lesotho. A decision of the Committee is to be enforced in the same way as if it were a decision of the court appealed from, and there is a provision in the constitution to this effect. Thus the old idea that a decision of the Committee was merely the advice of its members to the British sovereign has, at any rate so far as Lesotho is concerned, passed away. In keeping with its new role based on similar provisions in the laws and constitutions of other newly independent states, the Privy Council is now able to give its judgments in a manner more consonant with a court of law. Whereas formerly only one judgment could be given on the basis that advice to the sovereign should be

---

19 E.g., to hear appeals from medical and dental practitioners whose names have been struck off the register by Disciplinary Committees of their respective professions, and also in Prize cases.

20 See generally Ibrahimbo v. R. (1964) AC 900 (PC), an appeal from Ceylon; Hull McKenna and others (1926) 1R 402; and Wade & Phillips, Constitutional Law, Chapter 33.

21 The Judicial Committee is made up of the Lord President of the Council (who does not usually sit), the Lord Chancellor, the nine Lords of Appeal in Ordinary (who are members of the House of Lords), the Lords Justices of Appeal (who do not usually sit as they are members of the English Court of Appeal where they are fully occupied) and such other judges or ex-judges of the superior courts of the Commonwealth as are Privy Councillors - Judicial Committee Act, 1833 (3 & 4 Will. 4 c.41); Judicial Committee Amendment Act 1895, 58 & 59 V.C. 44; Appellate Jurisdiction Acts 1908, 8 Ed. 7, c.51, and 1913, 3 & 4 Geo. 5, c.21 and the Administration of Justice Act 1928, 18 & 19 Geo. 5, c.26. Membership at present includes judges from Australia, New Zealand and Trinidad and Tobago.

22 As opposed to Her Majesty-in-Council. This follows the practice adopted by Kenya on independence - see Roberts-Wray, Commonwealth and Colonial Law (Stevens, 1966) 450.

23 Section 124(1).
unanimous and not contradictory, dissenting opinions have now been introduced.24

It should be borne in mind that the Judicial Committee sits in London and not in Lesotho and thus there is likely to be considerable expense in taking an appeal to it. However, provision exists for special leave to appeal to the Committee in forma pauperis where the petitioner is not worth £100 in the world.25

When the Judicial Committee hears a case brought to it from a country administering Roman-Dutch law it will naturally apply that law and not English law,26 and in the past it used to have one member who had had judicial experience in that law.

This is well illustrated by the case of Nkau Majara v. R27 where the Committee was composed of Lord Goddard (then Lord Chief Justice of England), Lord Reid (also a member of the House of Lords) and Mr L. M. D. de Silva (who formerly held high judicial office in Ceylon).

In that case a headman had, contrary to his duty, refrained from arresting the culprits on his arrival at the scene of a ritual murder. In this way, and also by his subsequent conduct in failing to report the murder and give prompt assistance to the police, he had assisted the murderers by giving them an opportunity to escape from justice. The question was whether or not his conviction as an accessory after the fact by the Basutoland High Court should be upheld. Under English

