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Fallible Justice: The Dilemma of the British in the Gold Coast, 1874-1944

Neal M. Goldman

Graduate Center, City University of New York

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FALLIBLE JUSTICE: THE DILEMMA OF THE BRITISH IN THE GOLD COAST, 1874-1944

By

NEAL M. GOLDMAN

A dissertation submitted to the Graduate Faculty in History in partial fulfillment of the requirements for the degree of Doctor of Philosophy, The City University of New York

2016
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Neal M. Goldman

This manuscript has been read and accepted for the Graduate Faculty in History in satisfaction of the dissertation requirement for the degree of Doctor of Philosophy.

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THE CITY UNIVERSITY OF NEW YORK
ABSTRACT

Fallible Justice: The Dilemma of the British in The Gold Coast, 1874-1944

By

Neal M. Goldman

Advisor: Timothy Alborn

This dissertation studies the manner in which the British administered justice as a technique of colonial administration in one of its West African dependencies, the Gold Coast, during the first seventy years of formal colonial rule. In this study that covers the period from the creation of the Gold Coast Colony in 1874 to 1944, I argue that the British were caught between their honest desire to deliver prompt and fair justice to their Gold Coast subjects and their perceived need to support indigenous authorities through whom they wished to govern despite their recognition that those authorities were too often focused on fostering their own political and financial interests to the detriment of justice as the British defined it. They desired to preserve traditional courts and law in part to support those through whom they ruled while keeping to a minimum the costs of governing the colony. I also demonstrate, in the context of an old and relatively well developed non-settler colony, the inability of the colonial authorities to adhere to a consistent policy particularly when faced with concerted opposition from their subjects. This was the case more often than not in the Gold Coast despite the common assumption by colonial legal historians that the rule of law was one of the characteristics of British imperialism the colonized found least burdensome,
ACKNOWLEDGEMENTS

It has often been said that no scholarly work exists apart from much that has gone before. That is certainly true of this dissertation, not merely because of the many works I have cited but because of the support shown me by teachers and colleagues at the City University of New York Graduate Center as well as the staff of the archives and libraries in the United States, Great Britain and Ghana whose assistance made my research so much fun for me. I must particularly thank Ms Helen Afi Gadzekpo, the recently retired director of the archives at the Ghanaian Public Records and Archives Administration Department in Accra who enabled me to obtain a visa and found an apartment within walking distance of the archives all without ever having spent more than five minutes with me during a chance meeting at the British National Archives in Kew. I must also acknowledge the assistance of my advisor, Professor Timothy Alborn whose patience I am sure that I tried almost to the breaking point on many occasions but whose criticisms and suggestions made this a far, far better work than had I been left to my own devices. As a proud father and grandfather, I must express my appreciation for the support Daniel, Jessica, Pristine and Michael have given me over the years along with the opportunity to spend so many happy hours with Rose, Hannah, Jesse and Sadie. Finally, to Karin, who was always there at critical junctures and not so critical points to offer love and encouragement.
TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>TABLE OF ABBREVIATIONS</th>
<th>xi</th>
</tr>
</thead>
<tbody>
<tr>
<td>CHAPTER I – INTRODUCTION</td>
<td>1</td>
</tr>
<tr>
<td>LAW AND COLONIALISM</td>
<td>8</td>
</tr>
<tr>
<td>JUDGES AND ADMINISTRATORS</td>
<td>13</td>
</tr>
<tr>
<td>HISTORIOGRAPHY</td>
<td>16</td>
</tr>
<tr>
<td>LAW AND CUSTOM</td>
<td>16</td>
</tr>
<tr>
<td>ADMINISTRATIVE HISTORY</td>
<td>25</td>
</tr>
<tr>
<td>NATIONALISM AND ECONOMIC DEVELOPMENT</td>
<td>27</td>
</tr>
<tr>
<td>SOURCES AND METHODOLOGY</td>
<td>35</td>
</tr>
<tr>
<td>MAIN ARGUMENTS</td>
<td>37</td>
</tr>
<tr>
<td>CHAPTER OUTLINE</td>
<td>38</td>
</tr>
<tr>
<td>CHAPTER II - BRITAIN IN THE GOLD COAST BEFORE CREATION OF THE COLONY: 1662-1874</td>
<td>45</td>
</tr>
<tr>
<td>THE EARLIEST DAYS</td>
<td>49</td>
</tr>
<tr>
<td>THE ARRIVAL OF CAPTAIN MACLEAN</td>
<td>58</td>
</tr>
<tr>
<td>THE ROLE OF BRITISH JUDGES AFTER MACLEAN’S DEATH</td>
<td>69</td>
</tr>
<tr>
<td>CONTRADICTORY BRITISH POLICIES LEADING UP TO THE</td>
<td></td>
</tr>
</tbody>
</table>

- vi -
OF JUSTICE............................................................................................................................................. 197

APPLICATION OF CUSTOMARY LAW................................................................. 200

THE REPUGNANCY DOCTRINE........................................................................... 207

DISTRICT COMMISSIONERS.............................................................................. 210

APPEALS IN THE GOLD COAST AND WEST AFRICA GENERALLY:

A WEST AFRICAN COURT OF APPEALS....................................................... 225

JUDICIAL REFORM IN THE 1930’S.............................................................. 243

IMPRISONMENT FOR DEBT........................................................................... 254

CHAPTER VII - NATIVE JURISDICTION - 1878 TO 1910: FIRST EFFORTS TO

REGULATE NATIVE TRIBUNALS........................................................................ 261

REGULATING NATIVE JURISDICTION BY LEGISLATION.............................. 268

THE 1883 NATIVE JURISDICTION ORDINANCE ........................................ 277

AMENDING THE 1883 NATIVE JURISDICTION ORDINANCE.................... 283

EARLY VERSIONS OF THE 1910 NATIVE JURISDICTION

AMENDMENT ORDINANCE .............................................................................. 300

CHAPTER VIII - NATIVE JURISDICTION – 1910 -1927: CHIEFS VersUS

COASTAL ELITES............................................................................................... 325

LIFE UNDER THE 1910 ORDINANCE AND EFFORTS TO

AMEND IT.......................................................................................................... 326

THE NATIVE ADMINISTRATION ORDINANCE OF 1927 ............................ 342

CHAPTER IX - NATIVE JURISDICTION - 1927 -1944: REFORMING

TRADITIONAL COURTS.................................................................................... 359
CHAPTER XIII – LAND ISSUES – THE FOREST ORDINANCES AND EFFORTS TO FORMULATE A LAND POLICY

FORESTRY PRESERVATION AND LAND LAW, 1897-1927

EFFORTS TO FORMULATE A LAND POLICY 1920-1944 –

REGISTRATION AND A STATUTE OF LIMITATIONS

CONCLUSION

CHAPTER XIV – CONCLUSION

BIBLIOGRAPHY
TABLE OF ABBREVIATIONS

BNA CO = BRITISH NATIONAL ARCHIVES, COLONIAL OFFICE

GNA  = GHANA PUBLIC RECORDS AND ARCHIVES ADMINISTRATION

DEPARTMENT – NATIONAL ARCHIVES, ACCRA

    ADM = ADMINISTRATIVE FILES

    CSO = COLONIAL SECRETARY’S OFFICE

    PF  = PERSONNEL FILES

    SC  = SPECIAL COLLECTIONS

    SCT = SUPREME COURT

FCL = FANTI CUSTOMARY LAWS

FNC = FANTI NATIONAL CONSTITUTION
CHAPTER I - INTRODUCTION

This dissertation studies the manner in which the British administered justice as a technique of colonial administration in one of its West African dependencies, the Gold Coast, during the first seventy years of formal colonial rule. It is a study at the intersection of British and African histories. Although it sees matters primarily from the perspective of the colonial authorities, the views of Africans of their colonial masters and the agency of the colonized is often heard and seen, since the consequences of the administrative and judicial processes discussed in this dissertation had a major impact on the lives of Gold Coast residents as well as on the legal landscape in Ghana after independence.

Law, as Richard Rathbone, has noted, was one of the languages in which Africans addressed the colonial state, and, in some cases spoke to one another. As such, the relationship between the colonial executive and the colonial judiciary, both directly and through the Colonial Office, is of interest to those who study the manner in which the British dealt with colonized peoples in other parts of the world. Britain’s long tradition of judicial independence and deference to judges’ decisions was the cutting edge of British cultural imperialism conveying the Empire’s adherence to the rule of law in contrast to what was seen as the arbitrariness of indigenous custom (as well as of

executive fiat). This tradition came to be challenged, albeit not overcome in the colonial Gold Coast by both the educated coastal elites who felt alienated from indigenous tribunals and the colonial administration who often believed that the courts were undermining colonial authority.

In this study that covers the period from the creation of the Gold Coast Colony in 1874 to 1944, I argue that the British were caught between their honest desire to deliver prompt and fair justice to their Gold Coast subjects and their perceived need to support indigenous authorities through whom they wished to govern despite their recognition that those authorities were too often focused on fostering their own political and financial interests to the detriment of justice as the British defined it. Moreover, I demonstrate in the context of an old and relatively well developed non-settler colony the inability of the colonial authorities to adhere to a consistent policy particularly when faced with concerted opposition from their subjects notwithstanding the common assumption by colonial legal historians that the rule of law was one of the “least objectionable features of British imperialism.” I intend to explore how the administration of justice was used as a tool of colonial rule. I examine the question of who the judges were, the manner in which the executive crossed the lines and

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compromised judicial independence and how British racism prevented the advancement of African lawyers to places on the bench during most of the first four decades of the twentieth century. We shall see how the colonial power created a dual system of courts, native tribunals administering customary law and theoretically independent of, but in fact subordinate to, British common law courts. Finally I shall demonstrate by examining criminal procedure, matrimonial law and land law how the courts operated, how inconsistently the British behaved and how they repeatedly failed in convincing the people of their *soi disant* infallibility.

I shall show that the professed British desire for indirect rule never came to full fruition because they did not and could not trust the traditional authorities to carry out British policies. Moreover, they were faced with two sets of indigenous elites, the chiefs and the educated intelligentsia, neither of whom gave them much comfort. Indeed, the interests of these two groups conflicted in many important respects as when the British forced the latter to litigate their disputes in the traditional courts of the former, the heads of which the coastal elites usually did not respect. The British found that they had to choose one group or the other as agents of their rule, but did not exercise their choice in a consistent manner.

Seen repeatedly in this study are three groups of players, the British colonial administration, the traditional authorities and an elite of generally well-to-do merchants, ministers and professional men living primarily in the coastal communities of the Gold

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4 As long ago as the mid 1930’s, Lucy Mair argued that the policy pursued by the British in the Gold Coast was not so much indirect rule as it was *laissez faire* with the British lacking the will to impose direct taxation on its colonial subjects although the chiefs could levy taxes on their subjects for specific purposes in accord with traditional law. Lucy P. Mair, *Native Policies in Africa*, New York: Negro Universities Press, [1936] 1969, 157-158.
Coast. The background, selection and the responsibilities of this first group are elucidated at some length herein. They were almost always graduates of the four great British universities, Oxford, Cambridge, Trinity Dublin and Edinburgh and came to the colonial service by patronage and individual selection rather than by competitive examination. The second group includes the chiefs of the several indigenous states and their councils. These states, existing for many, many years prior to the arrival of the British on the Gold Coast, were usually quite small with economies based on small farms raising food for the farmers' families on land allocated by the chiefs. The chiefs were chosen, or enstooled, by the people from among a few families deemed to have royal lineage. As they were enstooled by popular choice, they could also be removed, or destooled, by vote of their subjects and were those beholden to those members of their communities, most often their councillors, with the most political influence. Until 1944, these chiefs and their councillors made up the indigenous or “Native” tribunals that decided disputes between and among their subjects. With rare exceptions, they were not conversant with English and were illiterate in that language. The third group, usually described herein as a coastal elite, were most often graduates of missionary or other European style schools, spoke and wrote English and frequently had English university educations and professional training. Ever since the crushing by the Gold Coast administration of the Fanti Confederation in the years immediately preceding establishment of the Gold Coast Colony, an event I discuss in the next chapter, the British had often expressed their distrust, if not their fear, of this coastal elite, many of which were involved in the creation of early form of westernized African government, residents principally of Cape Coast, Elmina and Accra, many of whom were men of
means and who had a relatively long history of engagement with British merchants, on which basis they asserted a claim to leadership, but who might form a nucleus of opposition to British rule. The traditional authorities and this coastal elite more often than not were competitors for leadership roles and distrusted one another, the former believing the latter to be ignorant tyrants and the latter fearful of the former as deculturated and out of touch with the lives of the people. The British all too often disdained the members of the coastal elite as what we might call “wanna be” Englishmen. Rather than turning to this group for more than incidental support, the British chose to rely on traditional chiefs whom they believed were supported by the bulk of the indigenous population and who would be readier to comply with colonial policies, yet whose authority over their subjects was all too often arbitrarily and unfairly enforced and was inconsistent with British concepts of justice. Thus the British found themselves between two sets of elites: a coastal elite of educated and professional and mercantile men who sought a larger role in the governance of the colony and a larger set of traditional chiefs and councillors who had for centuries been the leaders of the populace.

