THE LAW PLATFORM

TANOR AND ANOTHER v. AKOSUA KOKO

IN THE COURT OF APPEAL, ACCRA

6 TH MAY, 1974

CORAM: APALOO, LASSEY AND ARCHER JJ.A.

Adoption | Customary adoption | Essential requirements | Consent of child's parents and expression of adopter's intention before witnesses | Adoption according to Akim Abuakwa custom | Additional requirements | Whether failure to perform additional requirements invalidates an adoption otherwise valid.

Customary law | Krobo custom | Dipo ceremony | Custom requiring every female reaching puberty to undergo ceremony before getting pregnant | Consequences of pregnancy before undergoing ceremony | Banishment from home | Whether custom contrary to natural justice, equity and good conscience | Whether court should declare custom invalid.

CASE SUMMARY

According to Krobo custom a female who reaches the age of puberty must undergo a customary rite called dipo before becoming pregnant. If she conceived before undergoing this ceremony she was not only ostracised but was liable to be banished from home and disowned by her parents. In late 1933 K., a female from Ogome in Yilo Krobo, became pregnant without performing dipo. In consequence of this, K. stated that she was adopted in early 1934 by D., an Akan from Akim Abuakwa where she was taken and she had since been living there without ever returning to Yilo Krobo. D. gave £60 and a bottle of schnapps to seal the adoption. On the death of D. he was succeeded, in succession, by two of his maternal nephews. When the last surviving nephew died, A., a niece of D. and his last surviving maternal relation, succeeded to D.'s estate. A. died in 1968. In January 1969, K. claiming as the rightful successor to A. applied to the High Court for letters of administration to administer A.'s estate. T. and B., paternal relations of D., entered a caveat disputing K.'s right to administer the estate. In view of this conflict as to the person to whom the letters should be granted, the court ordered the issue of a writ. K. did so as plaintiff. The issues for the determination of the court were: (a) whether K. was customarily adopted into D.'s family and (b) whether K., by virtue of the adoption, was entitled to succeed to A. The court gave an affirmative answer to both issues. On appeal it was contended on behalf of the appellants, that even if it was assumed that D.'s object in taking K. to Akim Abuakwa was to adopt her, he failed to achieve that object because he did not do what customary law required to give effect to his intention. The question of law raised for the determination of the court was what was necessary to constitute a valid adoption in

customary law or, relevantly, Akim Abuakwa customary law. Counsel further invited the court to declare the dipo custom invalid on the ground that it was harsh and contrary to natural justice, equity and good conscience.

Held, dismissing the appeal:

(1) the essential requirements for the adoption of an infant into a family in accordance with customary law were the consent of the child's parents and the expression of the adopter's intention to adopt the infant before witnesses. There was evidence on record that D. did obtain the consent of K.'s parents and family to adopt her, and secondly he did clearly state his desire and intention to adopt K. before witnesses. Amoabimaa v. Badu (1956) 1 W.A.L.R. 227, W.A.C.A.; Okaikor v. Opare (1956) 1 W.A.L.R. 275 and Fynn v. Kum (1957) 2 W.A.L.R. 289 considered. Plange v. Plange, High Court, Accra, 23 February 1968, unreported; digested in (1968) C.C. 88 doubted.

(2) It was possible that in Akim Abuakwa, in addition to the said essential requirements stated above, adoption was evidenced by the slaughtering of a sheep, the consumption of liquor, the pouring of libation and the placing of the adopted child on a "family ladder." But these were unessential frills and an adoption otherwise valid could not be invalidated by failure to perform these frills.

Per Apaloo J.A. Counsel for the defendants complains that the customary sanction for the violation of the "dipo" custom is so harsh that we should deny its validity on the ground that it offended "natural justice, equity and good conscience." The moral objective of that custom can hardly be faulted. I believe it is to oblige our girls to maintain their purity of sexual life until they were married. In present-day permissive society replete with talk of free love and women's liberation, abstinence from premarital sex can only be an ideal. Whether it is an attainable one or not, I express no opinion. There is something to be said for the argument that to banish a teenage girl from home and to compel her parents to disown and disinherit her for, what is afterall, a girlish indiscretion, seems out of step with modern notions. Whether this court should deny validity to such sanction today, does not arise for consideration. It would be wrong to hamstring a future consideration of this matter in an appropriate case by expressing any opinion now.