24 See the Judicial Committee (Dissenting Opinions) Order-in-Council of 4 March 1966.
25 Judicial Committee Rules, S.I. 1957 No. 2224, section 2. The petition must be accompanied by an affidavit from the petitioner stating that he is not worth £100 in the world excepting his wearing apparel and his interest in the subject-matter of the intended appeal, and that he is unable to provide sureties. A certificate of counsel must also be sent stating that the petitioner has a reasonable ground of appeal, though this will not automatically mean that the Privy Council has to grant leave to appeal in forma pauperis - see Nelson v. East African Newspapers (Nation Series) Ltd [1963] 3 All ER 812. If the appeal is not in forma pauperis the costs are likely to be high since an English Q.C. will often lead and commonly be assisted by a junior from the country of appeal. In addition 30 copies of a party’s case must be printed and bound.
26 But see the amazing revelation in Leqhobetsi v. R (1926-53) HCTLR 149 (PC) at 156 that in the earlier case of Tlhabale v. R (1926-53) HCTLR 123 (PC) it was argued for the appellants and not disputed by Counsel for the Crown that from 1884 onwards English law and practice had been applicable in Basutoland save insofar as superseded by legislative enactment. That such an error could go unnoticed in the High Court as well as before the Privy Council can only be explained by the colossal incompetence and lack of interest of those responsible for the legal affairs of the country at that time. For further discussion of these two Privy Council decisions see pages 19-20 infra.
27 (1954) HCTLR 38. See also Jayawardena v. Amarawickrama (1918) 20 NLR 289 on appeal from Ceylon.
law a person can only be convicted of being an accessory after the fact if he actively assists the principal offender and not if he only stands passively by and omits to do something. It was argued for the appellant that the term "accessory after the fact" had to be given a meaning under South African law identical to its meaning in English law since it was originally an English legal term of art. The Privy Council held that this was not necessarily so and stated:

"No doubt it would retain much of the connotation which it possessed under English law but its meaning in the country of its adoption could naturally and properly be influenced by the system of law prevailing in that country, namely the Roman-Dutch law. This was almost inevitable as the term had to be used in relation to, and in the course of administration of, that law . . . . In their Lordships' opinion an authoritative view of the true position is to be found in the following passage in the judgment of Innes C. J. in the case of Rex v. Mlooi: 30: 31 'He who intervenes 29 to assist a criminal after the event may conveniently be called an accessory after the fact - not in the technical and restricted sense in which that term is used in English law, but in an extended sense applicable to crimes in general. So used, its meaning is well understood . . . ."30

The Committee reached the conclusion that in order to constitute a person an accessory after the fact under the law of Basutoland (as it was then) it is sufficient to establish that assistance was given to the principal offender in circumstances from which it would appear that the giver "associated" himself with the offence committed. South African law (Roman-Dutch law) makes no distinction for this purpose between giving passive assistance and giving positive assistance. Applying this law and not English law the Committee dismissed the appeal.

Nearly all the cases which have so far come before the Judicial Committee on appeal from Basutoland have concerned criminal matters, and it is as well to state the true position of the Committee in relation to such appeals. The Committee is not a court of criminal appeal31

281925 AD 131.

29The use of the expression "intervenes" is confusing here since Nkun Majara v. R. was concerned with passive assistance. R. v. Mlooi was not concerned with this problem but with whether or not an accessory after the fact is a scius criminis.

30At 44.

31See generally Roberts-Wray, op. cit., at 437 and Nandon v. R [1926] AC 482 at 495. In Tadeyo Kwalira and another v. R, an appeal from Malawi (No. 38 of 1963), the Board reiterated the view of its function in criminal appeals which it laid down in Arnold v. King Emperor [1914] AC 644 as follows-

"This Committee is not a Court of Criminal Appeal. It may in general be stated that its practice is to the following effect. It is not guided by its own doubts of the appellant's innocence or suspicion of his guilt. It will not interfere with the course of criminal law unless there has been such an interference with the elementary rights of an accused as has placed him outside the pale of regular law, or unless, within that pale, there has been a violation.
and it does not have the wide powers which such a court would have. It will only disturb a decision in the court below where there are strong grounds for doing so. The rule laid down by the Committee in Re Dillett is that there must have been some clear departure from the requirements of justice, and an appeal will not be allowed unless it is shown that by a disregard of the form of legal process or by some violation of the principles of natural justice or otherwise some substantial and grave injustice has been done. Such an irregularity was uncovered by the Committee in the case of Tumahole Bereng v. R.