In the second and third decade of the twentieth century, the coastal elite was the source of judges of the lesser, or inferior, courts, e.g. police magistrates, as well as unofficial, that is to say, non-governmental members of the Legislative Council where they were able to express their opinions but rarely carried the day in the face of a majority of official members who were officers of the central colonial administration. From about 1913 onward, two or three of the most prominent chiefs also sat on the Legislative Council although they never were appointed to British judicial positions.
A substantial portion of this dissertation concerns the dual court system in operation in the Gold Coast Colony: British courts and Native Tribunals. The latter were seen as the most significant criterion of chiefdom, from the operation of which he and his councillors derived most of their income. I discuss below the manner in which these courts compelled attendance of parties and witnesses and how decisions were reached and the supervision given to them by British officials. In the British courts, customary law was privileged by requiring that the judges apply it in resolving disputes between local litigants. Until 1910, a disputant could choose to have his case determined in either British or traditional courts. The 1910 Native Jurisdiction Amendment Ordinance, however, severely limited, over the staunch opposition of the coastal elites, expressed principally by Joseph E. Casely Hayford, access by Africans to British courts despite repeated evidence that the Native Tribunals that would now often be the only forum for resolving disputes were not being fairly or efficiently run. To both of these policies, the coastal educated elite expressed intense opposition, opposition that continued almost throughout the period under study but which failed, until 1944, to alter the British policy of favoring the traditional chiefs in the administration of justice. We shall see that this dichotomy of often conflicting interests was a major reason that British rule was both weak and inconsistent both in policies demanded by the Colonial Office as well as in
those created in Accra itself.\textsuperscript{5} Indeed, it was, as Anne Phillips has pointed out, “impossible to find a consistent expression of the objectives of colonial rule.”\textsuperscript{6}

Lonsdale and Berman argue that the Kenya they studied was “paralyzed between the opposing demands of a ‘West Coast’ and a ‘South African’ policy – or, as we would prefer, between the conflicting requirements of peasant and settler political economy.” They argue that the authority of the colonial state rested on a “compatibility of interest between the big men of both peasant [by whom it appears they mean the chiefs and elders of the indigenous communities] and capitalist production [by whom it appears they mean plantation and mine owners].” However, unlike the situation in the Gold Coast, they argue that capitalist production required appropriation of African land, creating very different tensions than those that existed in the Gold Coast where only a small percentage of land was subject to concessions to Europeans.\textsuperscript{7}

The British were not the only colonial power in Africa having to deal with choosing between educated elites and traditional chiefs. The French, too, faced this choice. They opted to grant citizenship to a small group of Africans in four communities in Senegal many of whom received French educations and who were granted access to French courts as two elements of what the French deemed to be civilization. At the

\begin{footnotesize}
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\item Mair argues that the British responded to “spasmodic pressure” to pass legislation to control the chiefs that they then did not enforce. \textit{Ibid.} Lawrance, Osborn and Roberts, in the Introduction to their volume of essays, explore the question whether the weakness of colonial rule derived from a continual restriction on funds and a shortage of personnel or whether the colonial state, having imposed law and a stable economic and social organization was, in fact, a strong state. Benjamin N. Lawrance, Emily Lynn Osborn and Richard L. Roberts, “Introduction,” in \textit{Intermediaries, Interpreters, and Clerks, African Employees in the Making of Colonial Africa}, edited by Benjamin N. Lawrance, Emily Lynn Osborn and Richard L. Roberts, Madison, WI: The University of Wisconsin Press, 2006, 3-34.
\end{enumerate}
\end{footnotesize}
same time, they felt “duty bound to respect ‘traditional’ West African customs, thus permitting those of their Senegalese subjects to resolve disputes in the traditional manner according to traditional law.  

**Law and Colonialism**

According to the historian/anthropologist, Martin Chanock, European law was “the cutting edge of colonialism, an instrument of the power of the alien state and part of the process of coercion.” Chanock’s unconditional opinion was not unique to him. The noted German historian of imperialism, Wolfgang J. Mommsen, expressed a similar view when he wrote: “There can be no doubt that the imposition of European law and European legal procedures upon various peoples in the non-Western world was in the first place a means of establishing and extending imperial control, formal or informal.” Benjamin Lawrance and his colleagues argue that the purpose of the legal system was to engage the natives in the colonial project, and that validation of colonial

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authority required that subjects have a means to “aspire to justice,” to facilitate commerce, to prove external legitimacy and to reduce African resistance. Certainly, as we shall see, the British authorities repeatedly expressed their desire to see to it that the indigenous courts rendered fair justice without exploiting the people.

A reader of these sentiments could reasonably conclude that law was the principal, if not the sole, vector through which the European powers imposed themselves on subordinate peoples, even more important than military force. That is simply not true in the case of the Gold Coast. Indeed, while British law and legal principles were important elements in establishing and maintaining imperial control in the British West African colonies in general and in the Gold Coast protectorates and colony in particular, a more nuanced view, I submit, will show that British law was not, as P. Fitzgerald put it, the “central mode and legitimation of the imperial project,” but was one “tool,” in Michael Doyle’s words, to implement imperial objectives.\(^{11}\) I attempt to show what those imperial objectives were and also to explore the manner in which colonial judges used that tool.

In this study, we shall see that the British had no consistent imperial policy, shifting initially between abandoning the Gold Coast forts to the merchant community at

\(^{11}\) P. Fitzgerald, “Custom as Imperialism,” in Law, Society and National Identity in Africa, edited by Jamil M. Abun-Nasr, Ulrich Spellenberg and Ulrike Wanitzek, Hamburg, 1990), 23; Michael W. Doyle, Empires, Ithaca, N.Y.: Cornell University Press, 1986, 354. It cannot be doubted that the enforcement of English mercantile and commercial law greatly benefitted not only English merchants, but African ones as well, of which there were a great many on the Gold Coast. John D. Hargreaves, Prelude to the Partition of West Africa, London: Macmillan; New York: St. Martin’s Press, 1963, 30. See also Adewoye, supra, 14. (“A very potent factor in consolidating and stabilizing colonial rule was the imported European legal process. In the hands of British colonial administrators, law was a veritable tool, stronger in many ways than the Maxim gun.”)
the behest of the Treasury and retrieving them at the importuning of missionaries and humanitarians intent on quashing the domestic slave trade, then wavering between leaving the Gold Coast and establishing a colony.\textsuperscript{12} For almost two hundred years, the British evidenced no interest in a permanent presence on the Gold Coast, limiting themselves to small forts from which they conducted trade, first in slaves and later in tropical commodities. Such a conquest would require not only power to suppress hostile opposition, but education, an investment in the economy and “an efficient judicial system suited to the state of social progress.”\textsuperscript{13} Even after the Colony was created, the British waffled on such issues as imposing direct taxation and European land tenure, creating more autonomous indigenous courts and generally ruling indirectly. But, unlike their countrymen in India, the British were present on the Gold Coast for almost two hundred years before they created formal courts for the resolution of disputes between Europeans and Gold Coast Africans, nor did they at any time during the first nine decades of the nineteenth century seek to change the rules governing property. The leading expert on the imposition of European law on India and Indians, Bernard Cohn, has written that “One of the first problems confronting a colonial power after establishing \textit{de facto} or \textit{de jure} sovereignty over a new territory is to set up procedures for settling disputes arising within the dominated society, and to establish a whole range of rights in relation to property and obligations of individuals and groups to


\textsuperscript{13} \textit{Ibid.}, 10-11.
one another and to the State.” Although, as I discuss below, the British ordained the establishment of both British and Indigenous Courts following creation of the Colony in 1874, they did little to alter the form of land tenure as they had done in India and created no obligations to the colonial authorities by imposing any direct taxes until World War Two.

These failures to change land tenure and impose direct taxes are a recognized mark of British weakness in colonial administration of the Gold Coast Colony, a weakness derived from an unwillingness to pay the cost in treasure and lives that they believed would be necessary to enforce a firm policy in either of these areas and were exceptional within the Empire as a whole. As J. E. Casely Hayford, a British educated African barrister and early Gold Coast nationalist, put it, the colonial administrators were without direction and too concerned with promotion and mobility. In discussing the

15 Phillips, The Enigma of Colonialism, 123.
16 J. E. Casely Hayford, Gold Coast Native Institutions, London: Sweet & Maxwell, Ltd., [1903] 1970. Hayford was the son of a prominent and prosperous Methodist minister who was educated at a Wesleyan school in Cape Coast and then Fourah Bay College in Sierra Leone. He served as a teacher and then principal of the Wesleyan school. He edited and co-owned two English language newspapers published in Cape Coast before going to England to study at Peterhouse College, Cambridge, and the Inner Temple. While practicing as a barrister in the Gold Coast, he edited the Gold Coast Leader and co-founded, along with John Mensah Sarbah, the Mfantsipim School in Cape Coast. Upon Sarbah’s death he became President of the Aborigines Rights Protective Society and was a founder of the National Congress of British West Africa. Hayford wrote a number of influential treatises on land policy noted below and served on the Gold Coast Legislative Council. Magnus J. Sampson, Gold Coast Men of Affairs (Past and Present), London: Dawson’s of Pall Mall, [1937] 1969; Magnus J. Sampson, ed., West African Leadership: Public Speeches Delivered by J. E. Casely Hayford, London: Frank Cass & Co., Ltd. [1951], 1969; Magnus J. Sampson, Makers of Modern (continued...)
British failure to impose modern European concepts of land tenure, Anne Phillips argues that the British were anti-modern and anti-capitalist in West Africa and saw themselves as the guardians of a pre-capitalist order, paternalistic and concerned with the “dangers of a modern economy,” slowing change wherever possible to avoid the perceived evils of wage labor and to prevent the spread of European individualism that had been adopted by the coastal African elite.\textsuperscript{17} She contends that the colonial power could not enforce change because of its reliance on and commitment to the traditional authorities whose power and influence would be undermined by that change.\textsuperscript{18} So, too, Thomas Hodgkin saw the colonial state as feudal in nature, with the Secretary of State as sovereign and the Governor as principal vassal, lacking in internal consistency and responding in an uncoordinated manner to various stimuli.\textsuperscript{19} Indeed, the British establishment prided itself on its \textit{ad hoc} response to events. George Padmore quoted Lord Cranborne, a one time Parliamentary Under Secretary of State for the Colonies, saying “We have no cut and dried pattern. We have adopted and adapted existing systems, changing them readily as the need arose and experience taught.”\textsuperscript{20} This pragmatic approach was based on British perception of African character and trends but, as Sara Berry noted, they “rarely exercised enough effective control to accomplish

\footnotesize{(...continued)}


\textsuperscript{17} Philips, \textit{The Enigma of Colonialism}, 1, 3-5, 7

\textsuperscript{18} \textit{Ibid.}, 11.


what they set out to do.”

Berry’s perception is right on the mark insofar as the evidence from the Gold Coast discloses. Thus, until World War Two, Britain failed to impose direct taxation despite almost a century of efforts to do so. It failed to save the tropical rain forests despite repeated expression by its chosen experts of the necessity to do so to prevent dessication of the land and destruction of the cocoa crop.

Even some of the Colonial Governors themselves recognized the lack of consistent policy. Writing in 1908, Governor John Rodger told the Colonial Office that he had studied Gold Coast history going back seventy years “as recorded in official despatches and elsewhere” and that colonial administration had been characterized by “lethargy and ineptitude.” He went on to say that “it is difficult to trace either continuity of policy or rigour of administration in the history of this colony.”

Judges and Administrators

The relationship between the judges and the administrative officers in the Gold Coast Colony is a separate but also a significant issue in this study. In the United Kingdom as well as in the United States, the separation of the powers and functions of the executive and the judiciary is fundamental to the Anglo-American concept of judicial administration. Yet in the Gold Coast Colony that separation was, at best, partial. As one scholar and African judge, Austin Amissah, has noted, “[t]he judicial tradition

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22 GNA ADM 12/3/15, Confidential, 12.28.08.
bequeathed by the British colonial administration to the African states was not such as would encourage the kind of judicial independence of action of the other branches of government as is associated with the American courts. The position of the courts was that of an adjunct of the executive.” Judges were considered to be no different than other colonial officers serving during the pleasure of the Sovereign. “The position of the colonial judges, which was akin to civil servants, coupled with the fact that they served in any one particular country for only a limited period of time, a period which could be shortened by transfer to another place if a judge proved uncongenial, must have further weakened any desire on their part to appear in the image of a Coke.” Amissah argues that the practice of reporting on the judges to the Governor and the Colonial Office was inconsistent with judicial independence and that the courts were but an extended arm of the executive to be used for enforcing imperial policy and “to underpin the administration.” “By and large,” Amissah claims, “the judiciary did not fail to come up to the expectations of the government” in those few cases in which important policy issues or the image of the government were involved. As we shall see below, Henrika Kuklick’s research on the origins of Gold Coast colonial officials disclosed that they were all treated as administrative officers, even those whose duties involved hearing criminal cases and appeals from indigenous courts.

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24 *Ibid.*, 62, 63, noting that the Chief Justice of Northern Nigeria was sent to Buganda after a dispute with the Governor, Lord Lugard, and that his successor was “more compliant.”


Simenssen argues that the Colonial Government saw judicial independence as an “anomaly” unsuitable for a “basically authoritarian” system of government. He notes that the Government made regular efforts to reduce the jurisdiction of the British Courts, e.g. the Chiefs Ordinance of 1904 that put the power to destool in the hands of the Administration, and the Native Jurisdiction Amendment Ordinance of 1910 and the Native Administration Ordinance of 1927. He contends that the real motive and rationale behind the continual professed effort to reduce the expense of litigation was hostility to local attorneys and the educated African elite and the desire to protect the colonial state from the perceived nationalist threat of these groups and to protect European companies from the competition from African merchants. 27 Such evidence as exists in the archives does not fully support Simenssen’s somewhat cynical view. Rather the archival material demonstrates that in legislating as to native jurisdiction, the British were aware of the problem of the expense of litigation and sought to limit the imposition of what the British felt were excessive fines and fees. While this evidenced a sincere desire to reduce the expense of litigation, British efforts to carry out that policy were weak and ineffectual because the burden of enforcing the rules set out in the ordinances fell on overburdened District Commissioners who lacked the time to review native tribunal judgments unless one or another of the parties appealed and who were, in the first instance, administrative officials, not independent judges. 28


28 While it is true that the British generally disdained the members of the Gold Coast Bar, they had been prohibited from appearing in the Native Tribunals from at least 1883.
Historiography

Until as late as 1999, few historians gave attention to colonial legal history. As Anthony G. Hopkins noted, “[c]olonial legal history is one topic that has been signalled but scarcely explored.”29 I shall try to fill that lacuna in the process addressing several historiographies that touch on, but do not primarily focus on, colonial law in the Gold Coast.30 First among these is the historiography of common and customary law. Next is that of colonial administration such as the studies of Anthony Kirk Greene and Henrika Kuklick. The third approach, taken most recently and influentially by Frederick Cooper, connects colonial law to the related issues of economic development and nationalism.

