

VIEWS ON THE ECHOING INFLUENCE OF THE COMMON LAW ON THE NIGERIAN LEGAL SYSTEM*

Abstract

Nigeria as a former British colony owes the development of its legal system to the English common law. Post-independence and even till date, the common law has remained a major influence on the Nigerian legal system. Although, the common law was statutorily received as a source of law in Nigeria via Ordinance No 3 of 1863 which provides that the common law of England, rules of equity and statutes of general application in force in England as at the 1st of January, 1900 be made applicable in Nigeria and an independent Nigeria has since developed its own legal system, yet the indirect influence of common law resonates in almost all aspects of laws in Nigeria. This paper therefore attempts an analysis of some of the Nigerian judicial authorities which reflects the echoing influence of the common law on the Nigerian legal system with special emphasis on the criminal law, civil law of tort, contract law, company law, constitutional law and labour law. It concludes that the common law is still a strong influence more than sixty years post independence.

Keywords: Common Law, Legal System, *Stare decisis*, Nigeria, Influence

1. Introduction

The common law originally meant law common to the whole of England as opposed to local law. It is the law that developed in England solely from judicial decisions as opposed to statute law.¹ Curiously, many important areas of English law was not enacted by the parliament but rather developed from the practice of judges through the doctrine of *stare decisis* and judicial precedent² and administered by the common law courts of England since the middle ages.³ This has evolved into a legal system used in most common wealth countries.⁴ Generally, the sources of law in Nigeria can be divided in to four. These are legislations enacted by the various legislative houses⁵, customary law,⁶ case law through the operation of judicial precedent and the common law. The common law as a source of law in Nigeria is as a result of Nigeria's history as a British colony because the concept of law as is presently known is a colonial concept.⁷ In addition, legislative enactments both during and post colonial era was greatly influenced by the common law.⁸ Also, judicial attitude shows that the common law rules have been of significant influence on judicial pronouncements in Nigeria.⁹ This is however not surprising as the common law was received in to Nigeria through Ordinance No 3 of 1863¹⁰ which provides that the common law of England, rules of equity and statutes of general application in force in England as at the 1st day of 1900 be made applicable in Nigeria. By this provision, the common law received legal validity as a source of law in Nigeria beyond the indirect influence. Till date, the Nigerian legal jurisprudence displays its affinity to the English common law. The influence of the common law is evident in areas of contract, tort, company law and even the criminal law. Some of the noticeable influence of the English common law in the Nigerian legal system shall be discussed in the course of this article.

2. Constitutional Law

The common law principle of judicial precedent has been fully entrenched in to the Nigerian legal system. The doctrine follows the principle of *stare decisis* which literally means follow your decision. It is the principle of law on which a judicial decision is based,¹¹ also known as *stare decisis*, it is not every pronouncement by a judge that is the ratio or rationale for the decision and others can be supporting statements by the way known as *obiter*

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¹ Wan arfah Wan Hamzah A *First Look at the Malaysian Legal System* (Kuala Lumpur, Oxford Fajar 2009),82

² Ibid p.83

³ <https://www.britannica.com/topic/common-law> accessed on 25th January, 2022

⁴ Nigeria as a former British colony is among the fifty-four common wealth countries.

⁵ The present Constitution of Nigeria which came into force on May 29, 1999 distributes legislative powers between the National Assembly which makes law for the federation and the 36 state Houses of Assembly.

⁶ The Islamic shariah law is regarded as part of customary law.

⁷ This is however not alleging that pre-colonial Nigeria had no system of law making and administration of justice. Although, there were variations in the system based on the nature of the indigenous community, For example, the northern parts of Nigeria greatly influenced by the Islamic religion had the Maliki School of Islamic jurisprudence as its main law. See Akintunde O. Obilade, *The Nigerian Legal System*, Spectrum Law Series, Ibadan, 1977, p.17-18

⁸ The common law rule on passing off can be regarded as the foundation for the provisions on trade mark as provided in the Trade Mark Act Cap T13 LFN 2004.