Here the administrative officer who sat with the judge at the trial pursuant to the relevant statutory provisions, had acquainted himself before the trial with certain material aspects of the Crown’s case in the company of a number of Crown witnesses and had interrogated one of the accomplices of the accused in connection with several important aspects of his evidence. The Committee held that his subsequent participation in the trial was highly irregular and therefore set aside the conviction for murder. In the words of the judgment:

“As has been so often said, justice must not only be done but must manifestly be seen to be done. In their Lordships’ opinion (the administrative officer’s) conduct was such as to cause doubt in the public mind as to the complete impartiality of the proceedings in which he subsequently took part... it might well have been thought, when this activity became known, that he had come to Court with a biased mind in the sense of having formed a definite view as to what had occurred or as to the credibility of the witnesses whom he had observed or questioned... All this, of course, is in the realm of conjecture,

of the natural principles of justice so demonstrably manifest as to convince their Lordships, first that, the result arrived at was opposite to the result their Lordships would themselves have reached, and secondly that the same opposite result would have been reached by the local tribunal also, if the alleged defect or misdirection had been avoided.”

In civil cases special leave will only be given by the Privy Council “where the case is of gravity involving a matter of public interest or some important question of law, or affecting property of considerable amount or where the case is otherwise of some public importance or of a very substantial character”. See Prince v. Gagnon (1882) 8 App. Cas. 103 at 105.

32 (1887) 12 App. Cas. 459 at 467.
33 (1926-53) HCTLR 123 (PC) (Basutoland). See also Mablikilili Dlamini v. R [1942] AC 583 (PC) a case from Swaziland where a failure to hold the whole of the proceedings in public in accordance with the law was held prima facie to amount to a disregard of the forms of justice. The Judicial Committee allowed the appeal because the opinions of the assessors on matters of custom had been given privately to the judge instead of in open court as required by the relevant proclamation. For other examples of appeals allowed by the Privy Council where a disregard of the forms of justice occurred see Ras Behari Lal v. The King Emperor (1933) 102 LJ (PC) 144 (member of jury did not understand the language in which the trial was conducted) and Knowles v. R [1930] AC 336 (judge in Ashanti sitting without jury sentencing to death for murder without considering the possibility of manslaughter).
but when the irregularity complained of may reasonably engender suspicions of this nature it cannot be left out of account, particularly when, as here, the opinion of the Officer could have been communicated to the judge in private."

It remains to advert to a doctrine which has been established by the Privy Council that it will not normally disturb concurrent findings of fact in the courts below, more especially in cases relating to customary law.

(iii) The authority of Privy Council decisions

It is certain that decisions of the Privy Council in cases that have come to it on appeal from Lesotho are binding on all other courts in Lesotho since it is the highest court for that country. The binding effect of the Privy Council decisions given in cases originating from other countries is much more doubtful. It may be said at the outset that decisions applying English law cannot even be relevant unless the common law in force in Lesotho and the English common law agree on the point, or unless the two systems of law are otherwise identical (for instance they possess statutes in pari materia). Clearly, the decisions of courts in South Africa, Botswana, Swaziland, Rhodesia and Ceylon applying Roman-Dutch law are entitled to great respect in the Lesotho courts, but the question which arises is whether or not they are binding.

(a) Two theories

The authority to be attached to Privy Council decisions is a problem which has given rise to a number of conflicting theories. One of these theories states that the Privy Council is not one body hearing appeals from all over the Commonwealth, but a separate entity for every country for which it is the highest court of appeal. Therefore, it is argued, decisions on appeal from one country, can only be binding in that country and not elsewhere. This theory may be