Law and Custom

Before engaging in an analysis of the historiography, I look at concepts of law and custom. Law is not a static concept. This is particularly true of the common law, a system of normative rules that developed in Great Britain, but more so in England, over


30 The Colonial Office and the Gold Coast Government went so far as to involve themselves in creating a history to their advantage. William Walton Claridge, an officer in the West African Medical Service wrote a history of the British involvement on the Gold Coast and submitted it to the Colonial Office seeking permission to publish it. The Colonial Office advised the Governor to review the manuscript and if he approved, the Secretary of State had no objection to publication. BNA CO 96/540, Confidential 4.5.13. Governor Hugh Clifford approved of the manuscript and reported to the Colonial Office that he had arranged for publication if the Government would contribute £250 toward the costs and agree to purchase one hundred twenty copies. The Governor warmly endorsed this proposal. BNA CO 96/543, No. 196, 3.26.14. After further negotiations to reduce the Government’s contribution to £100, publication was approved. BNA CO 96/553, Confidential, 6.5.14. The book was published and became part of the Gold Coast historiography.
the past one thousand years by means of judicial decisions and parliamentary statutes.\textsuperscript{31}

Law represents standards of communal behavior and guides that behavior not merely by negative means, that is by civil and criminal penalties, but by offering positive criteria against which members of the community can be judged. Nevertheless, many definitions of law include the coercive effect of state power, for unless violation leads to negative consequences for the violator, it is not law.\textsuperscript{32}

Common law derived in England from customary law. Thus they are not so much different in kind as in a stage of evolution. Sally Falk Moore argues that law and custom are more alike than different and that custom, like law, can and does evolve

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and change. Custom is based on the day to day practice of the community, that is what people do as opposed to the normative position of law, that is, what people should do. Not every custom rises to the dignity of law, but such custom is a material source of law out of which a norm is manufactured. It has been said that customary law as applied by lawyers is a "distortion of something and that something is custom before it becomes entangled and appropriated in the colonial situation"; it is separate from the social relations that are integral to true custom.

Common law courts decide cases on the basis of established rules, rules that bind the courts as well as the parties. These rules, embodied in the concept of stare decisis, are enunciated by higher courts, generally courts of appeals, and disseminated to lower courts, and are fashioned from often conflicting rules. To disseminate these rules implies written decisions or judgments so that reference can be made by future courts dealing with similar matters. By contrast, customary courts determine matters on the basis of habitual conduct taught by family and community to be proper human behavior, the source of which is often considered to be divine and which is enforced not

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by corporal punishment or imprisonment but by communal criticism and even ostracism. In the Gold Coast, reliance on precedent was not a part of Akan customary law – each case was decided as if it were the first of its kind, because no record of the judgments of customary courts was made. The primary purpose of the customary courts in the Akan area of the Gold Coast was not to enforce a “right” or an “obligation,” as such, but to prevent discordance in the community, to keep or restore peace and harmony and to assuage injured feelings by a decision that all parties would accept. Nevertheless, writing in the late 60’s, Max Gluckman, a social anthropologist of the so-called Manchester School that focused on conflict, postulated a balanced society while some of his colleagues emphasized what Lyn Schumaker describes as a pursuit of the


38. T. O. Elias, “Colonial Courts and the Doctrine of Judicial Precedent,” Modern Law Review, Vol. 18, No. 4 (July, 1955): 356-370, 358-359. Elias points out, however, that when a case that began in a customary court entered the English court system, as when a case might be transferred to a Magistrate’s Court or when the Gold Coast Supreme Court acted in an appellate capacity, precedent did govern. Ibid.

39. James W. Fernandez, “Fang Representations Under Acculturation,” in Africa and the West: Intellectual Responses to European Culture, edited by Phillip Curtin, Madison, WI: University of Wisconsin Press, 1972, 13; Matson, “The Supreme Court and the Customary Judicial Process in the Gold Coast,” 47, 52. In this respect, a customary court is similar to a Rabbinical tribunal or Beth Din Torah, the function of which was to judge in accordance with equitable principles. Julius Silversmith, “The Administration of Laws and Justice in the Early Jewish and Christian Eras,” The Biblical World, Vol. 13, No. 8 (March, 1899):170-175, 170. The analogy is a good one in that both the customary court and the Rabbinical tribunal acted more like arbitrators than judges. Their decisions were not res judicata to further litigation. That is, the parties, or a dissatisfied party might bring the same matter to a different tribunal for further litigation. Matson, 53.
nature of conflict and change.\textsuperscript{40} In his model of a balanced society, Gluckman argued that reasonableness and responsibility was as much a part of customary law as of common law.\textsuperscript{41} Gluckman’s argument defines the dispute among legal historians as to the relationship, if any, between custom and law. Gluckman contends that custom as applied by the Barotse among whom he lived and worked, and by extension by all indigenous peoples, was as much “law” as were the rules applied by European courts and those of the colonial powers in Africa. Indeed, as we shall see, the common law courts of the Gold Coast were obliged to apply customary law in cases between indigenous peoples and sometimes in those where Europeans were parties. While the purpose of this dissertation is not to resolve the dispute between those who claim custom is law and those who contend that it is not, description and discussion of the manner in which justice was administered in the Gold Coast necessarily touches on that dispute, and we shall see how some of the common law judges viewed custom.

It has been argued that the customary law of the Gold Coast peoples was not adapted to modern commerce as it came to be developed in the latter part of the nineteenth century.\textsuperscript{42} Nevertheless the common law courts of the Gold Coast recognized that there are “many roads that lead to justice,” and permitted, indeed were required by the Gold Coast Supreme Court Ordinance to permit, customary law to

\begin{thebibliography}{99}

\bibitem{schumaker}

\bibitem{gluckman}

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flourish and treated it with respect in most instances, provided that, in the opinion of the common law courts, they conformed to "modern standards of civilized values." Jörg Fisch argues that the British generally had to allow indigenous courts to exist and indigenous law to continue to be enforced in order to stabilize European rule because imposing English law at the behest of a small group of Europeans would have risked resistance and unrest. As a result, the British created and maintained legal inequality between Europeans [who had access to British courts] and natives [who, as in the Gold Coast, generally did not, but who wanted to have such access] by giving Europeans control of native courts and law theoretically "in order to do justice." Similarly, Samuel Assante asserts that enforcement of customary rules was merely "a sort of imperial dispensation within the larger framework of English law, that often official contempt for 'native' law was hardly veiled" and that rules for dealing with custom, such as the repugnancy doctrine, were based on a "tacit premise . . . that English law enshrined a higher set of values than Ghanaian customary law," an expression of the cultural imperialism referred to earlier in this chapter. But driven by the pressures of commerce, colonial administrators began to modify customary law in an unsystematic, indeed ad hoc, fashion. The evidence I have found in the Gold Coast archives and in


judicial decisions of the British courts fully supports Fisch’s and Assante’s view that customary law was tolerated rather than supported and was controlled by English rules, such as the repugnancy doctrine, more about which below, and appeals to English judges who may not have fully understood the customary rules they were obliged to enforce.

Bertram argues that attorneys were prohibited in Native Tribunals not so much as Simenssen would later have it because of hostility to attorneys in general and the local elite in particular, but because forensic advocacy was not a customary practice and attorneys were not readily available outside the large towns on the coast. Moreover, Bertram contends, untrained or ill-trained “bush lawyers” fomented litigation and tended to obscure rather than elucidate the truth.46 Firmin-Sellers attributes to Danquah the view that since attorneys cared little if anything for customary law, permitting them to appear in Native Tribunals would cause those Tribunals to lose their identity as administrators of the customary law. She argues that the British feared the native elites would unduly influence the uneducated chiefs who, they thought, were best suited by experience to lead the people. In their typical racist fashion, they considered the elites to be “detribalized troublemakers” divorced from their indigenous roots.47 The evidence found in judicial decisions of the British courts of the Gold Coast does not support either Danquah’s or Firmin-Sellers’ conclusions, particularly when one

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considers that were all parties in customary courts to be represented, no party would have a particular advantage in influencing the decision makers.

In Max Gluckman’s chapter in Kuper and Kuper and in his contribution to *Ideas and Procedures in African Customary Law*, based on his study of the Barotse of south-central Africa, he argues that the concept of reasonableness and responsibility in trade, contract and tort law is as important in African customary law as it is in much of British law. Gluckman implicitly exalts British common law comparing it favorably to traditional law which he praises for its similarity to common law. This dissertation seeks to apply Gluckman’s thesis by arguing that the colonial common law judges made law that was attractive to indigenous Gold Coasters because many of the core concepts embodied in the judges’ decisions were already familiar to them.

Lauren Benton most recently contends that all colonial powers used similar techniques to sustain and structure multiple legal systems to stabilize the colonial order. Of course, she says, the colonial state dominated that order by requiring that appeals from indigenous courts be made to their colonial courts and by regulating the conditions under which such appeals could be taken. This process homogenized traditional law while making it less reflective of local differences and the social context while creating a colonial common law much as English judges had created a law common to all of England from disparate local sources.48 She goes on to argue over the years, the

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48 Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900* Cambridge, UK and New York: Cambridge University Press, 2002. This process of homogenization of customary law in the Gold Coast is seen in the frequent application by colonial courts of the Fanti system of matrilineal succession to cases involving the Ga whose customs dictated patrilineal succession.
common law courts “subsumed in one way or another all jurisdiction including ‘traditional’ forums given special status by the state, essentially saying that all courts were British courts. This was particularly true in the Gold Coast, I show, where British courts held that Native Tribunals existed as courts only because of legislation. Benton also argues that British law, like British courts, was dominant; such dominance “was what made legal pluralism possible. . . . Indigenous law was recognized precisely when it could no longer offer a true alternative to the power of the colonial state.” My study demonstrates that the British judges and administrators identified the rule of law with rule by law and that they constructed purposeful differences between colonized and colonizers as well as colonial cohesion. They changed local law into an imperial common law. I examine here how the government and its agents, the judges, created and implemented that law. The judges, who, in the common law tradition declared what the law was, carried out the government’s program of developing resources while maintaining the differences between rulers and ruled and reinforcing the power of the former.

It should be noted, as Sara Berry has done, that some pre-1993 works criticize the “structural and jural paradigms” set out in the works of Gluckman and Marxists such as Rothermund. These critics (e.g. Berry) see African society as more fluid, dynamic and ambiguous than those they criticize. Berry argues that custom continued to


change even after ostensibly being fixed in judicial decisions. One may also argue that British judges changed custom, as they often altered common law rules, to fit in with colonial developmental policies. The evidence found in the decisions of the Gold Coast Supreme Court establishes that British judges often created customs based on conflicting expert evidence adduced to them, but it also establishes that customary law was less fluid than Berry would have it, albeit not entirely rigid, in what Berry calls “an era of intensified contestation over custom, power and property.”

**Administrative History**

Henrika Kuklick, who studied Gold Coast administrators, argues that so-called indirect rule became individualized personal rule by junior officials who were given responsibility to oversee the conduct of traditional authorities, particularly how these latter functioned in their judicial capacity, but who were not supervised closely enough by the colonial government to prevent them from exercising more power than they otherwise might or should have done. She points out that senior colonial office recruiters eschewed the idea of competitive examinations in favor of personal interviews looking for applicants with social polish, a characteristic valued over practical knowledge, men with “a keen sense of justice,” primarily from the upper classes who did not have to seek an economic return from their education. However, she argues

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52 See also Björn M. Edsman, *Lawyers in Gold Coast Politics, 1900-1955: From Mensah Sarbah to J. B. Danquah*, Uppsala, Uppsala University, 1979, 214, who says that by the 1930's rule had become more and more direct as traditional authorities proved themselves to be judicially and financially irresponsible.

that the colonized of the Gold Coast pressured their chiefs to oppose unpopular colonial policies and thus compelled to British to compromise in the face of such pressure to prevent the chiefs, their principal agents, from being seen a British tools and thus losing the respect and obedience of their people.\textsuperscript{54} Kuklick argues that the public school background of those chosen to fill the post of District Commissioner that stressed and unswerving loyalty and faithfulness to tradition led to the Commissioners offering an indiscriminate protection of chiefly authority and customary practices.\textsuperscript{55} Kuklick ignores the creation of the Colonial Legal Service in 1933 and only deals in passing with the magisterial role of the District Commissioners. Thus a gap exists in the picture of the British colonial administration. She, Anthony Kirk-Greene (who was a colonial official) and others have gathered very useful data on the class origins, education and professional background and service of colonial governors suggesting the homogeneity of class and education.\textsuperscript{56} Benjamin N. Lawrance, Emily Lynn Osborne, Richard L. Roberts and the contributors to their volume of essays,\textsuperscript{57} as well as Jonathan Derrick,\textsuperscript{58} have looked at the role and influence of native interpreters and clerks as intermediaries between the British and the indigenous peoples, but there exists no studies, such as Kuklick and Kirk-Greene have done with respect to administrative officers, as to colonial

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\item \textsuperscript{54} \textit{Ibid.}, 1,3. Kuklick does not examine superior court judges but did look at District Commissioners, who exercised wide magisterial jurisdiction, as administrative officers.
\item \textsuperscript{55} \textit{Ibid.}, 23.
\item \textsuperscript{56} Kirk-Greene, Anthony H. M., \textit{Britain's Imperial Administrators, 1858-1966}, New York: St. Martin’s Press, Inc., 2000.,
\item \textsuperscript{58} Jonathan Derrick, “The ‘Native Clerk’ In Colonial West Africa,” \textit{African Affairs}, Vol. 82, No. 326 (January 1983):61-74.
\end{itemize}
judges and such a study is sorely needed because the judges, a narrow subset of colonial administrators, exercised so much authority over disputes in what was deemed to be a litigious society where judicial proceedings occupied much time and financial resources, because they often represented the principal connection between the local populace and the British administration and because they held ultimate jurisdiction over decisions of the traditional rulers.

These studies and this dissertation fit into the context of “political structures values and understandings of the colonial,” but I would move the conversation forward by showing how the judges fit into those experiences, values structures and understanding and how they contributed to the purposeful construction of differences and colonial cohesion, *i.e.* by changing local law into an imperial common law, by exerting a monopoly on criminal procedure and the trial of serious crimes and by asserting their power to have the final say on appeals from traditional courts in land cases. Since the judiciary played such a significant role in the colonial bureaucracy and the manner of colonial rule, historians of British colonialism should be interested in filling this lacuna in their study of imperialism, a lacuna derived in part, I submit, from the British aversion to lawyers in general and to colonial lawyers and judges in particular.