⁹ It should be noted however that common law decisions are of persuasive authority to Nigerian courts.

¹⁰ This ordinance received the English common law to the colony of Lagos but it was later extended to cover the whole country.

¹¹ Obilade p.111

dictum. It basically operates upon a hierarchy of court system. It believes that courts lower in the hierarchy are bound by decisions of courts higher in the hierarchy.¹² A long line of Nigerian cases has shown absolute devotion to the doctrine of judicial precedent. In fact, the principle has equally been given constitutional assent by Cap VII of the 1999 Constitution¹³ which provides for a settled hierarchy of court system. In the case of *Idris v. ANPP*,¹⁴ the Supreme Court reiterated the importance of judicial precedent and hierarchy of courts in Nigeria when it held that it is the highest and final court in Nigeria and that its decisions were binding on every court, authority or person in Nigeria. It went further in emphasising the importance of the doctrine of *stare decisis* and held that the trial tribunal was right when it took judicial notice of the earlier decision of the Supreme Court in *Action Congress v. INEC*.¹⁵

Interpretation of statutes is also an area of influence of the common law. In interpreting statutes, the Nigerian courts have also accepted the common law rules on interpretation of statutes as its guide.¹⁶ The courts have not hesitated to apply the common law rules whenever necessary. As far back as 1962, the Judicial Committee of the Privy Council in *Adegbenro v. Akintola*¹⁷ interpreted the provisions of section 33 of the then Constitution of Western region literally and held that the Governor had the powers to remove the Premier. More recently, a similar approach was taken in the case of *Peoples Democratic Party v. Congress for Progressive Change*,¹⁸ the Supreme Court made recourse to the literal common law rule of interpretation when it held that when the words of a statute are ambiguous, plain and clear, they must be given their ordinary and natural meaning. This is similar to the decision by the common law court in the case of *R v. Judge of the City of London Court*¹⁹ where the court held that if an Act is clear and unambiguous, it must be given its literal and ordinary meaning.

The principle of sovereign immunity from judicial action is also a common law principle entrenched in the Nigerian legal system. It was originally a feature of the ancient feudal structure in England.²⁰ It protects the holder from liability that would have otherwise been imposed; it is not a defence rather it means that an action cannot even be maintained against the holder.²¹ It has been given validity by the 1999 Constitution of Nigeria.²² The Constitution guarantees that absolute immunity is enjoyed by the holders of some offices and it excludes both criminal and civil prosecution against the holder of such office in his personal capacity during the subsistence of that office. In the case of *Colonel Olurotimi and Others v. Macgregor*²³, the court reaffirmed the concept of judicial immunity and held that a suit pending against a sitting governor was not proper and should be discontinued.²⁴ Qualified immunity on the other hand is limited and it excludes judges and lawmakers²⁵ from civil liability for acts done in their official capacity.²⁶ No doubt, the idea of sovereign immunity is one of the legacies of the English common law on Nigeria.²⁷ The purpose of the immunity clause in the Constitution is to prevent any form of distraction to the holder of the office in his execution of State functions.²⁸ It has however been argued that such immunity only lies against prosecution and does not apply to investigation for crime.²⁹ Thus, the holder

¹² However, the part of a decision which binds lower courts is the ratio decidendi which is the rule of law upon which a decision is based.

¹³ 1999 Constitution as amended

¹⁴ (2008) 8 NWLR pt 1

¹⁵ (2007) LCN/3701 (SC), (2007) JELR 46492 (SC)

¹⁶ The writer however acknowledges the fact that there are statutory rules on interpretation of statutes in Nigeria. The main common law rules of interpretation of statutes are the literal rule, mischief rule, golden rule and purposive rule. There are other common law rules of interpreting statutes like the rules of language and all these have been applied by courts in Nigeria.