34 At 141.
35 Kwamin v. Kafuar (1914) PC '74 .28; Devi v. Roy [1946] AC 508. The practice of the Board is to decline to review the evidence for a third time where two local courts have reached the same findings of fact. Dissents by individual members of those courts do not affect the position. In order for the Board to depart from this practice there must be some miscarriage of justice or violation of some principle of law or procedure. The Board will always be reluctant to depart from the practice in cases which involve questions of manners, customs or sentiments peculiar to the country or locality from which the case comes, whose significance is specially within the knowledge of the courts of that country. See also Chua Chee Chor v. Chua Kim Young [1963] 1 All ER 102.
36 See the discussion in Roberts-Wray, op. cit., at 572-5; Daniels, The Common Law in West Africa (Butterworths, 1964) 186-190; and Allott (1968) Journal of African Law, 3 at 7-9.
37 In Negro v. Pietro's Bread Co. Ltd. (1933) OR 112 the Ontario Court of Appeal refused to be bound by the Privy Council decision in the Australian case of Victorian Railway Commissioners v. Coitlas (1888) 13 App. Cas. 222.
buttressed by two practical considerations. First it may be questioned whether a Privy Council decision in a case coming from, say, New Zealand should be allowed to alter the law of Lesotho without discussion of the existing law of Lesotho. Thus counsel, briefed on the decisions in the courts of Lesotho, would have to be heard in argument before a decision affecting the law of Lesotho could be given. Secondly, how can decisions of the Lesotho High Court or Court of Appeal be said to be overruled by decisions on appeal from, say, Ceylon, since "overruling" implies that the decision has been considered and set aside?38

The defect of this theory, however, is that it fails to take account of the reality of the Committee's operations. It is staffed by a relatively constant Board of judges and it has a standard procedure and body of rules which are followed in all appeals irrespective of origin. Moreover, it is predictable that if the Board gives a particular ruling in country A it will give the same ruling later in country B if the same legal system exists in both.39

Another theory is that decisions of the Privy Council are binding in all countries where that body is the highest court of appeal for the simple reason that courts in practice decide cases on that assumption.40 Thus one finds the following statement in the judgment of the Privy Council in *Fatuma binti Mohamed bin Salim Backshiwun v. Mohamed bin Salim Backshiwun*,41 a case from Kenya:

"In *Said bin Muhammed v. Wakf Commissioner*... the experienced judges of the Court of Appeal for Eastern Africa did not doubt that on a question of Mohamedan law decisions of the Privy Council in appeals from India must bind them in appeals from the High Court of Zanzibar. Their Lordships are of opinion that this was clearly the correct view and that it must prevail also in appeals from Kenya."43

Thus the Privy Council was expressing the view, albeit in an *obiter dictum*, that their decisions are authoritative beyond the country from which the appeal comes.44 This view receives support from the widely held belief, endorsed by the courts, that Privy Council decisions on important matters of constitutional law are of general applica-

---

38See *Pesona v. Babouchi Baas* (1948) 49 NLR (Ceylon) 442.
40In *Onoen v. Leventis & Co. Ltd.*, (1959) GLR 105 at 115 a Ghanaian judge held himself bound by a decision of the Privy Council on appeal from India.
42[1946] 13 EACA 32.
43At 14.
44The Privy Council took the same view in *Tzamborakis and another v. Radousakis* on appeal from Tanzania (PC appeal No. 5 of 1957 reported in 1958 *Journal of African Law* 186) as to the binding effect of their decision in the Indian appeal of *Tricondas Cooverji Bhoja v. Thakur*, ILR 44 Cal. 759.
tion and not limited to the country of origin. Thus the Swaziland case of *Sobhiza II v. Miller* has long been accepted as authority for the principle that if the jurisdiction conferred upon the British sovereign by the *Foreign Jurisdiction Act* of 1890 is exercised, then it cannot be called in question by the courts. The courts will rely on the representatives of the Crown to know the limits of its jurisdiction and to keep within these limits. As soon as the jurisdiction has been exercised it is unchallengeable. Thus in *Sobhiza's* case the Judicial Committee accepted the validity of an Order-in-Council without question. It has never been suggested that this case was only authoritative for Swaziland. Indeed it has been followed time and again throughout the Commonwealth. Similarly decisions such as that in *Re Dillett* on the jurisdiction of the Committee in criminal appeals are thought to be of worldwide application.

(b) *Some judicial views on the question from Roman-Dutch jurisdictions*

Before hazarding a conclusion on this question it may be useful to examine briefly some of the judicial pronouncements on the subject in jurisdictions administering Roman-Dutch law.