**Nationalism and Economic Development**

The shifting nature of the “politics of difference,” as Frederick Cooper calls it, is illustrated by the relationship between the elite common lawyers of the coastal communities and incipient Gold Coast nationalism. Björn Edsman’s thesis is that Gold Coast nationalism is not linearly descended from the alliance between western
educated mainly urban coastal elite and traditional chiefs in opposition to colonial land policy. Rather, he contends, the traditional chiefs were adapting to colonialism while the elites were seeking to participate in a society being created by the British through membership in the legislature and the judiciary. Edsman argues that the educated urban elites tried to manipulate tradition and its symbolic representatives, the Chiefs, in their own interests while proclaiming that they were defending traditional law and custom as chiefs gained political power. He goes on to say that Hayford and his colleagues “claimed social affinity with the British and the society they represented” and that John Mensah Sarbah and his colleagues worked to adapt the ideas of the British judiciary to local conditions. According to Edsman, they believed that English law was an engine for social change and that it was necessary to make traditional courts part of and subordinate to the Supreme Court and to codify customary law along English lines.\(^{59}\) Over the course of the period covered by this study, both coastal lawyers and other members of the coastal elite as well as traditional chiefs found places in the legislature, although they did not become a majority until after the close of the period under study. Moreover, slowly, indeed, very slowly, Africans moved into judicial positions, at first as Police Magistrates, and, finally, in the 1930's onto the Supreme

\(^{59}\) Edsman, 147, 247, 249. Sarbah was the son of a merchant born at Cape Coast in 1864. He was educated at Cape Coast Wesleyan School and Taunton School in England. He prepared for the Bar at Lincoln’s Inn and was called in 1887, the first Gold Coast African to qualify as a barrister. Sarbah was one of the founders of the Aborigines’ Rights Protective Society and wrote the brief presented by that group to Joseph Chamberlain in connection with the 1897 Lands Bill. He founded and offered scholarships to the Mfantsepiim school, an institution that became one of the principal locales for the education of the sons of the coastal mercantile and professional elites. Sarbah, the author of three extremely influential legal studies, sat as an Unofficial Member in the Gold Coast Legislative Council from 1901 until his death in 1910. Azu Crabbe, John Mensah Sarbah, 1864-1910 (His Life and Works), Accra: Ghana Universities Press, 1971. Magnus J. Sampson, Gold Coast Men of Affairs (Past and Present), London: Dawson’s of Pall Mall, [1937] 1969, 212.
Court. It can be said then that they adapted to colonialism.\footnote{In Facing Two Ways: Ghana’s Coastal Communities under Colonial Rule, Roger Gocking deals most directly with the relationship between colonial law and nationalism, but limits his study to the coastal elite. He argues that long established Fanti communities were reshaped by colonial contact and rule. Two processes, that Gocking calls “Creolization” and “Akanization,” antithetic yet sympathetic, produced a middle class elite receptive to British culture until the late nineteenth century when increasingly blatant British racism and aggressive imperialism turned the elite again toward African culture. The resulting political and legal competition sowed the seeds, Gocking argues, for Gold Coast nationalism.}{60}

Some historians, among whom are Martin Chanock, Gordon Woodman, Jap de Moor and Dietmar Rothermund, point to the interplay of law and colonial exploitation. Chanock argues that both indigenous people and Europeans used the law to compete for resources.\footnote{Throughout the period under study here, those resources constituted the two principal exports from the Gold Coast: gold and cocoa. The former was almost entirely in the hands of British firms with sufficient capital to import the expensive machinery utilized in the extraction and smelting of gold. The latter was almost entirely in the hands of small indigenous farmers who raised their crops using family or, infrequently, hired labor.}{61} He accepts the British rationale that their reluctance to impose individual ownership tenure was related to the colonial government’s concern that development should be orderly. Rothermund more recently argues, however, that Europeans purposefully tried to turn land in Africa, and particularly in the Gold Coast, into a commodity, a condition that previously existed only in Europe and, by insisting on specific boundaries of estates, to effect a shift of cultivation and pastoralism into commercial agriculture. Woodman, however, in the De Moor and Rothermund collection of essays, agrees with Chanock that access to land and resources is the central theme in colonial history, but argues, contra to Chanock and Rothermund, that the British failed impose English land law in both the Gold Coast and Nigeria. Rather, the British creatively utilized colonial law, an amalgam of common and customary law, to develop a legal system that enabled them to maintain peace and order, one of their principal political objectives being peacefully to exploit indigenous resources.

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Rothermund’s thesis is similar to the view of the Critical Legal Theorists that the British used law for political purposes, to enable European exploitation of African resources.

Kirstin Mann’s and Richard Roberts argue that law both facilitated and restrained colonialism as well as provided a window through which to view colonialism. Similarly to Rothermund, they see the British as purposefully utilizing both common and traditional law to enable them to exploit Gold Coast resources, but, as Woodman argues, because the British felt compelled to respect judicial decisions, they were unable to carry out their initial intentions. Moreover, I contend that the judges’ shift from directly imposing common law land tenure to creation of a hybrid colonial law where British judges determined what traditional tenure was amounted to strategy and technique. Similarly, Beverly Grier urges that the interests of British capital required that the bulk of the population remain in traditional communal economic and political relationships because cocoa was cheaper if produced on non-alienable family or stool land.\(^{62}\) Contrast these views with that of A. L. Loveridge, who served for years in the Gold Coast administration, who argues that traditional tenure impeded economic development by obscuring the nature and extent of the rights of individuals participating in communal title.\(^{63}\) As I shall show hereafter, this view ignores the well developed decisional law defining the rights of such participants as undivided interests in the property entitled to be consulted and to agree with respect to alienation of property.


Chanock argues that both the native peoples and the British used law to compete for resources and that British reluctance to impose individual land tenure was evidence of their desire to encourage development of peasant agriculture. In this he is consistent with Grier’s view. While the archival evidence found in London and Accra supports the British desire to create and maintain a peasant agriculture, the motive for such desire is less obvious. Clearly it was easier for British firms that purchased Gold Coast cocoa to deal with an atomized market, but there is no evidence to prove that British opposition to plantation agriculture was motivated by a desire to support British chocolate manufacturers. It could as easily be, as Harrington argues, that the role of the British was to assist the natives by “‘grafting’” on to indigenous institutions, particularly judicial institutions, such British ones as would push the natives toward modernization and make them part of “civilized nations.”

Frederick Cooper, one of the leading experts on West African history builds on and criticizes both Berry’s reliance on customary law and nationalist historiographies. As Cooper has pointed out, some of these “reveal the hypocrisy of Europe’s claims to provide models of democratic politics [and] efficient economic systems . . . ,” demonstrating both the “stultifying effect” of colonialism as well as the dead hand of tradition that colonialism inconsistently and contradictorily supported.

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taken another look at British African colonial history as written by post-independence African historians. He argues that many such historians privilege early resistance and emphasis on sovereignty but, he says, sovereignty was not the only, and perhaps not even the main issue for many African societies. Also involved was a “history of small-scale producers and merchants for whom the overseas connection offered opportunities they did not want to give up as well as oppressions they wanted to contest.” Cooper points out that recent studies see the anti-colonial struggle also in terms of protecting the power of certain elites to exploit the people and the privileges of the ruling class. Cooper seeks to rethink the nationalist metanarrative, pointing out that some of the greatest economic successes, of which cocoa production on the Gold Coast stands out, did not depend on colonial initiatives but were inspired by Africans themselves and do not fit within the bounds of subaltern narratives.

Cooper concludes that understanding colonialism requires a social analysis of power relationships, that these relationships were not entirely one way and that western ideas of reason and progress could be and were utilized by colonized people for their own purposes. Examples of this approach may be seen in some of the settler colonies of southern Africa, colonial governments reduced their commitment to involvement in British justice in favor of the traditional authorities who would be able to exercise some

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control over detribalized industrial workers.\textsuperscript{69} Finally, Cooper concludes that the weakness of some post-colonial states grew out of the territoriality displayed by those traditional elites privileged by the colonial administration. This was not true in the Gold Coast, where the chiefs, being subject to replacement by their subjects, were weaker than they may have been elsewhere but where they could, as long as they were supported by their subjects, withstand pressure from the colonial administration as, for example, their ability to weaken forestry legislation to allow them to continue to exercise some measure of control over lands subject to their control. The problematic relationship between Britain and the traditional authorities is also exemplified by its confused and anemic land policy. The Colonial authorities were convinced that control of the use of land not under cultivation should lie with the administration, but they were not able to carry out such a policy because of strong opposition by a unity of coastal and traditional elites. They also believed that control of concessions by the chiefs should be subject to administrative, not judicial, oversight and approval, but they were unable, despite strong support from a commissioner and a departmental committee, to achieve such a result. Britain’s attitude toward development of Gold Coast resources is not necessarily manifest through judicial administration. However, one may note the repeated failure of the British executive to enact legislation to regulate land tenure or land use or to create forest reserves over the objections of indigenous authorities that such legislation trespassed on their rights to own and use their land as they saw fit.

Lastly, the colonial administration was able to enact legislation toward the end of

the period under consideration in this dissertation that would limit severely, if not eliminate entirely, the authority of the chiefs to operate indigenous tribunals, albeit such courts were supposedly strengthened and made less oppressive to encourage the people to make more use of them. Nevertheless, a special commissioner sent to study operations of the indigenous tribunals found that such legislation did not eliminate imposition of excessive costs and fees although the reforms enacted in 1944 did reduce or eliminate entirely the control of the traditional authorities over those courts and introduced into them educated members of the urban elite. Indeed, subsequent commissions recommended further reforms to reduce further the influence of the hereditary authorities in the hopes of eliminating what was determined to be continuing corruption.

The British, in their efforts to rule indirectly by supporting traditional authorities, Mahmood Mamdani argues, transformed a decentralized tribal government that was subject to control by councils and potential destoolment into a decentralized despotism.70 The chiefs’ courts were seen by them as an arm of their chiefly power and permitted them to coerce litigants into paying the fines and fees that, given British failure to support the chiefs financially, amounted to their main source of revenue. As we shall see, British oversight, as weak as it often was, may have alleviated but never eliminated this coercion. Having elected to support the traditional elite as opposed to the relatively new elite of the educated classes and having limited the jurisdiction of the British courts leaving oversight of the native authorities to what Mamdani calls “the

administrative guidance” of overworked District Commissioners, the British can readily be said to have enabled this form of corruption that continued onto the eve of independence and afterward.71

**Sources and Methodology**

As noted above, most of my sources are in archival documents consisting of communications between the colonial administration and the Colonial Office in London as well as internal communications between various members of the colonial administration in London and Accra. I found no inconsistencies in the vast majority of the documents consulted and thus feel comfortable in relying on their veracity. In these communications, I looked for the motivations underlying them, particularly when they revealed some dispute or disagreement between the colonial administration and the Colonial Office. Often the answers to these questions were revealed in the documents themselves or in a subsequent interchange.

By the nature of the documents seen in the archives, the voices of the indigenous people of the Gold Coast are rarely heard. Trevor Getz looks at this phenomenon in his discussion of the problems of Abina Mansah, noting that historians are at fault for “tending to see ordinary individuals as less important and so they have chosen not to write about them.”72 However, he says, historians have begun to look at sources for the voices of ordinary actors, such as court cases and newspapers. I, too,

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look at these sources as well. Abina’s story was found in the report of her judicial proceeding, *Regina v. Quamina Eddo*, in the court of an English Judicial Assessor.  

Moreover, an occasional communication from an important local authority, as, for example, Nana Ofori Atta, the Paramount Chief of Akyem Abuakwa, may be found in reports of legislative proceedings or letters to colonial officials or in reports of his indigenous tribunal, but except as relayed or interpreted by District Commissioners or as detailed in a judicial report, or newspaper article, we do not generally hear what the “people” say. In sum, then, this is a history of a bureaucracy, governmental officials at different levels charged with ruling a subjugated people. It looks at a particular and somewhat narrow aspect of colonialism, the administration of justice, from the point of view of the colonial masters rather than from that of the governed. As such, it is a history written by the victors and many of the points made herein are those of the colonial authorities and rarely consider the views of the colonized, although I do look at the effects on the colonial subjects of the decisions and policies of the British overlords. Acknowledging that I write from the perspective of the British authorities, my narrative is, as Michel-Rolph Trouillot puts it, necessarily just one of many possible narratives with an effort to make it more than just a “pretense of truth.” I further acknowledge that the past I am exploring is not again in Trouillot’s words, “a fixed reality” and that I look at the issues I discuss both as narrator and actor.

**Main Arguments**

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75 *Ibid*, 147, 150.
I strive in this study to demonstrate Britain’s quandary in its efforts to assure the efficient delivery of justice in both British and indigenous courts while governing through local authorities whom they did not trust to deal honestly in their courts. I show that Britain never found a way out of this dilemma until the major, and only partially successful, reforms of 1944. I also demonstrate that Britain was inconsistent in the formulation and enforcement of policies dealing with the indigenous courts and land tenure thus allowing a major space for indigenous agency in a colonial context.

This study also shows that despite lip service to judicial independence, the administrative authorities made many efforts to bend the judiciary to perceived administrative requirements, particularly in dealing with issues arising from concessions to European mining interests. It also sought, more successfully, to limit the jurisdiction of the British courts in land disputes between and among indigenous litigants as well as in the creation and administration of forest preserves. I show that the influence of the administration on judicial activity was most obvious in the actions of District Commissioners who carried out both administrative and judicial functions.

The evidence I found in the archival materials supports Woodman’s view as to Britain’s failed efforts to replace customary law with European ideas. It also demonstrates the failure to impose upon its colonial subjects a legal regime to which they expressed united opposition. One only has to look at the proceedings of the West African Lands Committee appointed by the Colonial Office to review land tenure and concession problems and which concluded that customary tenure rather than European tenure was more appropriate to the indigenous peoples or the failure in the 1920’s to enact a Statute of Limitations and thus to impose European norms as to land holdings
to demonstrate such failure. In sum, I build on and confirm Thomas Hodgkin’s view of the colonial state as a feudal entity, but one allowing some space for the agency of both the educated class, those trained in British schools, lawyers, ministers and physicians as well as successful merchants, all of whom I call the colonial elite, as well as the indigenous traditional authorities.

Chapter Outline

The chapters of this dissertation discuss different aspects of the administration of justice in the Gold Coast, including the dual system of law and justice, British and “Native,” criminal and civil. I look at the appointment of British judges, the manner in which matrimonial law and succession was legislated and carried out and the way in which the British dealt with customary land tenure and forest preservation policies.