¹⁷ (1962) 1 ALL N.L.R 465

¹⁸ 2011 SC 272/2011, (2011) JELR 48533 (SC) A similar approach was applied in the case of *Cotecna International Limited v. Churchgate International Limited & Anor* (2010) JELR 33217 SC

¹⁹ (1892) 1 QB 273

²⁰ G Omo Arishe 'Reconsidering Executive Immunity Under the Nigerian Constitution' *Nigerian Current Law Review* (2007-2010): 275

²¹ *ibid*

²² Section 308

²³ Omo Arishe p.288

²⁴ A similar decision was held in the case of *Tinubu v. I.M.B Securities* (2001) 16, NWLR pt.740 670. See also the case of *Dasuki v. Muazu* (2002) 16 NWLR pt. 793, 319

²⁵ See Legislative Houses (Powers & Privileges) Act 2018

²⁶ Also, diplomatic immunity is enjoyed by diplomats and envoys but the focus is on executive immunity from both civil and criminal actions.

²⁷ Omo Arishe p.280

²⁸ This has however been subject to a lot of arguments; it has been suggested by human rights activists and the civil society that the immunity clause be removed from the Nigerian constitution as it has led to a lot of abuse. See also Arishe p.280

²⁹ *Ibid* p.289

of immunity under the constitution can therefore be investigated and the prosecution could wait until he vacates the office.

The principle of natural justice has also been entrenched into the Nigerian legal jurisprudence via both the Constitution and case law. Natural justice often expressed in terms of fair hearing and lack of bias has been described as denoting specific rights in the English legal system.³⁰ The latin maxim *'audi alterem partem'* and *'nemo iudex in causa sua'* are expressions of the idea of natural justice. The first maxim states that no one should be condemned unheard thus parties must be given the opportunity to state their case/ defence as the case may be. The second leg known as the rule against bias provides that one cannot be a judge in his or her own case. The 1999 Constitution provides in its chapter 4 right to fair hearing as a fundamental right. Also, the case of *Garba & Ors v. University of Maiduguri*³¹ is one of the cases where the natural justice principle was well espoused. In that case, the appellants were expelled as students from the respondent university based on the report of a disciplinary committee following a riot which led to the destruction of school properties and assaults on persons. The appellants instituted a fundamental rights enforcement proceeding at the high court alleging amongst other things that they were denied fair hearing and thus their expulsion constitutes a violation of their fundamental right. The trial court held in favour of the appellants and granted all the reliefs claimed. Dissatisfied, the respondent appealed to the court of appeal, the appeal succeeded leading to a final appeal to the Supreme Court. The apex court reiterated the importance of the rule of natural justice that a person cannot be a judge in his own case and held that the vice chancellor and other principal officers of the university were vital witnesses and cannot be a judge in their own case and that fact was itself sufficient to allow the appeal. There has since been a long line of cases concretising the importance of the principle of fair hearing, for example in *Tsokwa Motors (Nig) Ltd v. UBA plc*,³² it was held that a breach of fair hearing will render a proceeding a nullity.³³