In South Africa it is possible to find conflicting statements on the authority of decisions of the Privy Council on matters of Roman-Dutch law on appeal from Ceylon. Thus in *Hare v. Trustee of Heath* Lord de Villiers CJ remarked:

45(1926-53) HCTLR 1; [1926] AC 518. The facts of the case were as follows. Xibandzeni who was the Paramount Chief of Swaziland from 1875 to 1889 had granted numerous concessions including one to the predecessors in title of the respondents. Under the concession the grantees bound themselves not to interfere with the rights of the Swazi inhabitants. The appellant claimed that the first respondent had trespassed on the existing rights of Swazi occupants and had caused them to be ejected from the land which they occupied. A convention had been made in 1894 between Great Britain and the South African Republic which, apart from giving the latter rights of legislation, jurisdiction and administration, guaranteed the grazing and agricultural rights of the Swazis and contained a proviso that no law thereafter made in Swaziland was to be in conflict with the guarantees given to the Swazi people in the convention. This was followed by an Order-in-Council which disregarded the proviso and the guarantees, and gave the High Commissioner power to make grants of lands, which he promptly did, including one to the respondents. Since the grant was one of full ownership the respondents evicted the Swazi occupants. The Privy Council held that the Crown could not, except by statute, deprive itself of freedom to make Orders-in-Council even when these were inconsistent with previous Orders such as the 1894 Convention. Thus the principle of the Crown's unfettered power to extend its jurisdiction was established, and its right to make an inconsistent Order-in-Council was accepted without question.

46Ibid supra note 32 at 10.

47It was applied e.g. in *Fakisanda Nkambule v. R* (1955) HCTLR 1 (PC) (Swaziland).

48(1884) 3 SC 32.
"The case of Tatbam v. Andree49 was decided by the Privy Council in 1863 on appeal from the Supreme Court of Ceylon where the Roman-Dutch Law also prevails; but I ought here to observe that if the decision of the Privy Council in that case had been inconsistent with the rules laid down and recognised in this Court for half a century, and if those rules appeared to me to carry out the true principles of the Roman-Dutch Law, I should not consider the decision of the Privy Council as binding upon this Court in the present case."50

However, the decision of the Privy Council in Le Mesurier v. Le Mesurier51 on appeal from Ceylon was held to be absolutely binding in both Ex parte Kaiser52 and Murphy v. Murphy.53 Both Tatbam v. Andree and Le Mesurier v. Le Mesurier were decisions on the Roman-Dutch common law.

Turning to decisions interpreting statutes we find a more consistent approach being developed. In De Waal N. O. v. North Bay Canning Co. Ltd,54 the South African Appellate Division held itself bound in construing a South African statute to follow the Judicial Committee's interpretation of identical wording in a foreign statute. A proviso was later added in Estate Wege v. Strauss55 that there should be nothing in the Roman-Dutch common law requiring a different interpretation. In Southern Rhodesia the courts have taken the same view. Thus in R v. Nkala6 the Federal Supreme Court in construing a clause in the Sedition Act held it was bound to follow the decision of the Privy Council in Wallace - Johnson v. R57 (an appeal from the Gold Coast, as it then was). Beadle CJ said:

"Whether or not, therefore, the decision in Wallace - Johnson's case is binding on the High Court depends on whether or not any difference which there might be between the common law of Southern Rhodesia and the Gold Coast might affect the interpretation to be placed on the Southern Rhodesia Act and the Gold Coast Act respectively.