Per Archer J.A. Learned counsel for the appellants has invited this court to condemn the particular Krobo custom which led to the respondent's departure from Kroboland. Whether the objective of this ancient custom is to enable the Krobos to preserve their young maidens astropical nymphs, I do not know. However, it appears to be a custom which the Krobos strictly observe in order to discourage their maidens from being sexually adventurous at too early an age. No doubt preservation of one's virginity before marriage is an ideal which I think a majority of maidens would like to achieve. However, so long as there are ravenous men to whom these young females fall prey from time to time on account of lack of proper parental control and financial insecurity, this ideal will continue to elude some of these girls. Whether the custom should be abolished or not, is not a matter for the courts. If the Krobos wish to preserve this custom to enable their maidens to vaunt about their virginity, it is a matter for the Krobos themselves. In any case, I am indifferent.

CASES REFERRED TO

(1) Plange v. Plange, High Court, Accra, 23 February 1968, unreported; digested in (1968) C.C. 88.

(2) Welbeck v. Brown (1884) Sar.F.C.L. 185.

(3) Amoabimaa v. Badu (1956) 1 W.A.L.R. 227, W.A.C.A.

(4) Okaikor v. Opare (1956) 1 W.A.L.R. 275.

(5) Fynn v. Kum (1957) 2 W.A.L.R. 289.

(6) Poh v. Konamba (1957) 3 W.A.L.R. 74.

(7) Bassil and Acquah v. Honger (1954) 14 W.A.C.A. 569.

NATURE OF PROCEEDINGS

APPEAL against a decision of Quashie-Sam J. wherein he held that the plaintiff had been adopted in accordance with customary law and was therefore entitled to a grant of letters of administration to administer the estate of her deceased adopter. The facts are sufficiently stated in the judgment of Apaloo J.A.

JUDGMENT OF APALOO J.A.

This appeal raises some interesting questions about the true requirements of adoption of a child in customary law. Although there is some controversy between the parties on the facts, there is also between them, a large area of agreement.

The plaintiff (i.e. the respondent) who should be in her mid-fifties, originally hailed from a town called Ogome in the Yilo Krobo District of the Eastern Region. She was born of Krobo parents. Late in 1933, just about the time that she reached puberty, she had an affair with a man from her home district. She found herself pregnant. There was and still is in Krobo custom, an inflexible rule which ordains that a female who reaches puberty, should undergo a customary rite called "dipo" before taking seed. A female who got pregnant before undergoing this ceremony, incurred severe customary sanctions. She was not only to be socially ostracized, but she was liable to be banished from home and disowned by her parents. At the time the plaintiff found herself with child, she had not undergone this ceremony. She was finished! As she knew the consequences to herself of her own lapse, she was always in hiding.

About March 1934, a redeemer came to her. It was in the person of a man from Akrofufu in Akim Abuakwa called Dobre. The latter seemed to have been of fairly advanced age. He was married to five women. His family, in a matrilineal sense, consisted of himself his three nephews and an only niece. Dobre saw the plaintiff's parents, and after reaching some understanding with them, took the plaintiff away with him to his home in Akrofufu. She has remained in that house ever since and has survived Dobre and all his maternal relations. So much is not in dispute.

The plaintiff says, Dobre's object in taking her away was to adopt her into his family. This was because his only niece Abena Asase, though married, was childless and was unlikely, by reason of her age, to bear children. Dobre, according to the plaintiff, did so adopt her in accordance with custom and she became wholly assimilated into his family. The defendants who are the appellants, are a paternal grand-nephew and son respectively of Dobre and are, in the contemplation of Akan customary law, strangers to his family. They say, Dobre's object in bringing the plaintiff from her home was to marry her. They say he did so marry her but the marriage failed after two years. Thereafter, the plaintiff led, what the defendants described as a "concubinage life." They deny that Dobre adopted her or at all events, did so in accordance with Akim Abuakwa custom.

Dobre died on a date which it is not possible to fix with precision on the evidence. He was succeeded by his nephew Broni. When the latter died, Boadi, yet another nephew of Dobre, succeeded. He was in turn succeeded by Dobre's only niece Abena Asase. The latter died on 22 December 1968, without issue. It is succession to her that brought the present dispute, and hence the materiality of the issue of adoption. If as the plaintiff claimed, she was adopted by Dobre and assimilated into his family, she was, on Asase's death entitled to succeed to her being the only eligible relation in the maternal line. If as the defendants asserted, she was only a divorced wife of Dobre then being a total stranger to Dobre and hence to Asase, she had no claim to her inheritance. The defendants concede as indeed they cannot dispute, that being paternal relations of Dobre and Asase, they are not ordinarily entitled to succeed either of them. But they say, in the absence of maternal relations, they as blood relations are entitled to succeed Asase or, at any rate, as against the plaintiff to take possession of her property.