3. Law of Torts

The Nigerian civil law of tort is essentially premised on the English common law. Thus, principles like conflict of interest, passing off and negligence have become entrenched in the Nigerian legal jurisprudence. For example, the common law rules on negligence and duty of care as laid down in the famous case of *Donoghue v. Stevenson*³⁴ has been entrenched in the Nigerian case law. The rule in *Donoghue* is to the effect that a manufacturer owes a duty of care to the ultimate consumer of its products. This decision was followed in the Nigerian case of *Osemobor v. Nigerian Biscuits Co*³⁵ where the court held that the manufacturer owed and breached its duty of care to the plaintiff who found a decayed tooth in the biscuit manufactured by the defendant company and consequently became sick as a result of the biscuit. It must however be noted that given the peculiarity of the Nigerian State, it can most times be difficult to prove or link a manufacturer with the defective product as was the case in *Nigerian Bottling Co Plc v. Okweji Minor & Anor*.³⁶ Again, the Supreme Court in *Universal Trust Bank of Nigeria v. Fidelia Ozoemena*³⁷ reinforced the common law duty of care principle to the effect that before an action for negligence could stand, a duty of care must exist and such must have been breached.³⁸ Also, the common law conflict of law rule laid down in *Phillips v. Eye*³⁹ on the applicable law on torts committed abroad has also become entrenched in the Nigerian laws. This common law case laid down the requirements for founding a suit in England for torts committed abroad. The rules as laid down includes the fact that the wrong must be one that would have been ordinarily actionable in England and it must not have been justifiable by the law of the place where it was committed. This rule was applied in the Nigerian case of *Ubanwa v. Afocha and University of Nigeria*⁴⁰. In this case, the deceased was a student of the second respondent and was also the captain of the school team; he died in an accident while leading the school team to a universities game in the northern part of Nigeria. The deceased and the defendants were all resident in the eastern part of Nigeria. In the action brought by his family, the plaintiffs relied on the law of the place of occurrence which was Zaria, a place in northern Nigeria, while the defendants and the deceased were resident in the eastern part of Nigeria. The court relied on the principle of Phillips case and

³⁰ Frederick F. Shauer English Natural Justice and American Due Process: An Analytical Comparison 18 Wm & Mary L.Rev.47 (1976) <https://scholarship.law.wm.edu/wm/r/vol18/iss1/3>

³¹ (1986)2 LLER 1

³² (2008) ALL FWLR 403 1240 at 1255

³³ See Olaniyan & Ors v. University of Lagos & Anor (1985) 2NWLR (pt.9)599, Federal Civil Service Commission v. Laoye (1989) 2 NWLR 106 at 652

³⁴ (1932) AC 562

³⁵ (1973) NCLR 382

³⁶ Nigerian Bottling Co Plc v. Okweji Minor and Anor (1973) NCLR 382, it was held that the claimant could not link the contaminated drink with the appellant.

³⁷ (2007) 3 NWLR (Pt.1022)

³⁸ See also Agbonmagbe Bank Ltd v. C.F.A.O (1966) 1 ALL NLR 130

³⁹ (1870) LR 6 QB 1

⁴⁰ (1974)4ECSLR 308

section 22 of the High Court Law of East Central State held that the case was properly founded on the law of northern Nigeria.⁴¹

In the case of *Benson v. Ashiru*,⁴² the respondent was the dependant of an accident victim and brought an action against the appellant before the Lagos high court even though the accident occurred in Iperu, Ijebu Remo in the present-day Ogun State, Nigeria. The action was successful and on appeal to the Supreme Court, the court reiterated the common law rule in Phillips case. The Supreme Court held specifically that the common law rules on private international law was applicable in the Lagos high court and held that the present case had satisfied the requirements stated in Phillips case. However, the action was dismissed on technical grounds as the plaintiff could not show he had the locus to institute the action. Besides this, the tort of passing off can be said to be foundational to the legislative enactment on the law of violation of trade mark. Under the common law, passing off is a means of protecting established business' goodwill already acquired by a trade name or trade mark. The House of Lords in the case of *IRC v. Muller Margarine*⁴³ reiterated the aim of passing off as to preserve and protect the benefit and advantage of the good name and reputation of a business.