In the next chapter, I outline the history of British contact with the Gold Coast from the early nineteenth century until and shortly after the creation of the Colony in 1874. I discuss the establishment of what came to be known as a “Judicial Protectorate” by Captain George Maclean, the apparently voluntary execution by many of the chiefs of an agreement, known as the Bond, giving the British jurisdiction in serious criminal matters, the continuous and sometimes reluctant intensification of British involvement in the affairs of the indigenous population, the creation and brief existence of a confederation of Fanti states the existence of which enraged the British Governor. I discuss the expanding role of British judges who sat as assessors in Native Tribunals and their gradual assumption of decisive roles in determining disputes between natives. Finally, I describe the creation of the Gold Coast Colony and and the establishment via a Supreme Court Ordinance of British courts.

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Chapter III discusses the qualifications of the judges who manned the courts established in 1876, their social origins, how they came to be recruited and appointed, their training and issues involving judicial independence. I look at transfer and promotion of the judges and their tenure in general. I also examine the conflicts inherent in the duties of District Commissioners who served in both administrative and magisterial capacities. In Chapter IV I briefly describe the lives and work of four significant Gold Coast Chief Justices who led the Gold Coast Supreme Court for more than forty five years in the nineteenth and twentieth centuries. I discuss their impact on Gold Coast law and their relationships with the executive arm of government. I chose these judges because of their impact on the hybrid law that developed in the Gold Coast after 1874 and their relationships with the Executive, both abrasive and cooperative.

Chapter V deals with the appointment of African judges. Between 1907 when the first African Supreme Court Puisne Judge retired and 1935 when an African was appointed to that tribunal, no indigenous judge sat on the Gold Coast Supreme Court, although from 1919 on several Africans were appointed to police Magistracies. These appointments seem to have been made only reluctantly, as much for political purposes as for responding to judicial needs. Although appointed in the same manner as their European colleagues, they had to overcome higher hurdles to achieve the positions they came to hold.

Having discussed in detail the personnel of the British courts, I turn, in Chapter VI, to the jurisdiction of these courts in a dual system of justice divided between British and Native Courts. I discuss the narrowing of Supreme Court jurisdiction over the years
from a plenary jurisdiction to one in which the most important cases, those dealing with land, were confided primarily to traditional tribunals, the requirement of the Supreme Court Ordinance of 1876 to apply customary law to cases involving indigens and determination of such law, through the testimony of “experts” whose opinions the judges were free to accept or reject, thus enabling the British judges to create “custom” that often was unknown to the indigenous peoples. I describe the pressure for and the complexities involved in creating a super-colonial appellate court in the 1920's and disputes over debtors’ rights in the British courts.

Chapters VII, VIII and IX go to the heart of this study, the development of indigenous courts under the British, the latter’s continued unhappiness with the manner in which those courts operated and their successive efforts to cause them to deliver justice while, at the same time, supporting the prestige of the traditional authorities until 1944 when the role of the chiefs as judges was reduced and almost entirely eliminated.

The first of these chapters discusses the efforts to enact and enforce a statutory scheme, a Native Jurisdiction Ordinance. By means of this scheme, Britain hoped to regulate indigenous courts, such that those not recognized in accordance with the terms of the Ordinance would not be recognized as other than arbitration or mediation panels. Chapter VII also describes the perceived inadequacies of the initial Native Jurisdiction Ordinance because of the lack of provisions to enforce their judgments and what critics saw as oppression of litigants through excessive fees and fines and rampant corruption and Britain’s efforts from 1894 to 1910 to revise the initial ordinance to correct such perceived defects, the opposition to such efforts by the Chief Justice of the Supreme Court who argued that limiting access to British courts as the proposed
ordinances provided would contravene what he believed was the desire of a huge majority of native litigants to seek British justice rather than to submit their disputes to traditional chiefs. I note the ultimate support for such limitation by African unofficial members of the Legislative Council who represented the educated elites of the coastal towns.

Chapter VIII describes the failure of the 1910 Amendment Ordinance to satisfy the requirements of inexpensive and impartial rendition of justice by the Native Tribunals because of repeated and lengthy adjournments of hearings and continued imposition of excessive fees and fines and further efforts to amend it because of opposition from both elites and chiefs, the latter of which objected to perceived restriction of their traditional powers to impose such fees and fines as they saw fit. Finally the British turned the process of drafting an amendatory ordinance over to a group of chiefs who consulted widely with their colleagues and the British Administration resulting in a 1927 Native Administration Ordinance that aroused widespread opposition from the coastal elites who charged that the Ordinance gave the traditional authorities so much authority as to enable the chiefs to tyrannize not only their direct subjects but the elites as well.

Chapter IX describes repeated amendments, essentially band aids, to correct numerous shortcomings in the 1927 Ordinance, primarily the continued oppression of litigants through excessive fees and fines shared among members of the tribunals who represented only the chiefs and their councillors. It discusses reform proposals by

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76 Most if not all of the traditional chiefs were selected by the elders of the community from a small coterie of “royal” families.
British officials on the Gold Coast, Lord Hailey and a Committee of colonial executives and Africans all of whom agreed on the necessity to reduce the number of tribunals, to reduce the number of judges who sat on the tribunals and to inject a measure of professionalism into the administration of traditional justice. The result was a Native Courts Ordinance that took the rendition of native justice out of the hands of traditional chiefs and their councillors and put it into those of a broad group of local people, including educated Africans. It concludes with a brief description of post-1944 studies of the failures of the traditional courts to satisfy both British requirements to provide justice and the demands of local peoples.

Chapter X concerns British criminal procedure, an essential element of the foremost manner in which British colonialism was imposed on the indigenous population and had been since prior to 1844. Supreme Court judges held regular Assizes during which all manner of criminal actions were tried in accordance with English common and penal law pursuant to a Criminal Procedure Ordinance, most with panels of assessors whose recommendations that court was free to disregard, but the most serious of which were tried by juries empaneled from lists of educated Africans and European residents in the same manner as would exist in England. It discusses one of the most notorious examples of the trial for capital murder of an Englishman, Dr. Knowles, accused of killing his wife and who was tried by a judge without either jury or counsel to defend him and his ultimate exoneration after appeal to the Privy Council.

Chapter XI delves into some aspects of matrimonial law and succession to the property of intestate decedents, again illustrating the relationships and frictions between British and native law. Marriage among Gold Coasters was generally a matter of
customary law and the property of married couples would descend upon their deaths according to customary law. 77 This law, for most of the people of the Colony, required that property of intestate decedents pass not to their spouses or children but to their matrilineal relatives. I describe the origins of the Matrimonial Ordinance that required those married pursuant to its terms to forego polygamy and to have their property pass in intestacy pursuant to English law, a patrilineal system. I go on to discuss pressure from the African community to amend the Ordinance to permit at least a portion of an intestate’s property to descend pursuant to customary law and the treatment of children born to a couple prior to their Ordinance marriage.

Chapters XII and XIII deal with the manner in which land disputes were handled in both the indigenous and British courts and legislation involving concessions and forestry. Chapter XII describes how the British courts through rulings in individual cases altered traditional communal land tenure toward the European concept of individual tenure so as to make land more readily alienable and subject to development. It discusses efforts by the colonial administration to control alienation of land by legislation in order to impose European tenure and the failure of such efforts when the Secretary of State, Joseph Chamberlain, accepted the protests of the African community represented by members of the coastal elite and refused consent to legislation that would have placed all African owned land under British control. It describes enactment of a Concessions Ordinance designed to prevent the unregulated

77 Jean Allman and Victoria Tashjian, “I Will Not Eat Stone,” A Women’s History of Colonial Asante, Portsmouth, NH: Heinemann, 2000, describe customary marriage in Asante as a “fluid, dialogical process” that was not expected to last a lifetime, divorce was easy and mutual and could be granted for any reason or no reason at all. Ibid., 75.
alienation of native lands to European speculators and the continuing efforts of the executive authorities to wrest control of the concession process from the courts under whose aegis control of the concession process was placed. It discusses appointment first of a commissioner and then of a West African Lands Committee to review land tenure and alienation, the recommendations of these bodies to eliminate the judicial role in the concession process and the ultimate failure of the British government to carry out those recommendations or to enact several subsequent proposals for reform of land regulation all designed to make land more readily alienable, presumably to British investors.

Chapter XIII discusses efforts that began in the first decade of the twentieth century to preserve the rain forests from destruction. It looks at Nigerian precedents, a comprehensive scheme that provoke attack as an effort to deprive the traditional owners of the land of their rights to use such land as they chose and the unwillingness of the British government to impose any effective method to protect the forests until the latter part of the 1920's.

These chapters evidence the inconsistency of British policy and the feebleness of their efforts to enact policies they strongly believed to be necessary for the development of the Gold Coast economy as well as preservation of its natural resources.
CHAPTER II – BRITAIN IN THE GOLD COAST BEFORE
CREATION OF THE COLONY: 1662-1874

Any discussion of the manner in which the British administered justice in the intense Gold Coast should begin with a brief description of how the British came to be there and how they came to be involved with the internal affairs, particularly the judicial affairs, of the indigenous peoples. British involvement involved a number of frustrated reforms perhaps deriving from an inconsistent series of efforts at government and seven wars with the Ashanti state that bordered what became the Gold Coast Colony. Nevertheless, the arc of more British involvement in local judicial determinations was continuous. It ran from the initial efforts of Captain George Maclean to promote peace among indigenous states and their peoples that abutted the British forts the interest of increasing trade through appointment of permanent judicial officials to hear claims brought to them by such neighboring peoples. Finally it led to the establishment of a Colony with a statute based system of courts and justice.

Initially, I describe the region and its people prior to the administration of Captain Maclean, the manner in which the Akan and Twi peoples came to the Gold Coast, the relationship between the coast Fanti and the inland Ashanti and Britain’s delegation of government to merchants. Then I discuss how Captain Maclean came to become the supreme judicial figure in the Gold Coast Settlements and his relations with the Metropolitan Government. Finally, I describe British judicial administration of those settlements and the events that led to the founding of the Gold Coast Colony, including the Fanti Federation, the decision not to leave the Gold Coast but to create a colony
and the drafting and passage of the basic ordinances that created the Gold Coast Supreme Court. This chapter demonstrates the British Government’s indecision as to whether and, if so, how it extensively it should be involved in the administration of what ultimately became the Gold Coast colony, whether by private administration by merchants engaged in trade on the Gold Coast, somewhat akin to how Britain dealt with other trading entities that also exercised public authority such as the East Africa Company, or direct administration by the Government in London. Both methods were tried before the merchants were permanently removed from the duty and power to administer what were then coastal settlements. It also demonstrates the reluctance of the metropolitan government to intervene in the administration of justice by the indigenous leaders and the increasing intervention in such administration in large measure because trade disputes between British and local merchants and the necessity, for purposes of commerce, to maintain peace with and amongst the local population.

Historians dealing with the nineteenth century Gold Coast and British involvement there concentrate on the political implications, increasing British imperialism and nascent nationalism. However, A. P. Newton, while not writing extensively on the subject, trenchantly argues that an 1844 treaty known as the “Bond,” was the “principal title deed of the Gold Coast Protectorate.”\footnote{A. P. Newton, “British Enterprise in Tropical Africa,” in \textit{The Cambridge History of the British Empire}, Vol. II, Cambridge: Cambridge University Press, 1961. edited by J. Holland Rose, A. P., and E. A. Benians, Vol. II, pp. 635-679. 659.} The evidence cited herein supports this argument. Similarly, the evidence supports the argument of W. Ross

Johnston that the submission of the chiefs in executing the Bond of 1844, resolved the ambiguities of jurisdiction that existed because of Maclean’s *ad hoc* actions and, inferentially, promoted the increasing British involvement in indigenous affairs. In this last respect David Kimble briefly discusses the British “judicial protectorate. He accurately points out that the roles of the Judicial Assessor, a position essentially created by Captain George Maclean, which was to assist local chiefs in resolving disputes and that of Chief Justice, which was to serve as the primary judicial authority in British courts, were merging and that “the regard paid to local customs became more and more perfunctory.”

In these early days, following the abolition of the slave trade, the *raison d’être* for the British presence on the Gold Coast was mercantile: trade in commodities and manufactured goods. Richard Huzzey, a historian of the anti-slavery movement, who points out that the principal result of a parliamentary inquiry into the manner in which Captain Maclean governed the British settlements and his creation of a judicial protectorate, induced by a report made by Richard Madden was an increase in state control over the Settlements and a reaffirmation of the “civilizing effects of trade.” He is supported by John D. Hargreaves, who describes the primary importance of trade and

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the necessity to use commerce as a means of civilizing the Africans of the Gold Coast.\(^5\) This focus on trade and commerce explains in some measure the reluctance of the British Government to respond to repeated pleas by the colonial governors for additional judicial personnel or to spend money on other than infrastructure improvements that would do other than benefit trade.\(^6\)

The manner in which the British administered justice in the nineteenth century Gold Coast was not unique. In Nigeria, merchants established a Court of Equity to settle disputes between British firms and local traders as early as 1850.\(^7\) Treaties were imposed on local chiefs establishing the British court of equity as the supreme judicial authority in the country.\(^8\) Following establishment of a colony in Lagos and protectorates in Southern Nigeria between 1861 and 1885\(^9\), the British created native courts whose authority emanated entirely from British recognition, choosing those who would sit on them from among men the British perceived to have leadership capabilities.\(^10\) In 1900 a Supreme Court was established for the Southern Nigeria


\(^8\) *Ibid.*


Protectorate that enforced English criminal law.\textsuperscript{11} Unlike the situation in the Gold Coast however, native courts had no legal status until 1906 when the colonial government issued a Native Courts Proclamation empowering to enforce customary law not “repugnant” to English ideas of natural justice.\textsuperscript{12}

The situation in other parts of Africa, however, was different. Thus, in Kenya where the colonial regime did not begin until 1890 as a result of the Congress of Berlin, little if any regard was given to indigenous courts until well into the twentieth century and all usual legal matters, both civil and criminal were handled by British courts, although the judges often considered and enforced customary law.\textsuperscript{13} In the segregated and often virulently racist colonial society in Kenya, the British appointed the chiefs who were permitted to become, in Swanepoel’s words, “increasingly dictatorial,” too often indifferent to the needs or demands of the people over whom they ruled.\textsuperscript{14}

\textbf{The Earliest Days}

The Akan peoples came to the Gold Coast in two waves between around 1200 and 1300 A.D. down the Volta Valley and later down the Offin and Pra rivers. Over the next several centuries, they spread east until they came into contact with the coastal Fantis. Both the Akans (a linguistic group that includes Ashantis) and Fantis spoke one


\textsuperscript{12} \textit{Ibid.}, 67.