As I said, Abena Asase died just before Christmas 1968. In January 1969, the plaintiff claiming to be her rightful successor, applied to the High Court for letters of administration to administer her estate. She was said to have died possessed of nine cocoa farms, a storey building and other species of movable property. The defendants entered a caveat and disputed the plaintiff's right to administer the estate. Both sides having failed to agree on the person to whom grant should be made, the court ordered the issue of writ. The plaintiff did so and the issues which she invited the court to determine, were formulated in the summons for directions as follows:

(a) Whether the plaintiff was customarily adopted into the family of the late Kofi Dobre of Akrofufu.

(b) Whether the plaintiff, by virtue of the said adoption, is entitled to succeed to Abena Asase alias Asuamah (deceased) the last female member of the said family."

The learned judge, Quashie-Sam J., resolved both issues in favour of the plaintiff. He expressed himself as satisfied that Dobre adopted the plaintiff into his family and that she was entitled to succeed to Abena Asase and not the defendants who are paternal relations to Dobre. He accordingly declared the plaintiff, the person entitled to letters of administration. The defendants ask us to say that that conclusion was erroneous both on the facts and in law and invite us to upset it.

On the facts, it was said the evidence tended to support the marriage story rather than the adoption one. Reliance was placed on the evidence of one Kwadjo Asante alias Okoto one of the paternal nephews of Dobre and the person who accompanied the latter when he went for the plaintiff in 1934. He testified that a man called Dofie who apparently handed over the plaintiff to Dobre, said a girl in the plaintiff's position would have been sold into slavery in olden days, but in view of the abolition of slavery "such a girl could be acquired through a custom of marriage." He also said "The girl was given to Dobre for £60 plus a bottle of schnapps.'

Attention was also drawn to the evidence of Abena Nuro one of the widows of Dobre. She said, when Dobre brought the plaintiff, he told his wives that he married her from Krobo and that on account of this, they, that is, the wives, demanded and obtained from him, a customary pacification fee of eight shillings each. The learned judge's view on this aspect of the case, was that the allegation of a marriage between Dobre and the plaintiff and the pacification story related by Abena Nuro, was a fabrication designed to destroy Dobre's true intention about the plaintiff and the subsequent "grafting of the plaintiff to the Dobre family."

In my judgment, the commonsense of this case, the probabilities and the other inherently credible evidence all unite to support the judge's conclusion on this part of the case. Dobre was said to be of fairly advanced age and if there was anything he lacked in Akim Abuakwa, it certainly was not wives. He was in 1934 married to five. It is extremely unlikely that he would travel to Krobo only to marry a girl who was a complete stranger to him and who was already pregnant by another man. When the girl was brought to Akrofufu, he proceeded to exercise parental rights over her. He named the child begotten of the Krobo pregnancy after his own mother Owusua. Shortly afterwards, he gave her in marriage to his nephew's son Jambibi and stood as father to her when the marriage ceremony was performed at the Ahenfie. When that union went on the rocks, he gave her in marriage to yet another man, Abuayitey and he named a son begotten of that marriage "Dobre," after himself.

There is evidence given to the court by Dobre's eldest wife and accepted by the judge that when Dobre brought the plaintiff, he gave her to his niece Abena Asase and said she was to be her child and his "dehye" - blood royal. The plaintiff lived with Abena Asase and the latter, for her part, not only treated her as her daughter, but proceeded to exercise the same parental rights over her offspring as Dobre did to herself. Abena Asase gave the plaintiff's daughter Owusua in marriage to Peprah and when that marriage was terminated by the latter's death, she gave her in marriage to Yaw Duku.

I think that Dobre's proved conduct towards the plaintiff gave the lie to any theory of his having intended to marry her or that he lived with the plaintiff as a man would with his wife. The learned judge considered that what Dobre went through in order to "acquire" the plaintiff from her parents, was a mock marriage. I think that is a correct interpretation of Okoto's evidence. The plaintiff could only be acquired "through a custom of marriage." Dobre went through the custom but his true intention could only be gathered from his proved subsequent conduct. That ceremony, if it was a marriage ceremony, was a sham or what Maine would call a legal fiction. I share the judge's conclusion that the evidence that Dobre cohabited with the plaintiff for two years and thereafter divorced her, was a deliberate falsehood and was wholly unworthy of credit.