In the case of *UK Tobacco Co Ltd v. Carreras Ltd*,⁴⁴ judicial validity was given to the common law principle of passing off where the court held that an action for passing off was well founded in the case when names and trade mark similar to that of an established brand was used by a subsequent business. More popular is the case of *Niger Chemist v. Nigeria Chemist*.⁴⁵ In this case, the plaintiff had operated business as a chemist for a long time using the trade name Niger Chemist and the defendant opened shop on the same street and started the same business with the name Nigeria Chemists. The court held that there was a tort of passing off because the two names were similar and capable of deceiving the general public. The court therefore preserved the goodwill enjoyed by the original business. It is submitted that the tort of passing off is the basis of legislations on violations of trade mark as provided in the Trade Mark Act,⁴⁶ besides, the Companies and Allied Matters Act provides in section 30(1) that if a company is through inadvertence or otherwise is registered with a name similar or identical to the name of a company already in existence, such company shall change its name under the direction of the Corporate Affairs Commission. Therefore, in the case of *Adekola v. Mustapha*,⁴⁷ the Court of Appeal in affirming the decision of the trial court held that the Corporate Affairs Commission had powers to refuse to register a name identical or similar to that of an already existing company. Later in the case of *Amasike v. Registrar General Corporate Affairs Commission*,⁴⁸ the Supreme Court reiterated the statutory provision of section 30(1) of the Companies and Allied Matters Act on the exercise of discretion on registration of names. It is submitted that the statutory provision was influenced by the common law doctrine of passing which seeks to prevent and preserve the business of an original owner. As stated, the common law tort of *passing off* has become established in the Nigerian legal jurisprudence through both statutory and judicial approach. Therefore, where a business is duly registered in line with the requirements of the Companies and Allied Matters Act, any violation of that trade name and trade mark is actionable as a violation of the Trade Mark Act, but where such a business is not registered as provided by the Act, such a violation is still actionable in the state high court under the tort of *passing off*.

4. Labour Law

Another area where the influence of the common law is dominant under the Nigerian legal system is in the area of labour and industrial law. The Nigerian labour law was essentially developed based on common law principles.⁴⁹ Some of the common law rules regulating the relationship of master and servant has been incorporated in to the Nigerian labour legislation and given judicial recognition by the courts. A case in reference is the decision in the case of *Western Nigeria Trading Co v. Busari Ajao*.⁵⁰ In this case, an employee of the appellant company was blinded in the eye while working because a splinter of glass flew in to his eyes. At trial, the appellant testified that protective goggles were provided to the workers and that the respondent employee had already paid compensation under the appropriate workmen's compensation legislation and that he could therefore

⁴¹ See also *Agunanne v. Nigerian Tobacco Company Ltd* (1995) 5 NWLR (PT.397) 541 where the common law principle of common employment was analyzed, though rejected as a defence in the this case as the facts of the case did not support same. It should be noted however that the defence of common employment is no longer applicable in Nigeria by virtue of the various labour legislations.

⁴² (1967) NMLR 363,365

⁴³ (1901) AC 217, 223

⁴⁴ (1931) 16 NLR 1

⁴⁵ (1961)1 ALL NLR 171

⁴⁶ Section 5(2) Cap T13 LFN 2004

⁴⁷ (2009) 8 NWLR pt.1142

⁴⁸ (2010) LPELR SC 204/205

⁴⁹ This is more so that the wage earning system of employment was introduced into Nigeria by the colonial masters.

⁵⁰ (1965) NMLR 178

not bring an action. The trial magistrate held that the company was wrong not to have insisted that the goggles were worn and therefore awarded damages in favour of the respondent employee. Dissatisfied, the company appealed and the appellate court affirmed the decision of the trial magistrate. In affirming the decision of the lower court, the appellate court showed albeit innocently the relevance of the common law as a source of law in Nigeria. It held that an injured employee has a right to claim against his employer either as a breach of a statutory duty or as a breach of a *common law duty*.⁵¹ The court went further that it was the employer's duty at common law to ensure that not only were goggles provided but also that they were used by strict order and supervision.⁵² Similarly, in *Jarmakani Transport Ltd v. Madam Wulemotu Abeke*,⁵³ the common law doctrine of vicarious liability was considered and applied. The case examined the extent of vicarious liability in a master-servant relationship and held on appeal that the master will only be liable for the acts of his servant if such servant acted within the scope of his employment. In this case, the owner of a transportation business was sued by the plaintiff who sustained injuries in an accident involving the lorry owned by the defendant/appellant. Evidence was adduced to show that the lorry was only meant for carrying loads and there was express prohibition of the driver not to carry passengers. The driver however and contrary to instructions gave a ride to the plaintiff/respondent resulting in the accident. It was held on appeal that the express prohibition had limited the owner's liability thus; the scope of employment in the case was limited to using the lorry to carry goods only.