That there may be a difference in the common law of the Gold Coast and of Southern Rhodesia, I will concede, for the purposes of this enquiry. But the ordinary grammatical meaning of the wording of the two Acts seems to me to be so plain that I cannot see how any difference in the common law of the two countries could affect their interpretation. It is clear also that the decision in Wallace - Johnson's case was arrived at purely on consideration of the words of the statute itself, and that the interpretation placed on the word 'disaffection' by the Privy Council was not influenced in any way by what the common law of the Gold Coast might or might not have been."58

---

49 MPCC (NS) 386.
50 At 33.
51 [1895] AC 517 (PC)
52 [1902] TH 165.
53 [1902] TS 179.
54 [1921] AD 921.
55 [1932] AD 75.
56 [1961] (4) SAL R 177 (F(C).
57 [1940] 1 All ER 241.
58 At 182-3.
R v. Nkala is instructive in showing that on the pure interpretation of the words of a statute a Privy Council decision from a basically English law jurisdiction was held binding in a basically Roman-Dutch law jurisdiction. Apart from differences in the common law which may affect the position where they are relevant, there are also dicta to suggest that the surrounding circumstances may on occasion play a significant part. This is an element to be taken into account in the interpretation of statutes generally, but it may be especially important in view of the wide differences which exist between conditions in the white-dominated part of Southern Africa and those prevailing in non-racial independent African states like Lesotho.

As recently as 1962 Beadle C J, in the Southern Rhodesia case of City of Salisbury v. Mehta, was distinguishing the racial conditions in South Africa from those in Southern Rhodesia. The question was whether or not the City of Salisbury could differentiate between the races in municipal swimming baths, and the South African picture was painted as follows:

“It stands to reason that in a country whose statute book is honeycombed with differential legislation as between white and coloured, and in which colour distinction in churches, schools, sports, places of amusement and in society generally are carefully observed, it can scarcely be said that in delegating legislative powers to municipalities, the Legislature could not possibly have contemplated that these subordinate law-making bodies would follow its own example as well as the settled social and colour differentiation.”

Beadle C J then went on:

“Interpreting a South African statute against this background it might well be right to infer that the South African Legislature when it gave a subordinate authority certain general authority, intended also to give it the authority to ‘differentiate’ between the races. In considering a statute made in a country whose racial policies are quite different from those of the Republic of South Africa, it might, however, be quite wrong to draw a similar inference.

For example it would surprise me if the Courts of England would hold that when the English Parliament gave the Birmingham Municipality the authority to make by-laws for the good government of the city, it intended also to give the municipality the authority to segregate West Indians from Europeans provided that the facilities afforded West Indians were equivalent to those afforded to Europeans.”

Similarly, dicta of Tredgold CJ in Estate Mehta v. The Master point in the same direction. The court had to construe a taxing statute which contained the words “surviving spouse”. The court held that

291962 (1) SALR 675 (SR).
60Ibid, at 686-7 quoting from Donges and Van Winsen’s Municipal Law 717 which was cited with approval in R v. Carette 1943 CPD 242 at 253.
61Ibid, at 687.
621958 R & N 570 (FC).
this expression included the survivor of a polygamous marriage which was valid by the law of the place of its celebration. Thus, for a limited purpose at any rate, recognition was given to a polygamous union, whereas this had been denied in the leading South African case.\(^{63}\)

There is, in addition, South African authority for the proposition that a Privy Council decision on a question involving public policy is binding. In\(^{64}\) Patz v. Salzbtlr.\(^{64}\) the Transvaal High Court held itself bound by a decision on appeal from India on what constituted champerty. Innes CJ said:

> "The rule was clearly laid down in the case referred to during the argument - Ram Coomar Coomoo v. Clunaidor Canto Mockery.\(^{65}\) It is a general rule, not founded upon the law of India, but upon public policy, and therefore binding on this court."\(^{66}\)

(c) Conclusions

The following conclusions are tentatively submitted as to the effect of Privy Council decisions from other jurisdictions. Such decisions are binding upon the courts of Lesotho in the following circumstances:

(1) Where the decision is on a broad constitutional question, e.g. dealing with English constitutional law (though there are only a few spheres in which such a decision could be relevant in Lesotho today).

(2) Where the decision interprets a provision in a constitution identical to one in the Lesotho constitution, e.g. on a question relating to a British constitutional convention which had been written into both constitutions. This is subject to the proviso that there is no significant difference in the surrounding circumstances between the two countries.