If Dobre did not intend to marry the plaintiff and did not in fact live with her as his wife, what was his object in travelling to Ogome to bring her? The plaintiff says, his object was to adopt her into his family. In my judgment on the evidence, Dobre's intention is incapable of explanation on any other rational hypothesis. I have already recited the parental rights which he exercised over her. There are also Dobre's own contemporaneous declarations of his intention. Okoto, whom the judge accepted as a witness of truth, testified that, "Dobre said, he was bringing the girl home as a member of his family." Akua Afronoaa, Dobre's eldest wife who lived with him for 30 years before his death swore that "when Dobre brought the plaintiff, he told me he had brought her to his niece Abena Asase as her child and his 'dehye'."

There was good reason why Dobre would wish to adopt into the family, a female of child-bearing age. This was a matrilineal family and the only member of the family who could continue the family lineage was Abena Asase. Dobre judged, and as events proved, rightly, that she might die without issue and the maternal line was in danger of extinction. It was entirely natural for him to wish to provide against this eventuality. The first defendant himself admitted that:

"I know the custom in Akim Abuakwa is maternal inheritance. Nobody likes it that his lineage comes to an end and becomes extinct. During the olden days, it was usual to buy slaves even to prevent the incidence. It is when the line is extinct that the slave succeeds."

On this, the defendant had behind him the considerable authority of Sarbah who wrote at page 34 of his book Fanti Customary Laws (3rd ed.) as follows: "Adoption is practised by persons who have no next of kin to succeed to their property."

It is impossible to resist the conclusion that Dobre's object in bringing the plaintiff to Akrofufu and to his home was to adopt her. But the defendants say, he failed to achieve that object because he did not do what customary law requires to effectuate his intention. The question of law raised therefore is: what is necessary to constitute a valid adoption in customary law or, relevantly, Akim Abuakwa customary law? Counsel on both sides who argued this appeal, were eminently qualified by reason of their origin and background to be well instructed on this. But perhaps owing to the dust of battle they could not bring themselves to agree on the customary law requirement of a valid adoption. One must therefore turn to a neutral source for assistance.

In 1928, the late Dr. Danquah wrote and published a book entitled Akan Laws and Customs. It was an objective and scholarly analysis of the laws and customs of the Akans as he knew them. The book was written ante litem motam and there is no reason to think that he would state the laws and customs otherwise than correctly. The learned author drew heavily on his own experience in the Omanhene's tribunal of Akim Abuakwa. If he had stated the customary law requirement of adoption, it would have given us considerable assistance. He referred to the custom of "Kahire," that is, severing of family ties. He said he had not known of one successful case in which a person was disinherited by the performance of this custom. He referred to Sarbah's Fanti Customary Laws and said at p. 194 that although the latter's view of that custom,

"may be true as a theoretical statement of the law, it is doubtful whether such an act

would be supported by an Akan Tribunal whose primary duty is not to dispense abstract principles of law but to exercise its prerogatives in a way that would best maintain tribal and family hegemony intact."

But the learned author said nothing about the custom of adoption of which Sarbah also wrote. If Sarbah's view had been other than he knew it to be, there is no reason to suppose that he would not have subjected it to at least an oblique criticism.

On the essentials of customary adoption, Sarbah wrote in 1896 that:

"To make adoption valid, it must be done publicly, and the person who wishes to adopt must not only get the consent of the family and parents whose child is to be adopted, but he must clearly state before witnesses his desire and intention."

See Sarbah, Fanti Customary Laws (3rd ed.), p. 34. If Sarbah's view accurately reflects the essentials of a customary adoption, they are two, consent of the parents and family of the child, and public declaration of the adopter's intention to adopt. This was the law as Sarbah conceived it in 1896. Dr. Danquah acquiesced in it in 1928 or at least found no fault with it as a general statement of the Akan custom. In 1966, Ollennu wrote and published The Law of Testate and Intestate Succession in Ghana. Like Dr. Danquah before him, he also described and stated the law relating to the severance of family ties (see pp. 104-105 of Ollennu, The Law of Testate and Intestate Succession in Ghana). Although he made indirect reference to adoption (see pp. 131, 138 and 271) Ollennu said nothing about the essentials of a valid customary adoption in his book.