\textsuperscript{14} \textit{Ibid.}, 43. Swanepoel attributes this attitude toward the hardening of the British response to what became the Mau Mau insurgency. \textit{Ibid.}
version or another of Twi. The Ga’s, Ewes and Krobos came from Nigeria at the end of the fifteenth or the early sixteenth century. All these indigens were matrilineal (although some Ga were patrilineal), territorial and chiefly. The Ga, who mainly occupied the towns, were patrilineal and the Chief (the Manche) was more beholden to his council than were the Akan/Fanti chiefs as his was more a spiritual position than a secular one and was not hereditary.\textsuperscript{15} By the beginning of the seventeenth century, the Akan states of the coastal region were being well established there and inland.\textsuperscript{16}

The Portuguese navigators Jao de San Toros and Pedro de Escobbar discovered Oro de la Mina in 1471, and in 1482 Diego d’Asambuja built Elmina Castle on rented land. Dutch, French and English followed to exploit the slave trade. The Dutch captured Elmina in 1637 effectively ending the Portuguese presence.\textsuperscript{17}

The English built Cape Coast Castle in 1662 as their headquarters. For almost two hundred years, the British evidenced no interest in a permanent presence on the Gold Coast, limiting themselves to small forts from which they conducted trade, first in slaves and later in tropical commodities. Brodie Cruickshank, who served as a judge in as well as governor of the Gold Coast settlements during the mid nineteenth century and whose memoir, \textit{Eighteen Years on the Gold Coast of Africa}, is one of the most important primary sources for a history of those settlements through that period, expresses most eloquently the motivation for the British imperial venture as seen at that time. Climate precluded, he says, armed conquest and settlement by Europeans even

\textsuperscript{15} Kojo Kwakyi Anti, \textit{The Legal Institutions of the Gold Coast}, University of Leeds, 1957. 4-5, 21.
\textsuperscript{16} Seth Amaoko Owusu, “Political institutions of the coastal areas of the Gold Coast as influenced by European contact,” M.A. Thesis, University of Chicago, 1964, 2.
\textsuperscript{17} \textit{Ibid.}, 6-7.
were intermarriage, an impossibility from the European perspective, to take place. Thus he argued, the only way to raise the Africans to a European standard of civility, “a conquest far nobler than the warrior’s sword has yet accomplished, a conquest born of Christian charity,” was to institute strong government, including “an efficient judicial system suited to the state of social progress,” – implying that it would change as the Africans became more and more Europeanized – as well as schools and improvements in infrastructure.

Cruickshank foresaw a permanent role for the British, but in fact they had no coherent imperial policy but shifted between abandoning the Gold Coast forts to the merchant community at the behest of the Treasury and retrieving them at the importuning of missionaries and humanitarians intent on quashing the domestic slave trade. Nevertheless, they did, albeit reluctantly and over a period of years, establish what came to be referred to as a “judicial protectorate,” the establishment of an informal jurisdiction to resolve disputes brought to them by the Fanti peoples of the coastal areas abutting their trading forts. Very shortly after such judicial protectorate was first asserted, a gap opened between the periphery, the administrators in the settlements, and the center, Government officials in London, about the propriety of such protectorate and the extent to which English law should be imposed. Thus, unlike their countrymen in India, the British were present on the Gold Coast for almost two hundred years before they created formal courts for the resolution of disputes between Europeans and Gold Coast Africans, nor did they at any time during the first nine decades of the

nineteenth century seek to change the rules governing property.  

From 1618, when the Company of Royal Adventurers Trading to Africa (the “Royal African Company”) was chartered, until 1822, the settlements on the Gold Coast were owned and operated by private merchants, first through the Royal African Company and then, from 1750, by the Company of African Merchants, whose directors sat in England and appointed officials to govern the settlements in West Africa. Until 1807, Europeans in general and the British in particular had nothing to do with African politics. They paid rent to the Fanti states in which their settlements were located in the form of “Notes” held by the Fanti kings and were subject in their dealings with Africans to the customary law of such kingdoms. Many British merchants objected strongly to much of this customary law such as that which held that beached ships escheated to the king of the territory in which the beach was located and that upon the death of a European merchant, his goods passed to the king. Nevertheless, they resolved their disputes through the process of “palaver,” an action in the customary court.

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19 The leading expert on the imposition of European law on India and Indians, Bernard Cohn, has written that “One of the first problems confronting a colonial power after establishing de facto or de jure sovereignty over a new territory is to set up procedures for settling disputes arising within the dominated society, and to establish a whole range of rights in relation to property and obligations of individuals and groups to one another and to the State.” Bernard S. Cohn, “From Indian Status to British Contract,” The Journal of Economic History, Vol. 21, No. 4 (Dec. 1961): 613-628, 613.


This is not to say that British authorities ignored the dispute resolution process as it related to their own merchants and even to those involving only Africans. As early as the mid-eighteenth century, merchant governors intervened to mediate disputes between and among their Fanti neighbors. Peace and order being the principal precondition for trade, the British merchant authorities offered their services in order to prevent disruption of that trade. In 1792, Archibald Dalzel, Governor of the Settlements, established a permanent court at Cape Coast Castle and together with the chiefs and elders as assessors, tried all cases among natives from Cape Coast and neighboring Fanti states. In 1802, the Governor entered into a “convention” with the Cape Coast chiefs for the latter to keep the peace on penalty of forfeiture of goods to the Royal African Company, a penalty which was no longer enforced after Dalzel left the Settlements. Another Governor of the forts, McCarthy, presided over trials and gave judgments in cases involving mulattos who resided up to four miles from Cape Coast Castle. Notwithstanding being told by chiefs that native law permitted the accused to do so, McCarthy gave judgment against a defendant accused of flogging a slave because he believed that English law was superior to and trumped native law. James Swanzy, a former Governor, testified before a Select Committee of the House of Commons in 1816-17 that even without any authority to do so, Governors accepted appeals from natives to decide cases between them and Europeans and even between

\[\text{21}(\ldots\text{continued})\]

them and other natives in accordance with native law and “English sense of justice.”

At this point the British made no effort to impose English law on Africans, although early missionaries, far removed from the coastal settlements pronounced judgment on marriage, inheritance and other legal questions that, they believed, bore on the morals of the community and did so on the basis of such principles of English law about which they had any knowledge.

In 1807, Great Britain outlawed the slave trade that had been the source of its profits (and those of the Fanti middlemen who bought slaves captured by Ashanti kings) threatening the well being of British and African merchants alike. The Ashanti, who had grown rich trading captives they had taken in their many wars for weapons and other British goods were unwilling to accept the demise of their economy quietly. They began to press their Fanti neighbors in order to gain direct access to the Europeans so as to benefit from the new legitimate trade without having to see the profits go to middlemen. Importuned by the Fanti for protection against increasing pressure from their traditional enemy, the British fought the first of a series of wars against the Ashanti, beating off an Ashanti invasion. In 1817, the British sent an embassy to the Asantehene, the King of the Ashanti, to negotiate a settlement of the outstanding disputes among the Ashanti, the Fanti and the British. The resulting “Bowdich Treaty”

provided for the transfer of the Notes on the British forts\textsuperscript{25} to the Asantehene, authorized the British Governor to mediate between the Ashanti and the coastal peoples and provided that “The Governor-in-Chief reserves to himself the right of punishing any subject of the Ashantee (sic) or Dwabin guilty of secondary offenses, but in the case of any crime of magnitude, he will send the offender to the King, to be dealt with according to the laws of the country.”\textsuperscript{26} The treaty did not define the terms “secondary offenses” or “crimes of magnitude,” thus permitting an interpretation that would have the British Governor trying any kind of criminal act. Indeed, as we shall see later, these imprecise terms were the source of much bloodshed.\textsuperscript{27}

In 1821, Parliament, acting under pressure from anti-slavery interests, dissolved the Company of Merchants and assumed direct control of the Gold Coast forts. On October 17, 1821, Letters Patent were issued giving effect to 1 & 2 Geo IV c.28 and creating a colony called the West African Settlements consisting of the Gold Coast settlements, Sierra Leone and the Gambia with its seat at Freetown. The Governor and Council sitting in Freetown were established as a court of record to hear appeals from

\textsuperscript{25} When the British originally established their forts, they gave the chiefs on whose lands the forts were built notes representing sums to be paid as rent.


\textsuperscript{27} Even prior to the provision of the Bowdich Treaty, intervention in disputes between merchants and the local authorities made the Governor particularly unpopular with some of the merchants. One such, Anthony Hutton, accused the Governor of wrongfully siding with the Fanti chiefs in a dispute to which he was a party: Hutton had insulted the chiefs by failing to pay to them the traditional Christmas gifts whereupon they ordered a boycott of him and his business. Hutton failed to obtain satisfaction from the Lieutenant Governor, the Governor or the Governor’s council and petitioned Parliament, asserting that the claims of Britons were being subjected to local customary law with the local chiefs and kings as judges. Anthony C. Hutton, \textit{British Justice in Africa}, London: J. Innes Wells-Street, 1816, §§ V-X, XII, XXIX.
courts in the Gold Coast settlements and the other parts of the colony. Appeals to the Privy Council were authorized, a Police Court and a Court of Requests were set up at Cape Coast, other “petty” courts were established at other points along the coast and officers in charge of the many forts were made Justices of the Peace. Soon British courts were being utilized by natives, 141 cases between natives were decided by various British officers assisted by native chiefs between May 1822 and June 1826.28

British rule could not prevent military disaster though as the Governor and 500 of his British and African troops were killed by a force of 10,000 Ashanti warriors in January 1824. As had happened elsewhere and was to happen in the Gold Coast again after the loss of a battle, the British regrouped. In 1826 a British contingent inflicted a serious defeat on the Ashanti. The colonial administration now proposed a treaty of peace that required the Asantehene to turn over to the British the Notes for the forts and to permit the Governor of Cape Coast Castle, the principal British fort, to act as arbitrator of disputes. The British Cabinet rejected the treaty because it had decided that the Gold Coast settlements were too expensive to maintain and determined to abandon them.29 It went so far as to send an officer in a naval vessel with orders to evacuate James Fort at Accra and Cape Coast Castle and to destroy both installations, but at the last moment the Cabinet changed its position responding once again to

29 Metcalfe, Maclean of the Gold Coast: the Life and Times of George Maclean, 1801-1847, 51, 57. Nevertheless, the British retained the Notes they had given to represent rent for their forts.
pressure from abolitionists "too strong to ignore and too earnest to deceive."30 Rather, yet again, the Government turned the forts over to a committee of London merchants who appointed seven local agents as justices of the peace and established rules for the conduct of business and government in the Settlements.31 No mention was made in the authorizing documents or the rules established by the London committee of exercising jurisdiction outside the Settlements.32

Indeed, twice in November 1828, the Colonial Office officials charged with supervising the colonies, informed the officers and merchants of the forts that they were not to exercise jurisdiction outside the forts even thought it would “promote peace, happiness and morality among the natives.”33 Nevertheless, the merchants construed the term “forts” to extend to and include “the persons and districts under their immediate influence and protection,” so that their courts tried crimes, even where chiefs were accused and settled inter-tribal disputes.34


31 The committee was an agency of the British African Company of Merchants made up of representatives of merchants doing business on the coast of West Africa chosen by those merchants under authority delegated by the British Government. Similar, but less powerful committees existed in Birmingham, Liverpool and Manchester. They were charged with administering the various forts that housed the British cocoa and other traders acting on behalf of their metropolitan principals.

32 J. J. Crooks, Records Relating to the Gold Coast Settlements from 1750 to 1874, Dublin: Browne and Nolan, 1923, 251-257 ("Crooks Documents"), letter dated 20th November 1828 from R. W. Hay, the Permanent Undersecretary of State in the Colonial Office. Then and until 1854 this agency was part of a combined War and Colonial Office. In 1854 this ministry was divided into the War Office and the Colonial Office, the latter under a Secretary of State for the Colonies. For ease of reference, I shall refer to the combined War and Colonial Office as the Colonial Office. See H. L. Hall, The Colonial Office: A History, Longmans, Green & Co. For the Royal Empire Society, 1937.


34 BNA CO 247/97, 11.11.1828.
The Arrival of Captain Maclean

In 1830, the London Committee appointed a Captain of Engineers, George Maclean, as President of the Council of Merchants in Cape Coast Castle. It can fairly be said that the beginnings of “real” British judicial imperialism on the Gold Coast are to be found in Maclean’s appointment. An extraordinary man, Maclean served at Cape Coast Castle as President of the Council, in effect Governor, from 1830 to 1844 and as Judicial Assessor from 1844 until his death in 1847. Although, as we shall see, he had numerous enemies among the merchant community, the verdict on Maclean is almost uniformly and universally superlative. Mary McCarthy argues that Maclean and most of his successors were very popular and appreciated by the chiefs and indigenous people in large measure because most of them had lived on the Gold Coast for lengthy periods and knew the customs and traditions of the people and because the skill of British judges attracted people to British courts in coastal towns where they could get justice that was cheap and convenient compared to what was available in Native Tribunals. One might consider it to be ironic that many of Maclean’s judicial determinations favored interests contrary to those of the merchants who appointed him. In fact this demonstrates the fairness and rectitude with which Maclean carried out his role as a judge, favoring only that which he believed to be right.

35 Even George Padmore, the Ghanaian Communist intellectual, described Maclean as a man of “great moral courage and high purpose.” Padmore, The Gold Coast Revolution, 29.