5. Company Law

Worthy of mention also, is the legacy of the common law case of *Salomon v. Salomon*⁵⁴ on the Nigerian company law. Salomon's case is the *locus classicus* case on the legal personality of a corporate entity.⁵⁵ This principle recognises that a corporation enjoys legal personality separate and distinct from its owners and founders. In that case, Aron Salomon, who was a merchant converted his business to a limited liability company and formed Salomon & Co Ltd with himself, his wife and children as shareholders. He held 20,001 of the 20,007 shares issued and each of the remaining six shares were held by his wife and children. The company ran into difficulties and the debenture holder appointed a receiver and the company went into liquidation. Its assets were sufficient to discharge the debentures but nothing was left for the unsecured creditors. The court of appeal held that the company was a sham and that Salomon remained the real owner of the business. The House of Lords however reversed this decision by a unanimous decision holding that a company was formed in compliance with the statutory provision becomes a separate entity from its owners. This decision has been given validity by both statutory and judicial process in Nigeria. For example, the Company Allied Matters Act provides in sections 41 and 42 that once a company is incorporated under the Act, it becomes a separate person entirely in law capable of enjoying rights and duties like a natural person. Also, in the case of *In the case of Ramanchandani v. Ekpenyong*⁵⁶, where the court considered among other things, whether a power of attorney purportedly made in favour of one party can be used by a 3rd party against the purported issuer, the court relying on the principle in *Salomon*, held that the plaintiff respondent was right in suing the defendant/appellant alone and not the Indian Trade Company, on the ground that the company enjoys a personality separate from that of its owners. Similarly, in *Marina Nominees Ltd v. FBIR*⁵⁷, the Supreme Court reiterated the fact that an incorporated company is a separate legal entity which must fulfil its own obligations under the law. In this case, Peat Marwick Casselton & Co was an accounting firm which also doubled as company secretary to some of its clients. In 1964, it incorporated another firm Marina Nominees to perform the secretarial duties. However, the new company had no separate staff from that of the original company. The same set of people worked for the two companies. The question arose whether the new company Marina Nominees was liable to pay tax on income earned and the Supreme Court rightly upheld the *Salomon* principle.⁵⁸ Earlier, Lord Denning in *H L Bolton & Co Ltd v. T J Graham & Sons Ltd*⁵⁹ expanded the *Salomon's* principle when he held: 'A company can in many ways be likened to a human body. It has a brain and a nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre.' In *Nigerian Bank for Commerce and Industry v. Integrated Gas (Nig.) Ltd*⁶⁰, the

⁵¹ Emphasis mine.

⁵² See also the case of *Strabag Construction (Nig.) Ltd v. Okpan Ogarekpe* (1991) 1 NWLR 733

⁵³ (1963) 1 ALL N.L.R 179

⁵⁴ (1897) AC 22

⁵⁵ K.O. Akanbi 'Towards Regulating Corporate Behaviour Through Criminal Sanctions.' *Journal of Contemporary Legal and Allied Issues*, IFJR Part 2, 2014, 355-366

⁵⁶ (1975) 5SC 29

⁵⁷ (1986)2 NWLR (pt. 20)48

⁵⁸ See generally Akanbi, K.O. Perspectives on the Legacy of *Salomon v. Salomon* on the Nigerian and Malaysian Company Laws. *Legal Network Series*, 1LNS (A) Ivii, 1-28 <http://www.newcljlaw.com/public/default.asp?page=subscription>

⁵⁹ (1957) 1 Q B 159

⁶⁰ (1999) 8 NWLR pt 613, p. 129, a similar decision was reached in *Delta Steel (Nig) v. American Computer Technology Incorporated* (1999) 4 NWLR pt.597, p.53, C.A

organic theory propounded by Lord Denning in Bolton's case supra was followed where the Nigerian Court of Appeal in affirming the decision of the trial court observed:

It must be realised that although a company is *a separate legal person*, it can do nothing for itself nor think for itself since it is a fiction and does not exist in the physical world... certainly not all biological persons working for and within a company will one look up to determine the mental manifestation of the company...the directors, managers, the general managers or the managing directors, represent the directing mind and will of the company and control what it does. The state of mind of this category of officials is the state of mind of the company and is treated by the law as such.⁶¹

6. Law of Contract

The common law is also influential in the Nigerian contract laws. The basic Nigerian law of contract is based entirely on the common law of England although applied to suit the local circumstance. Therefore, common law terms of offer, acceptance, consideration and intention to create legal relations have become entrenched in the Nigerian legal system. Secondly, under the common law of contract, a major condition to the validity of a contract is the *consensus ad idem*⁶² which means that the parties must mutually agree as to the terms of the contract. The common law in realisation of the fact that sometimes parties to a contract do not bargain on the same footing and in order to protect the weak party from fraud devised the principle of *non- est factum* which literally means not my deed.⁶³The main rule in that principle is that a person is not bound by a contract if he did not know that he was in fact contracting when he signed the agreement or he did not understand the terms of the contract. In the English case of *Gallie v. Lee*⁶⁴ it was explained as a defence for a person who for permanent or temporary reasons is incapable of reading and sufficiently understanding the contract signed.⁶⁵This position was given recognition by the Nigerian case of *Ogunleye v.State*⁶⁶ where the court affirmed that it was a civil law defence for a defendant who alleges that he did not execute the deed or he did not understand the document he signed. The implication of the principle of *non est factum* is that the minor, the insane and illiterates cannot enter into a contract. As regards the minor, it has been entrenched in the Nigerian contract laws that a minor cannot enter into a valid contract except contract for necessities as held in the popular case of *Labinjoh v. Abake*⁶⁷. The application of the rule of *non est factum* to illiterates have been adopted and given statutory recognition by the Illiterates Protection Laws of various states. For example, the Illiterates Protection Law of Lagos State, it is submitted that the common law rule on *non est factum* especially as regards the contractual capacity of the illiterates has been given both judicial and statutory effect in Nigeria.

In *Bala Angyu v. Alhaji Shehu Malami & Ors*⁶⁸, the first respondent was an illiterate customer of the second appellant. He operated his account through some of the officers of the second respondent bank like the first appellant who wrote cheques for him. Later, he became aware that some money was cashed from his account without his knowledge and confronted the first appellant who apologised and promised to refund which he eventually did. But the respondent wrote a petition that all his accounts with the second appellant bank be investigated. The outcome of the investigation showed a lot of irregularity and an action was entered by the respondent claiming special and general damages. The trial judge entered judgment for the respondent. Yet in *Egbase v. Oriareghan*⁶⁹, the Supreme Court held that where a person of full age and discretion executes a deed understanding fully the nature of the document, he cannot seek to nullify the contract. It is submitted that this decision gives credence to the common law principle that only fundamental mistake and absence of knowledge as to the nature of the contract can avail one the opportunity of voiding the contract. The common law principle of *privity of contract* has also been fully given judicial recognition and has become a well-grounded rule under the Nigerian contract laws. The main gist of the rule is that only parties to a contract have rights and obligations under the contract to the exclusion of all others. This principle was considered in Nigeria for the first time in *Chuba Ikpeazu v African Continental Bank*⁷⁰This rule is however subject to some exceptions which include agency collateral and multilateral contracts.

⁶¹ Emphasis mine

⁶² Literally, it means the meeting of minds.