(3) Where the decision is one interpreting a statutory provision\(^{in pari materia}\) with one contained in a Lesotho statute, e.g. a section of the English Companies Act\(^ {67}\) or Bills of Exchange Proclamation.\(^ {68}\)

This is subject not only to the proviso about different surrounding circumstances, but also to a condition that the common law

\(^{63}\) Seedat's Executor v. The Master 1917 AD 302. Similar decisions to this effect include the following: Makwana v. Lamb 1943 WLD 63, followed in Zuza v. Minister of Justice 1956 (2) SALR 128 (N); Nqaphela v. Sibele (1893) 10 Juta 346; Moseboso v. Links 1915 TPD 357; R. v. Nduna 1907 TPD 407: S.A.N.T.A.M. v. Fondo 1960 (2) SALR 467 (AD).

\(^{64}\) 1907 TS 526.

\(^{65}\) 2 App. Cas. 186.

\(^{66}\) At 528.

\(^{67}\) Companies Act, No. 25 of 1967.

\(^{68}\) Proclamation 13 of 1912 as amended.
The judicial system of Lesotho does not require a different interpretation, e.g., as to the meaning of the word “consideration” in the Lesotho Bills of Exchange Proclamation.69

This seems certain to be the case where the relevant Lesotho authorities are before the Privy Council as happened in the Swaziland case of Gideon Nkambule v. R.,70 but it will probably also be so even in the absence of consideration of Lesotho decisions

In Nkambule’s case the Judicial Committee had to decide whether to apply the English or the South African rule relating to the evidence of accomplices in a ritual murder case. The English rule is to the effect that the evidence of one accomplice cannot be corroborated by that of another. The South African law considers the evidence of two accomplices to be sufficient even though there is no other evidence of the crime, and it is based upon judicial interpretation of provisions in a statute in the same terms as the Swaziland statute.71 The particular provision which the Committee was called upon to interpret was section 231 of the Swaziland Criminal Procedure and Evidence Proclamation of 193872 as amended, which provides:

“Any court which is trying a person on a charge of any offence may convict him of any offence alleged against him on the single evidence of any accomplice: Provided that the offence has, by competent evidence, other than the single and unconfirmed evidence of the accomplice, been proved to the satisfaction of such court to have been actually committed.”

In Tumahole Bereng v. R.,73 which was an earlier decision on appeal from Basutoland, the Committee had interpreted the statute to mean that a conviction could not be sustained on the evidence of two accomplices, other independent evidence being necessary. Apart from the conclusion which it reached on the construction of the proclamation, the Committee considered it was bound to follow the English cautionary rule which is set out in R v. Baskerville,74 and therefore decided it was unsafe to convict in Tumahole Bereng v. R. The proclamations of Basutoland and Swaziland were in identical terms on this

69There is no requirement of consideration for the validity of a contract not under seal in the common law of Lesotho.
70(1926-53) HCTLR 181 (PC) (Swaziland).
71The statute is the Criminal Procedure and Evidence Act of 1917 which has been interpreted in R v. Thielke 1918 AD 373 and R v. Ncawana 1948 (4) SALR 399.
73(1926-53) HCTLR 123 (PC) (Basutoland).
74(1916) 2 KB 658. The cautionary rule is not absolute, but merely states that it is unsafe to convict on the testimony of an accomplice or accomplices, that one accomplice cannot corroborate another and that a jury must have careful warning of these dangers, but that if such warning is given, a jury is entitled to convict on the evidence of a single accomplice alone. (It should be borne in mind that there are no juries in Lesotho, but that the courts often sit with assessors).
point. Following certain of its *dicta* in the Basutoland case of *Lerotholi v. R*, which was decided after *Tumahole Bereng v. R*, the Committee in *Nkambule's* case departed from its earlier ruling in *Tumahole Bereng v. R* and held that the evidence of two accomplices, though unsupported by any other testimony, was sufficient.