36 Mary McCarthy, Social Change and the Growth of British Power in the Gold Coast: the Fante States 1807-1874, Lanham, MD: University Press of America, 1983, 146. However, she goes on, by the mid 1860’s this view had been reversed by British racism in excluding African from judicial and administrative positions, in inflicting disproportionate punishments on convicted Africans and led to the belief that Africans could not obtain justice in British courts. Nevertheless the number of cases brought in British courts where they existed increased while those brought in Native Tribunals decreased. Ibid., 151-152.
Maclean approached his duties with a clear agenda. Finding the country unsettled and insecure and with trade moribund, he determined to make peace with the Ashanti and end the internecine quarrels among the Fanti kings. While not vital to his objective of creating a state of peace and order, Maclean felt that he also had to end human sacrifice and slave trading and the common practice of panyaring (taking as hostage the relative of a debtor as security for repayment) and to demonstrate by his own example the humane and impartial administration of justice.37 All of this for the purpose of promoting and extending British trade.38 It was, in Fage’s words, “a common sense policy for an administration founded upon mercantile interest,” and, he might have added, one whose resources were severely limited.39 Maclean placed magistrates in the settlements at Dixcove, Anemabu and Accra and went himself on circuit to sit in trials held by indigenous authorities. Gradually and tactfully, Maclean attacked those customs that most “affected the rights and liberty of the individual and with those laws which seemed to err unduly on the side of harshness.”40 However, such attack resulted in the exercise of jurisdiction without any legal basis, and, as we shall see, exposed him to attack by some in England who thought less well of him that apparently did the

37 Claridge, vol. 1, 405. Maclean’s prevailing on the Fanti tribes in the Treaty of 1831 to outlaw panyaring was considered at the time to be “a huge step forward in inter-tribal, and indeed, international relations.” Julie Watt, Poisoned Lives: The Regency Poet Letitia Elizabeth Landon (L. E. L.) And British Gold Coast Administrator George Maclean, 110.

38 The Gold Coast lawyer and intellectual, J. E. Casely Hayford, noted that Maclean well “perceived that England’s true interest in the Gold Coast was to make it an open market through which the trade of the hinterland might pass freely.” J. E. Casely Hayford, Gold Coast Native Institutions , London: Sweet & Maxwell, Ltd., 1903, 243.

39 Fage, Ghana: A Historical Interpretation, 111-112.

indigenous chiefs.

The new Governor quickly disposed of the first item on his agenda by summoning the Fanti chiefs to a conference at Cape Coast Castle to which he invited the representative of the Asantehene. He kept them together until they had reached agreement. Their treaty of peace, made in April 1831, provided for open roads and free markets and the settlement of all disputes by palaver rather than war. Perhaps most importantly from the British point of view, the 1831 Treaty incorporated by reference the terms of the aborted 1827 treaty, the most important of which provided that the British Governor, sitting with two or more “adjacent kings or chiefs as are available” would determine disputes among Britons and Africans. Maclean sat with his council in the capacity of an appellate court, reviewing the penalties imposed by customary courts to assure humane consideration.

In theory, Maclean was to be merely an advisor to the customary judges in the exercise of their traditional jurisdiction. In fact, he came to be the principal if not the sole decision maker with the indigenous judges acting as his assessors as to customary law. Maclean had no training in the common law and did not purport to rule on the basis of any English precedent. Rather, he decided on the basis of his imperfect

41 Claridge, vol. 1, 408.
42 Crooks Documents, 262-265.
43 Newbury Documents, Treaty of Peace, 27th April 1831, ¶ 7; 1827 Memo, ¶ 5.
understanding of customary law, the common law and equity.\textsuperscript{46} His decisions outlawed, among other things, human sacrifice, charges of crime on the basis of what Cruickshank describes as “the oracular dictate of Fetishism” and the repayment of dowries and expenses of support in all divorces except where the wife unjustifiably abandoned her husband.\textsuperscript{37}

Maclean’s popularity among the Fanti as an arbiter arose not only from his own judiciousness but from the unpopularity of the customary courts where impartial judgments were rare and, more often than not, were made on the basis of political expediency. Cruickshank observed that they were corrupt; a party had to bribe one or more of the judges just to get a hearing.\textsuperscript{48} The British Governor’s reputation attracted more and more judicial business, none of which he turned away despite grumbling from the chiefs who lost the fees and fines of cases now being heard by Maclean and his associates.\textsuperscript{49} He devised a judicial system giving most control to local authorities subject to being “tempered by a British overview.”\textsuperscript{50} The impact of his judicial work cannot be overstated. The noted Ghanaian nationalist and legal thinker, J. B. Danquah, said of him that Maclean “created regularity and law,” that his “main interest


\textsuperscript{50} Watt, \textit{Poisoned Lives}, 120.
was in the expansion and perpetuation of justice.”

And J. Mensa Sarbah, one of the most influential voices of early Gold Coast nationalism, a barrister and legal scholar and the compiler and editor of several books on Fanti customary law, wrote of Maclean’s work in brokering the 1831 Treaty and his subsequent judicial activity that he acted in strict accordance with the Fanti proverb that a neutral had the duty to try to reconcile struggling neighbors. Sarbah saw Maclean’s policy of respecting and supporting the chiefs and involving them in his decisions as a means of consolidating British interests.

The draft report of the 1912 West African Lands Committee appointed by the Colonial Office pointed out that even without specific records, it could be assumed that the cases that Maclean and his successors dealt with involved land boundary disputes and “reduced considerably internecine fighting and bloodshed.” The combination of the velvet glove of Maclean’s judicial activities and the iron fist of British power permitted British influence and jurisdiction to extend far beyond the Settlements into the interior.

It must be emphasized that no African litigant was compelled to bring his claim to a court in which Maclean or his colleagues sat. If they did so, they did so voluntarily. That being said, the advantages of dealing with the apparently dominant power, even if

51 J. B. Danquah, “The Historical Significance of the Bond of 1844,” Transactions of the Historical Society of Ghana, Vol. III, Part I (1957): 1-29, 20. Brodie Cruickshank observed that the courts of the indigenous authorities with Maclean or one of his deputies present became “a species of lecture room, from which the principles of justice were disseminated far and wide throughout the country.” Cruickshank, Eighteen Years on the Gold Coast of Africa, Vol. 2, 24.


53 BNA CO 578/117/1046, 10.

that power was rarely and carefully exercised, must have been apparent to even the
dullest litigant. Consequently, despite Maclean’s intentions to the contrary, the power
and influence of the indigenous authorities began to wane and the chiefs began to see
themselves as subordinate officers in a system where they were subject to the
oversight of the superior power.55

Despite his apparent success in pacifying the Fanti lands and increasing British
trade, Maclean and his administration were the subject of a number of complaints from
London abolitionists, principal among them that he took no steps to suppress domestic
slavery although the Settlements constituted British territory and the Abolition Act
applied there. In addition, he was criticized for acting without legal authority in asserting
jurisdiction over African litigants and chiefs. Parliament reacted to these complaints by
sending an agent, Dr. Richard Robert Madden, as Commissioner of Inquiry into the
Affairs of the British Settlements on the West Coast of Africa to investigate. His report
alleged that the local authorities attempted to impede his inquiry and was sharply critical
of Maclean’s extralegal and “informal” jurisdiction.56

A Select Parliamentary Committee to Inquire into the State of the British
Possessions on the West Coast of Africa, etc., heard testimony from a number of
witnesses, including one of Maclean’s magistrates, Francis Swanzy, who testified that
British exercise of jurisdiction was “forced upon us” by the Africans themselves. Asked

56 BNA CO 267/170; Newton, “British Enterprise in Tropical Africa,” 665. Madden was so hostile to
Maclean that he claims to have placed, at his own expense, a marker on Mrs. Maclean’s grave at Cape
Coast Castle that Maclean had previously left unmarked. Thomas More Madden, ed., The Memoirs
(Chiefly Autobiographical) from 1798 to 1886 of Richard Robert Madden, London: Ward & Downey, 1891,
118.
if he thought the Africans would be “most unwilling to see us withdraw our influence,”
Swanzy replied, “I am certain they would be most unwilling; it would be a total loss to
them. . . .”

Contrary to Madden’s assertions, the Committee admitted the merits of
Maclean’s administration and his good influence among natives, maintaining “peace
and security through exercising a useful albeit irregular jurisdiction among the
neighboring tribes and much mitigating and in some cases extinguishing some of the
most atrocious practices which had prevailed among them unchecked heretofore.”
The Committee acknowledged that Maclean gave judgments in criminal cases without
the proper legal forms, i.e. without a separate judge and jury, but concluded that
Maclean did a great deal of good in resolving civil disputes to the satisfaction of the
indigenous litigants albeit by exercising “a kind of irregular jurisdiction.” However, the
Committee recommended that a “Judicial Officer should be placed at the disposal of
the Governor to assist or supercede partially or entirely his [Maclean’s] judicial
functions” and that jurisdiction be “better defined and understood” and exercised by an
official, rather than a private person, provided that the litigants and their chiefs agree
that he should do so and that he decide not on the basis of English common law.

The Secretary of State, Earl Grey, accepted most of Parliament’s
recommendations, but saw the role of Judicial Assessor as being one to execute

57 Newbury Documents No. 134, Testimony of Francis Swanzy at Nos. 397, 817.
58 GNA ADM 5/3/2, iii.
59 Ibid., v, vi.
60 Newbury Document No. 134, Parliamentary Papers 1842, xi [551], v-vi.
justice rather than to administer law, indeed to be “quite independent of all positive law.” Nevertheless, neither Parliament nor the Colonial Office specified the extent of the jurisdiction of the Judicial Assessor or the manner in which he was to decide cases. Indeed, a memorandum from James Stephen, Permanent Under Secretary of State, eschewed enforcement of English law entirely. These documents demonstrate the start of a different approach taken by colonial administrators in Africa and bureaucrats in London with the former being more aggressive in asserting claims to decision making authority while the latter seeking, albeit without real effort or success, to rein in their people on the periphery and permitting the judicial officers.

In the absence of any express limitation on his authority, it is clear that Maclean saw his powers to be coextensive with those of a metropolitan judge. Responding to the concerns set forth by the Secretary of State and Parliament, Maclean wrote to the London Government, expressing his view of Britain as sovereign over the Fanti Kingdoms by reason of the treaties of 1829 and 1831 that had never been renounced. He noted that his summonses and warrants were issued with the same authority as if they had been issued by an English Judge in the United Kingdom and he and the other magistrates exercised civil and criminal jurisdiction over the population without any objection from them.  

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\[61\] BNA CO. 96/2, Memorandum by James Stephen, 3 December 1842.

\[62\] BNA CO 96/4, 2.2.44. Maclean always gave due deference to customary law. Indeed he denied the existence of “British” as opposed to English or Scottish law and said that the latter was not “applicable to a people whose wants, customs and feelings are totally different from those of Englishmen.” Watt, Poisoned Lives, 237. But cf. his view on the necessity of English law and custom for trade purposes, .
On March 12, 1843 Maclean was appointed to the office of Judicial Assessor.\textsuperscript{63} In April and August 1843, Parliament passed two pieces of legislation crucial to the exercise of legal jurisdiction outside the limits of the forts on the Gold Coast. The first, the Government of the Coast of Africa and Falkland Islands Settlement Act (6 Vict. c. 13), authorized the Queen and her Privy Council to ordain laws and create courts to enforce those laws as was considered to be necessary to promote peace and order for Britons “and others within the said present or future settlements.” The second statute, the Foreign Jurisdiction Act of 1843 (6 & 7 Vict. c. 94) authorized the exercise of jurisdiction anywhere in the world to the same extent as if jurisdiction had been obtained by cession or conquest.\textsuperscript{64}

The London authorities were uncomfortable with the manner in which Maclean accepted cases. Therefore, in December 1843, the Colonial Secretary instructed the new Lieutenant-Governor of the Gold Coast Settlements, H. W. Hill, as to the powers to be exercised by Maclean as Judicial Assessor, once again warning of the limitations of British authority:

As regards any powers to be exercised by Mr. Maclean among tribes not within British territory, as proposed by the Select Committee of the House of Commons . . . , I need scarcely observe that it must rest with the sovereign power in each Territory to authorise or permit the exercise of any jurisdiction within that Territory, whether according to British Laws or the laws there prevalent.\textsuperscript{65}

It is evident that, at least up to this point, British policy was to refrain from

\textsuperscript{63} BNA CO 96/5, Dispatch from Lord Stanley, Colonial Secretary, to Maclean.

\textsuperscript{64} It should be noted that the Foreign Jurisdiction Act authorized British courts to determine the existence and extent of their own jurisdiction. W. C. Eckow Daniels, \textit{The Common Law in West Africa}, London: Butterworths 1964, 17.

\textsuperscript{65} BNA CO 96/4, Lord Stanley to H. W. Hill, 16 December 1843.
imposing British judicial authority on the indigens of the Gold Coast, albeit Maclean was
directed to continue his superintendence of the conduct of indigenous judges.\textsuperscript{66} This
seemingly contradictory directive was typical of Government policy during these years:
the Government could not clearly specify how and to what extent it wished to proceed.
Only the desire to limit British obligations was made clear, albeit only inferentially.
However, the failure of the Gold Coast and Falklands Island legislation to define the
extent of the administrative powers granted or the territorial limits in which those powers
could be exercised allowed local officials, whose policy considerations were not always
coeextensive with those of the London Government, to extend control over cooperating
chiefs whose submission to jurisdiction could be said by the Gold Coast colonial
officials to constitute at least tacit recognition of a British protectorate.\textsuperscript{67} The Order-in-
Council of September 18, 1844 issued under the cited statutes did not clarify the issue
as it merely asserted the existence of British jurisdiction over territories adjacent to the
forts. In principle, the statues and the Order-in-Council applied only to British subjects
and non-subjects who voluntarily submitted to British jurisdiction, but questions and
ambiguities remained and the method decided upon to resolves those questions and
ambiguities was a declaration of submission prepared for execution by many of the
local chiefs.\textsuperscript{68}

\textsuperscript{66} George E. Metcalfe, “After Maclean: Some Aspects of British Gold Coast Policy in the Mid-

\textsuperscript{67} Peter Burroughs, “Imperial Institutions and the Government of Empire,” in The Oxford History of

\textsuperscript{68} Johnston, 60-61; Ollenu, “The Influence of English Law on West Africa,” 22-23.
Carrying out his directive from the Colonial Office, on March 6, 1844, Lieutenant Governor Hill presented to a number of Fanti chiefs a proposed agreement to submit to British judicial jurisdiction in certain criminal cases. This Declaration of the Fanti Chiefs, a document that came to be known as The Bond, was a brief recitation (only three paragraphs) of the signatory chiefs' submission to the jurisdiction of a British judge in specified criminal cases. The chiefs acknowledged that “the first objects of law are the protection of individuals and property,” that human sacrifice and panyaring are “abominations and contrary to law,” and that “[m]urders, robberies and other crimes and offences will be tried and inquired before the Queen's judicial officers and the chiefs of the district, moulding (sic) the customs of the country to the general principles of British law.” The Bond was not a formal treaty and did little beyond documenting the preexisting situation where cases had been submitted voluntarily to Maclean and his colleagues. On its face, the Bond was limited to criminal jurisdiction although civil cases still made up most of the work of the Judicial Assessor.