⁶³ Gatta Ayodele 'An Overview of the Plea of Non Est Factum and Section 3 of the Illiterates Protection Law 1994 of Lagos in Contracts made by Illiterates' p.3

⁶⁴ (1971) AC 1004

⁶⁵ Per Lord Pearson

⁶⁶ (1991) 3 NWLR pt.177, p1

⁶⁷ (1924) 5 NLR 33 at 36 This is a locus classicus on the legal capacity of minors to enter in to a contract in Nigeria.

⁶⁸ (1992) 9 NWLR pt. 264, 242

⁶⁹ (1985) NSCC pt.11, Vol.6, p.1219

⁷⁰ (1965) NMLR 374

7. Criminal Law

Generally, the Nigerian criminal laws are statutes based. Nevertheless, a careful perusal of some of the provisions of the statutes shows the subtle influence of the common law. Therefore, the general principle of criminal responsibility under the common law is recognised in Nigeria. The Criminal and Penal Codes seems to accept the doctrine of *actus non facit reum nisi mensit rea*. Therefore, the common law ingredients of *actus reus* and *mens rea* are incorporated as ingredients of an offence under the various codes in Nigeria.⁷¹ It should be stated however that the word *mens rea* is not expressly used in the codes, rather words like intention, recklessly, negligently are used.⁷² For example, section 24 of the Criminal Code provides that a person is not criminally responsible for an act or omission if such act or omission occur independent of the exercise of his will or by accident. Similarly, section 51 of the Penal code provides that an offence is not committed when the person that commits it, is as a result of unsoundness of mind is incapable of *knowing*⁷³ the nature of the act or that he is wrong. The inference of that provision is that the *mens rea* or guilty mind is recognised, it is a matter of semantics that the *Latin* phrase is not used expressly. However, the courts have not hesitated to use the *Latin* phrase as the occasion demands. For example, in *Abeke v. State*⁷⁴ it was held that *mens rea* means the guilty mind. Another example is the provision on the *actus reus* of stealing as provided in the Criminal Code is to the effect that stealing does not merely mean taking away, the mere moving of another person's property suffice to constitute stealing. Also, the requirement that possession was fundamental to sustain a charge of theft laid down in the English case of *R v. Turner*⁷⁵ has also been given both judicial and statutory validity in Nigeria. In that case, the defendant had taken his car to a garage for repairs, called the garage owner and promised to pick his car the next day and pay appropriate fees. However, he picked his car parked at the front of the garage same day without informing the garage owner and paying the fees. He was charged and convicted of theft at the trial court. On appeal, the conviction was upheld on the ground that although he was the actual legal owner of the car, he was not in possession at the time he took the car; rather the garage owner was in possession. This position was applied in the Nigerian case of Commissioner of Police v. Nangbo⁷⁶ where it was held that theft is an offence against possession and a person that was already in possession of something cannot commit theft of it. If anything, he can only be charged with criminal breach of trust under sections 311 and 312 of the Penal Code.

8. Conclusion

Nigeria's past history as a British colony continues to resonate in most aspect of its legal system. More than sixty years after independence, the common law remains a major influence on the law in Nigeria both directly and indirectly. The influence of the common law is evident through both legislative and the judicial processes. As evident in this paper, some common law rules have served as basis for some legislative enactments in Nigeria. Although, the decisions of English courts are only of persuasive authority, the courts have not hesitated in using common law decisions as a guide in deciding cases in Nigeria. This has properly influenced the development of the Nigerian legal system. Conclusively, it can be seen that the common law of England was a major source of law in Nigeria, its influence still echoes in the development of the Nigeria legal jurisprudence and there is little doubt that it will not continue to be for a long time to come.

⁷¹ See sections 24 and 25 of the Criminal Code and sections 48, 51 of the Penal Code

⁷² See the case of *Onwudiwe v. Federal Republic of Nigeria* (1989) NNLR pt.115

⁷³ Emphasis Author's

⁷⁴ (2007) 9 NWLR Pt. 1040, 411 at 429-430

⁷⁵ (1971) 2 ALL ER 44

⁷⁶ (1976) NWLR 150