It is clear that, since the relevant Lesotho decisions were before the Committee and detailed consideration had been given to them before *Tumahole Bereng v. R* was departed from, the Swaziland decision is now binding on the courts in Lesotho; and it was so held by the High Court in 1954 in the case of *R v. Kabi and others*.

(4) Where the decision was purely on a question of Roman-Dutch law and the relevant Lesotho authorities were before the Committee.

(5) Probably, where the decision was purely on a question of Roman-Dutch law and, although the Lesotho authorities were not cited, the circumstances in Lesotho do not require a different rule.

(6) Where the decision was on the English common law and that law has been incorporated into the law of Lesotho by statute, for instance in various areas of the law of evidence.

(7) Possibly, where the decision was on a question of English common law and the position is the same under the common law in force in Lesotho and the circumstances in Lesotho permit. An example might be a case on a question of public policy, but public policy is an inconstant thing and subject to great changes due to time and place.

(8) Where the decision was concerned with questions of African customary law and the rule propounded was intended to be of general application. Thus in *Angu v. Attah*, a case on appeal from the Gold Coast (as it then was), the Privy Council's judgment contained the following statement:

"As is the case with all customary law it has to be proved in the first instance by calling witnesses acquainted with the native customs until the particular customs have, by frequent proof in the courts, become so notorious that the courts will take judicial notice of them."

---

*9* (1926-53) HCTLR 149 (PC) (Basutoland).

*10* (1954) HCTLR 27.

*11* See Evidence in Civil Proceedings Ordinance of 1830, sections 12, 15, 18, 21, 22, 23, 25 and 26; Criminal Procedure and Evidence Proclamation of 1938 (as amended) sections 220, 221, 226, 230, 237, 249, 250, 251 and 272. *The Mercantile Law Amendment Act* of 1879 also introduces English law in various fields.

*12* (1916) PC '74-'28, 43 at 44.
While this was an obiter dictum in that case, it has been incorporated in later Privy Council decisions and is thought to be binding in Lesotho in respect of proof of customary law in the higher courts.

(iv) The Judicial Committee is not bound by its own previous decisions

The decision in Gideon Nkambule v. R (supra) illustrates the established practice of the Privy Council that it does not hold itself bound to follow its own previous decisions, though it will naturally prefer not to dissent from any of them unless it appears very necessary to do so. The Committee stated the position in Nkambule's case in the following terms:

"Undoubtedly their Lordships must give a construction to the language used [in Section 231 supra] which differs from that adopted in Tlhabole's case if they are to uphold the conviction now under appeal. In ordinary circumstances they would be very slow to take this course. It is true that the Board does not act, as the House of Lords acts, on the strict rule that they are bound by a previous decision based on the same considerations. Nevertheless, as was said in Read v. Bishop of Lincoln, a decision on a given state of facts ought not to be reopened without the greatest hesitation, though the right to reopen it is not confined to cases where some fresh fact was adduced which had not been under consideration on the previous occasion. Still, the right to reopen remains, and from these observations it is apparent that the existence of some fresh material not communicated or, at any rate, not fully presented to the tribunal which heard and decided the earlier case is an element to be borne in mind when deciding whether that case should be followed or not... The present case, therefore, is one in which fresh facts have been adduced which were not under consideration when Tlhabole's case was decided, and accordingly it is one in which, in their Lordships' view, they are justified in reconsidering the foundations on which that case was determined."

The fresh facts unearthed in Nkambule's case were the existence of South African decisions interpreting identical wording to that in section 231, and the revelation that the law in force in Lesotho was not English law but Roman-Dutch law.

(to be continued)

---

81 The House of Lords no longer adopts this rigid position - see the Lord Chancellor's announcement of 26 July 1966 and Kahn (1966) 83 S.A.L.J 503.
82 (1892) AC 644. The case was concerned with whether or not the mixing of communion wine with water and various other practices were contrary to the law of the church.
83 At 186-7.
84 See note 26 supra.