In 1968, the case of Plange v. Plange, High Court, Accra, 23 February 1968, unreported; digested in (1968) C.C. 88 came before him. Sitting as an additional judge of the High Court, Ollennu J.A. proceeded to lay down the law with regard to adoption in customary law. He likened it to the rather different concept of the severing of family ties and said:

"Adoption purports to effect a transplantation of one person from each of the two natural families into which he is born, into two other families, thereby depriving the one group of families of their rights interest and obligation in the person adopted, and conferring those rights and interest, and imposing those obligations and privileges upon the other group of families.

Therefore where a person already belongs to a family there is no necessity for a member of the family to adopt him. The member of the family has a right and obligation to look after him without any forms and ceremonies.

Adoption under customary law is analogous to alienation of family property, or severance of family ties, a very rare custom known by different names in different tribes, e.g., in Akan it is known as cutting ekar or kahirie, among the Ga it is known as tako mlifoo, and among the Ewe as taku mama. As to severance of family ties see Amoabimaa v. Badu (1956) 1 W.A.L.R. 227, W.A.C.A., Okaikor v. Opare (1956) 1 W.A.L.R. 275 and Fynn v. Kum (1957) 2 W.A.L.R. 289.

On the principle that one single member of a family is incompetent on his own, i.e.

without the consent and concurrence of the head and principal members of the family to make valid alienation of family property, on self same principle, one parent who, after all is himself a species of property of his family, is incompetent to alienate his child, another of the family properties.

Therefore a valid adoption under customary law is such a serious operation, that it can only be performed by the head of the family with the consent and concurrence of the principal members of the family, and at a joint meeting of the two transacting families; and must be celebrated with certain formalities, rites and customary performance, including the ceremony of naming the child, giving it a family name. The particular rites and ceremonies may differ from tribe to tribe, but in each one the fundamental concept of uprooting from one family and transplanting into a new family must be symbolically demonstrated."

The learned trial judge was pressed with this decision. Quite clearly, all the formalities laid down in that judgment for a valid adoption were not met by the evidence led in this case. But the learned judge did not consider himself precluded by the pronouncements in that case from holding that there was a valid customary adoption. It was a decision of a court of co-ordinate jurisdiction and while judicial comity required the judge to treat it with respect, our doctrine of stare decisis did not oblige him to follow it. He considered that judgment with great deference, but in the end, concluded that the various formalities enumerated could only be of evidential value in determining whether or not a person had been customarily adopted into a family. He did not think they are a sine qua non to the validity of a customary adoption. In any event, the judge expressed himself as handicapped by the fact that the full judgment was not made available to him. But he took the view that the reasoning in some other cases which he considered entitled him to hold that a valid customary adoption of the plaintiff had taken place.

This holding provided one of the main planks of the defendants' dissatisfaction and was formulated in the third ground of appeal in a language which is perhaps quaint. It is that:

"The judgment is wrong because the trial judge wrongly rejected authorities and judicial opinions and pronouncements referred to him in an unjudicial manner and in particular, the case of Plange v. Plange (1968) C.C. 88) and Sarbah's Fanti Customary Laws (3rd ed.), p. 34."

It is not clear whether the judge's disinclination to follow a decision of a court of co-ordinate jurisdiction is the kernel of the complaint or the fact that he observed that he was only enabled to consider the summary of the holdings in that case as digested in Current Cases. The learned judge did not reject the actual conclusion in Plange v. Plange. He did not refer to that judgment in any discourteous language but he did not feel himself obliged to decide the issue of adoption other than he thought the facts and the customary law as he conceived it, warranted. As has been shown above, Sarbah's views did not tally with those expressed by Ollennu J.A. in Plange v. Plange. I think the wording of this ground of appeal is infelicitous, but the real gravamen of the complaint seems to be that in view of the formal requirements laid down in Plange v. Plange, the court ought not to have held otherwise.

One must treat that learned and distinguished judge's pronouncements on customary law with great deference but it is difficult to resist the observation that none of the author's who wrote on customary law, laid down the customary formalities for adopting a child with such stringency nor indeed did any of them find any real analogy between the concept of severing family ties and customary adoption. The learned judge himself in his different role as an author, did not seek to suggest that the formalities required in cutting ekar were the same as those required for adopting a child.

Dr. Danquah in his Akan Laws and Custom at p. 195 stated that "in Akim Abuakwa the law looks upon any attempt to 'cut the tie' as a crime, and there is scarcely one person in a hundred who would venture to acknowledge that he had actually done the deed." Sarbah referred to a case of Welbeck v. Brown (1884) Sar.F.C.L. 185 decided on 4 February 1884, at p. 34 of his Fanti Customary Laws (3rd ed.) in which a Chief Robertson was alleged to have said "'The cutting of the custom or ekar is a thing of the past in Cape Coast, as a sign of disownment. It was abolished by Governor Maclean'."

In his book The Law of Testate and Intestate Succession in Ghana, pp. 104-105, Ollennu took issue with Sarbah when he said the custom of severing family ties was abolished in Cape Coast. He referred to the cases cited supra in his judgment as supporting his contrary view. But both Sarbah and Danquah considered the cutting of kahirie as a custom performed at the instance of a family to dismiss a blood member from it. Danquah called it "disinherison" and Sarbah described it as "disownment." Sarbah described how the cutting of the ekar was actually performed.

Of the three cases cited by Ollennu in his book as contradictory of Sarbah's views only the first, that is, Amoabimaa v. Badu (1956) 1 W.A.L.R. 227, W.A.C.A. decided in 1956 is a decision of the West African Court of Appeal. There, the issue was not the disownment of a member of a family, but a dispute between two branches as to property. The court held that as the custom of ekar had been performed, it operated to cause a reversion to the respective severed elements of the family group of property originally brought into the group by those elements. In this case, the court cited with approval, Sarbah's Fanti Customary Laws on this subject. In the second case referred to by Ollennu, namely, Okaikor v. Opare (1956) 1 W.A.L.R. 275, there was no question of adopting a child. There a quarrel arose between a brother and a sister which seemed incapable of settlement. The sister then performed the Ga custom of "tako mlifoo" to sever her ties completely with her brother. On the latter's death, she claimed to enjoy a portion of his property. The High Court, presided over by Quashie-Idun J., held that as she severed her ties with her brother by the performance of that custom, she was not entitled to enjoy any part of his property. This was in 1956.

A year later, in 1957, Ollennu J. (as he then was) himself was faced with the Fante case of Fynn v. Kum (1957) 2 W.A.L.R. 289, the third case to which he referred. That case also concerned the partitioning of family property. In that case, the head of a family attempted to dispose of family property without obtaining the consent of the principal members of one of the branches. In an action brought on behalf of this branch for a declaration that the land concerned was family land and could not be disposed of without the consent of the principal members of each branch, it was argued by the head of the family that the objecting branch had severed its ties with the rest of the family and had thereby lost its right to participate in the disposal of family land.

Ollennu J. held that disagreement between members or branches of a family does not alone suffice to sever family ties. In the learned judge's view, to be effective as severance, there must be some clear and unequivocal acts showing the intention of both sides that severance shall take place. One of such acts of severance, must be the partitioning of family property.

It is plain that none of the cases relied on by the learned judge had the remotest resemblance to the adoption of an infant and nothing was said in any of those cases to suggest that the same customary formalities were required in both. The objectives of both concepts are different. In cutting ekar the intention is to disinherit or disown a member who has already been born into a family from which he acquired certain rights as such member. In view of the close bond that unites members of a family, one can see some reason in the law insisting on some formalities and a demonstration of the seriousness of the act by the symbolic splitting into two of ekar. It is difficult to see the rationale in insisting on any rigid formalities in the entirely different concept of adoption, where the goal is the opposite of ekar. The adoption of an infant may be made by a family on grounds of pure humanity, as in the adoption into the family of a foundling (see Poh v. Konamba (1957) 3 W.A.L.R. 74) or it may be made to meet a felt family need as the purchase of female slaves to avoid a failure of lineal descendants. Any insistence on rigid formalities will be self-defeating.

Although Sarbah wrote that the severance of family ties is symbolised by the cutting in twain of ekar coupled with the recital of certain words, he thought that in the case of the adoption of an infant, consent of the child's parents and the expression of the adopter's intention before witnesses were all that custom required. Ollennu J.A. did not cite any authority for the stringent requirements he laid down in Plange v. Plange (supra). Neither Danquah nor Sarbah who preceded him, knew of any such requirement. No judicial decision that I have been able to discover lays down any such requirement. The researches of counsel produced no such authority. Rattray also conceived adoption to be a formless affair in which a person is absorbed into a family. He wrote in 1929 at p. 71 of his Ashanti Law and Constitution that:

"Adoption into a clan was achieved by the slow and almost imperceptible process of time rather than by any public ceremony. It applied almost wholly to the descendants of slave women and to their descendants, who grew up to consider themselves members of the clan which had originally purchased their ancestress."

See also Bassil and Acquah v. Honger (1954) 14 W.A.C.A. 569.

Custom is said to be the observed habits of a community which by reason of immemorial usage, acquires the force of law. If the ingredients laid down for a valid customary adoption by Ollennu J.A. in Plange v. Plange (supra) truly reflect the voluntary practice of the people, it must claim long usage. It would not acquire the force of law if they are of recent origin. If they are observed habits of some antiquity, it is hardly conceivable that they can have escaped such legal scholars as Sarbah, Danquah and Rattray. One must resist the temptation of isolating the intellectual conception of customary law or what one legal scholar dubs "judicial customary law" from the recognised and accepted usage of a community. Notwithstanding his undoubted authority in these matters, I cannot help the observation that there is no

warrant either in legal literature or judicial decisions for the formal requirements which Ollennu J. A. laid down in Plange v. Plange for a customary adoption.

I think Sarbah's views accurately represent the Akan customary law of adoption. It has the merit of simplicity and informality and accords with Rattray's independent finding about the formless adoption of slaves into an Ashanti family. It is possible that in Akim Abuakwa, in addition to the essentials related by Sarbah, adoption is evidenced by the slaughtering of sheep, the consumption of liquor, the pouring of libation and the placing of the adopted child on what was described to us as a "family ladder." But these are unessential frills and an adoption which satisfies the test laid down by Sarbah cannot be invalidated by failure to perform these frills.

The questions for decision are, first, did Dobre obtain the consent of the plaintiff's parents and family to adopt her, and second, did he clearly state his desire and intention to adopt the plaintiff before witnesses? These two questions admit of nothing but affirmative answers. The plaintiff's parents and family were glad to be rid of her. Their assent was not only given but the plaintiff was told never to return to her original home in Ogome. Dufie who appeared to represent the plaintiff's Krobo family, obtained from Dobre £60 and a bottle of schnapps to stamp their consent. As the evidence shows, the plaintiff accepted her lot and was never re-united to her natural parents or their family in Krobo. Okoto who accompanied Dobre to Krobo to bring the plaintiff swore that: "Dobre was told that the girl had no right to return home to Krobo and that the girl and any children of hers would belong entirely to Dobre." This was precisely what Dobre wished for.

The evidence is overwhelming that not only did Dobre state before witnesses his desire to adopt the plaintiff, but he implemented his desire by overt acts which are impressive. When Dobre returned to Akrofufu with the plaintiff, he summoned a meeting of his matrilineal family. All his three nephews and his niece Abena Asase were present. He then told them he had brought the plaintiff to them. She was to become a member of the family "who would have children into the family." They all agreed and to celebrate what to them all must have been welcome news, slaughtered and entertained themselves with a fowl. Both Dobre and Abena Asase proceeded to treat her as their daughter and for the best part of half a century, the plaintiff lived with Dobre's family, shared his family's joys and sorrows and was entirely alienated from her natural parents. Her children and her children's children knew no other home save Dobre's home in Akrofufu. It would be a little surprising if any modern system of jurisprudence obliged a court of law, which I believe is also a court of justice, to hold in the circumstances of this case, that the plaintiff was not adopted into the Dobre family. I think the plaintiff was validly adopted in accordance with customary law and the judge's holding on this score was plainly right.

Counsel for the defendants complains that the customary sanction for the violation of the "dipo" custom is so harsh that we should deny its validity on the ground that it offended "natural justice, equity and good conscience." The moral objective of that custom can hardly be faulted. I believe it is to oblige our girls to maintain their purity of sexual life until they were married. In present-day permissive society replete with talk of free love and women's liberation, abstinence from pre-marital sex can only be an ideal. Whether it is an attainable one or not, I express no opinion. There is something

to be said for the argument that to banish a teenage girl from home and to compel her parents to disown and disinherit her for, what is after all, a girlish indiscretion, seems out of step with modern notions. Whether this court should deny validity to such sanction today, does not arise for consideration. It would be wrong to hamstring a future consideration of this matter in an appropriate case by expressing any opinion now.

Although succession according to Krobo custom is patrilineal, the plaintiff does not claim to inherit her natural parents and that we should ignore the consequences to herself of her breach of the "dipo" custom. She accepts it and is now an Akan woman. It would be unjust to deny her the rights which her altered tribal status entitled her to. The learned judge held that she is entitled to succeed Abena Asase and in virtue of that, was rightfully entitled to letters of administration to administer her estate. That conclusion is entirely right and ought to be affirmed. I would dismiss this appeal with costs.

JUDGMENT OF LASSEY J.A.

I agree with the judgment just delivered and the reasons given for it and have nothing which I wish to add.

JUDGMENT OF ARCHER J.A.

I also agree that this appeal fails and should be dismissed. The appellants appear to place considerable reliance on the judgment in Plange v. Plange (supra) delivered at the Accra High Court in 1968 in which Ollennu J.A., as he then was, stressed that adoption like severance of family ties was a serious affair and must be symbolically demonstrated. I personally do not think that the learned judge laid down new law when he delivered the judgment in Plange v. Plange. In this country, people treasure and venerate their family ties to such an extent that whenever the extraordinary is about to happen then members of the family should be informed. Inducting a stranger into a family as one of its members is an extraordinary thing and that is why Sarbah wrote that customary adoption must be publicly done. So also Ollennu J.A. in Plange v. Plange stated that the consent of the two transacting families must be evident. However, Ollennu J.A. went further and mentioned the giving of a family name to the adopted person as another formality. The appellants in this case have therefore urged strongly before this court that as the respondent was not given a family name, her adoption could not have been customarily valid. My view is that when Ollennu J.A. referred to the naming of the adopted person, he was only citing an example of one of the customary rites. I do not think that he was laying down an inflexible universal rule that in all customary adoptions, the person adopted must be given a family name. Indeed, Ollennu J.A. qualified his statement in Plange v. Plange by saying:

"The particular rites and ceremonies may differ from tribe to tribe, but in each the fundamental concept of uprooting from the family and transplanting into a new family must be symbolically demonstrated."

Customary adoptions in Ghana are infrequent if not rare, and it is impossible to say with certainty what formalities have been observed in the past. But common sense would

demand that before a stranger is adopted, the families concerned should know about it. Whether a cow, a goat or fowl is slaughtered is a secondary matter. Again the giving of a family name may be desirable but not essential.

It seems to me that, notwithstanding the rites to be performed in any particular community in order to constitute a valid customary adoption, the intention to adopt must not only be clearly demonstrated, but the adopters must also do so with the consent of their family and in the sight of others. Both learned counsel for the parties in the present appeal hail from the same traditional area where the respondent was adopted, yet they do not agree on what rites and formalities must be observed in customary adoption in their traditional area. It seems to me that in such a case, this court has to look critically at what happened in 1934 when the respondent, a young girl, was brought from Kroboland to Akim Abuakwaland. The evidence shows that she was brought for the purpose of being adopted. On her arrival, certain rites were performed and she was accepted into the new family as an adopted child. She remained with that family in that capacity until the death of Dobre who brought her into the family; afterwards and until the death of Abena Asase to whom she was given as a child, the respondent was closely identified with that family. It is now unconscionable to reject her for purposes of succession.

Learned counsel for the appellants has invited this court to condemn the particular Krobo custom which led to the respondent's departure from Kroboland. Whether the objective of this ancient custom is to enable the Krobos to preserve their young maidens as tropical nymphs, I do not know. However, it appears to be a custom which the Krobos strictly observe in order to discourage their maidens from being sexually adventurous at too early an age. No doubt preservation of one's virginity before marriage is an ideal which I think a majority of maidens would like to achieve. However, so long as there are ravenous men to whom these young females fall prey from time to time on account of lack of proper parental control and financial insecurity, this ideal will continue to elude some of these girls. Whether the custom should be abolished or not, is not a matter for the courts. If the Krobos wish to preserve this custom to enable their maidens to vaunt about their virginity, it is a matter for the Krobos themselves. In any case, I am indifferent.

Nevertheless if there is one stricture which should be passed, it must be against the matrilineal system of succession in certain parts of this country. This whole episode was brought about by the childlessness of Dobre's niece, upon whose death the female line of succession in the family would have been extinguished, if Dobre had not been blessed with the foresight to adopt the present respondent. When there are, in a family, virile males with procreative capabilities, it seems strange that the family should be compelled to adopt a female stranger in order to perpetuate the matrilineal system of succession in the family for the simple reason that the sole surviving female in that family has been afflicted with barrenness. The question I wish to pose for an answer at a future date by learned counsel for both parties is whether the matrilineal system is just and fair in twentieth-century Ghana.

DECISION

Appeal dismissed.

K.T.

COUNSEL

W. E. A. Ofori-Atta for the appellants.

K. Dua-Sakyi for the respondent.