69 Previously Maclean had negotiated a treaty with a Fanti coastal king, Kwecka Aka, whereby the king agreed not to execute anyone or sell anyone into slavery except after trial. This so-called Code of Laws and Regulations was a precursor to the Bond. Watt, Poisoned Lives, 147.
70 Metcalfe Documents, No. 145. Originally signed by eight Fanti kings, by the end of 1844, sixteen additional names had been added. Hayford, Gold Coast Native Institutions, 367-368
72 W. Brandford Griffith, Jr., argued that the Bond “was of small intrinsic value. It was only made, he contended, to satisfy the scruples of the Home Government for, "whether by virtue of our protection, or by consent or by usage or by usurpation, we had undoubtedly acquired the right of jurisdiction civil and criminal," which together with the British Settlement Act of 1843 (6 & 7 Vict. c. 13) and the Foreign Jurisdiction Act of 1843 (6 & 7 Vict. c. 94) provided a legal basis for the assertion of jurisdiction. Griffith says that the duties of Judicial Assessor were never defined except to say that “the system upon which Mr. Maclean has proceeded in the exercise of judicial powers over the natives is to be taken as the guide for the exercise of the powers of Assessor for the future.”” BNA CO 96/723/3, A Note on the History of the British Courts in the Gold Coast Colony with a Brief Account of the Changes in the Constitution of the Colony, 1, 14.
The chief significance of the Bond is to be found in the final phrase: “moulding (sic) the customs of the country to the general principles of British law,” as this phrase permitted the British judicial officer enormous leeway in applying the common law in situations where customary law should prevail. Indeed, almost immediately, the indigenous chiefs began to absent themselves from the joint courts, permitting Maclean and his assistants to decide cases on their own, the chiefs being satisfied to collect their fees while allowing Britons to assume responsibility for the imposition of punishment on Africans.73 Indeed, in October 1845, the Governor reported to London, that the Judicial Assessor had heard all but two of over one hundred cases alone, without the chiefs or native councillors.74 And this despite a directive from the Colonial Office that the Judicial Assessor was not to sit alone or to decide cases independently.75 Thus, notwithstanding any policy to the contrary, the colonial officials on the Gold Coast were assuming more and more responsibility for the administration of justice among the indigenous peoples.

The Role of British Judges After Maclean’s Death

After Maclean’s death in 1847, he was succeeded as Judicial Assessor first by Brodie Cruickshank and then by James Bannerman, neither of whom was a trained attorney. They followed the path established by Maclean, one that the Secretary of

73 Sarbah, Fanti National Constitution, 99; Metcalfe, Maclean of the Gold Coast: the Life and Times of George Maclean, 1801-1847, 307. Danquah claims that Maclean, who was not an attorney, drafted the Bond himself, thereby accounting for the vagueness of its terminology, but that he was uninterested in acquiring political power thereby but only in introducing British concepts of justice to the Fanti. J. B. Danquah, “The Historical Significance of the Bond of 1844,” 7.
74 BNA CO 96/7, 10.8.45.
75 BNA CO 96/4, 11.22.44.
State, Lord Stanley said should be “taken as a guide for the exercise of the powers of the Assessor in the future.” However, by 1850, the Judicial Assessors were being recruited from the English bar and these men were inclined toward the law they knew, the common law, rather than customary law, and they had to be reminded of the limits of their jurisdiction. As long as James Stephen held sway in the Colonial Office as the Permanent Undersecretary, the drift toward the common law would be held in check insofar as official policy was concerned as he was utterly opposed to the exercise of any judicial power at all outside of the forts. Expansion of English common law on the Gold Coast was also resisted by a number of indigenous authorities.

Despite such Colonial Office skepticism as to the propriety of Britons exercising judicial jurisdiction over Africans, Cape Coast Castle remained a long way from London and bureaucrats were able to exercise little supervision on the manner in which colonial administrators handled their day-to-day responsibilities. Moreover, by 1849, commerce on the Gold Coast had increased many fold and both European and African merchants had factors, or agents, at different places in the interior who kept books and accounted to their employers on the coast with a concomitant increase in the need for credit and a more efficient means of resolving disputes over nonpayment. Trading enterprises had relied on the local chiefs to assure payment because such chiefs wanted to attract

76 Watt, 240.
77 BNA CO 96/7, Minute of James Stephen, 1.28.46.
78 In 1852, the British had purchased the Danish forts and had thereby expanded their responsibilities on the Gold Coast considerably.
business to their towns and ports. Now such reliance, even with the presence of a Judicial Assessor, no longer seemed justified. Consequently litigation related to increased commerce also increased.

By virtue of a Supreme Court Ordinance enacted in 1853, the Judicial Assessor was to “assist” Native Chiefs but was also to fill the office of Chief Justice of the Supreme Court. The Governor-in-Council was to act as a local appellate court. Both the Order-in-Council and the Supreme Court Ordinance assumed consent and/or acquiescence of the natives as required by the Foreign Jurisdiction Act of 1843, 6&7 Vict. c. 13, C. 94. As it turned out, in the years after enactment of these measures, rather than the Assessor assisting the Chiefs, it was the Chiefs who assisted the Assessor. James Bannerman, now acting Governor, and concerned that judicial jurisdiction had grown beyond reasonable limits complained to the Colonial Secretary that the post of Judicial Assessor had evolved into “the supreme judicial authority, even where purely native law is administered” and that he had assumed jurisdiction in civil as well as criminal cases, albeit with the acquiescence of the native authorities.

In 1856, an Order-in-Council (4 April 1856), authorized the new Supreme Court

80 By successive ordinances in 1856, 1857 and 1859, the jurisdiction of the Supreme Court was expanded to include probate, equity and matrimonial matters. Daniels, The Common Law in West Africa, 24.
82 GNA ADM 5/3/16, 4.4.53, 13.
83 GNA ADM 5/3/14, Dispatch from James Bannerman to Lord Grey, Colonial Secretary, 5.6.51.
to hear cases in territories “protected by the Crown” to the same extent that they did in the forts (i.e. on British territory) without the cooperation of any local authority, although the consent of both local chiefs and litigants had to be obtained for the case to be decided pursuant to the common law.\footnote{GNA ADM 5/3/16, 4.4.53, 12.} Griffith, too, noted that from the creation of a Supreme Court for the forts and settlements in 1853 there was a dual jurisdiction in the Gold Coast: one dealing with matters inside the forts and settlements and one dealing with matters outside the forts and settlements. One person filled both positions as Chief Justice and Judicial Assessor. In the former incarnation, he was bound by English rules of procedure and evidence while in the latter he could make up the rules as he thought best. Gradually, according to Griffith, the two jurisdictions began to merge so that by 1865, Hackett, the Chief Justice and Judicial Advisor said that he sat in only one court, no chiefs sat with him and he heard appeals from native tribunals.\footnote{BNA CO 96/723/3, 15.}

The trend toward supremacy of the British judiciary enforcing the common law was accelerated by the enactment in 1858 of an Insolvency Ordinance that imposed the provisions of the English Insolvency Act on the Settlements.\footnote{Colin W. Newbury, “Credit in Early Nineteenth Century West African Trade,” 91.} Now, with a new court open to African creditors seeking redress under English law, the customary courts were being increasingly undermined as was the prestige and influence of the traditional authorities.\footnote{Kimble, 5.} Lieutenant-Governor Pine complained to his superior in Freetown, Sierra Leone, that such interference with the chiefs was harming British influence but he felt
powerless to rein in the judges.\textsuperscript{88}

Not every chief acceded to the influence of the British judicial authorities. King John Aggrey, King of Cape Coast objected strenuously to the reservation by the colonial authorities of appellate jurisdiction from decisions of the King’s court and the maintenance of a suit in the Judicial Assessor’s court against the judge that he had appointed. He complained to Governor Pine, accusing Captain Maclean of having “wrested from the hands of our kings, chiefs and headmen, their power to govern their own subjects.” For his pains, was ordered by Lord Carnarvon, the Secretary of State, to be exiled to Sierra Leone.\textsuperscript{89}

\textbf{Contradictory British Policies Leading Up to Creation of the Colony}

In the period leading up to 1874, colonial judges in the Gold Coast continued to exercise jurisdiction over Africans living outside the Settlements despite the rather feeble efforts by the Government in London to extricate Great Britain from the complications of governing a territory in which British interests were minimal. Thus, both the Foreign Office and the Colonial Office opposed any formal territorial expansion. It was their policy to limit Britain’s involvement to the suppression of the slave trade and to bring the advantages, as they saw it, of religion, civilization and commerce to the “miserable inhabitants of Africa,” by supporting merchants and missionaries in the least intrusive manner possible.\textsuperscript{90} Such a limited involvement

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\textsuperscript{88} BNA CO 96/41, 8.31.57, letter to Governor Labouchere from Lt.-Governor Pine.
\textsuperscript{89} BNA CO 96/67, 3.16.65, letter from John Aggrey to Richard Pine; BNA CO 96/71, 2.23.67, Lord Carnarvon, Colonial Secretary, to Mr. Blackall.
\textsuperscript{90} \textit{Hansard’s Parliamentary Papers}, 3\textsuperscript{rd} series CLXXVI, 1867-1870, 18 July 1864; John D. Hargreaves, \textit{Prelude to the Partition of West Africa}, 38.
\end{flushright}
seemed to be more and more difficult to maintain and the British Government never did do so. As will be seen below, the British Government executed a series of contradictory policies ultimately giving up all efforts to limit its involvement in Gold Coast affairs.

British wavering as to their proper and most desirable role on the Gold Coast continued into the 1860’s. In 1863, reacting to the refusal of the Lt.-Governor to extradite two fugitives, the Ashanti had invaded the Fanti states under British protection and inflicted a serious defeat on them and their British ally. Such defeat produced agitation in Parliament to give up the West African forts entirely. Some MP’s expressed complete accord with Captain Andrew Clarke of the Royal Engineers, a veteran of the latest Ashanti War, who urged the War Office to evacuate the forts since trade, he argued, could not be promoted by imposing “our institutions upon a people to whom they are neither suited nor applicable.”91 At the urging of these MP’s in 1866 Parliament convened a Select Committee to examine Britain’s then current role in the West African Settlements.

The Select Committee heard Sir Benjamin Pine, the Lieutenant-Governor, who told them that the Judicial Assessor/Chief Justice routinely held court and decided cases in the Queen’s name rather than the chiefs’ on the basis of British rather than the customary law that, he admitted, should be the basis for decision unless it was repugnant to principles of humanity. Moreover, Pine conceded, the manner in which

justice had been administered undermined native authority.92 Chief Justice William Haskell acknowledged that when he held court in the Fanti lands, he never sat with any of the local chiefs as it would be impossible for an English judge to sit collegially with a native judge to administer justice, and that he applied English law to the extent that he felt it to be consistent with “natural law.”. Finally he conceded that in matters between Britons and Africans, he decided on the basis of the common law or the British law mercantile.93

The Committee’s Report criticized the Judicial Assessor, arguing that he does not fulfill “the first intention of the office, assisting the chiefs in administering justice, but supercedes their authority by decisions according to his own sole judgment.” He introduced “needless technicalities and expense, and the employment of attorneys, when the natives had better speak for themselves.” The Committee resolved that the chiefs “should be rather left to exercise their own jurisdiction, with only an appeal, when necessary to the English magistracy.”94 This desire to limit the role of the Judicial Assessor was consistent with the Committee’s view that Britain was present primarily, if not only, to stamp out the slave trade and it looked forward to the day when Britain’s commitments could be reduced if not eliminated entirely. In the interim, it recommended a prohibition of all further territorial expansion or the assertion of any further protectorates in West Africa and that the existing protectorates be maintained

92 Irish University Press Series of British Parliamentary Papers (Shannon: Irish University Press, 1968), Vol. 5, 128. It should be noted that until 1900, no effort was made to assert any kind of judicial jurisdiction over the Ashanti or their territories.
93 Ibid., 262-264; see also Johnston, 65.
94 Ibid., Draft Report of the Select Committee on Africa (Western Coast).
only until the Fanti kings felt that they do without such protection, but they were not to be encouraged to rely on British help, even in the administration of justice. Finally, the Committee recommended that the Judicial Assessor return to the jurisdiction originally specified and cease to decide cases on any basis other than customary law.95

Gallagher and Robinson have implied that the Committee’s expressed desire to withdraw from West Africa was a mere sham and didn’t allow for the extension of existing settlements by colonial officials on the scene.96 The fact that six years later, Parliament enacted the West Africa Settlements Act (34 & 35 Vict. c. 8) that extended British jurisdiction to cover crimes committed within twenty miles of a British settlement or of an adjacent protectorate (emphasis mine) by Britons or persons not subject to any “civilized power” tends to support Gallagher’s and Robinson’s suggestion about British good faith.

At the time of the debate on this legislation, the Government advised Parliament of its unwillingness to withdraw so long as the Dutch remained. However, in 1872, Britain reached agreement to acquire all the Dutch posts on the Gold Coast. It was now the sole remaining European power, but before it could formulate a plan to withdraw, the Ashanti army again invaded the south.97 By the time that a substantial British Army under General Garnet Wolsey had defeated the Ashanti and occupied their capital of

95 Ibid.
Kumasi, all thought of withdrawal had vanished, Parliamentary opinion to the contrary notwithstanding. Now the rationale for remaining on the Gold Coast was the moral necessity to eliminate slavery.\textsuperscript{98}

British reluctance to impose European values beyond extermination of slavery was revealed to be less than honest by the circumstances surrounding the creation of the Fanti Confederacy, that the Africans created for themselves in 1868. A unique constitutional structure, the Fanti Confederation, an amalgam of the Fanti states of what is now southern Ghana, with its own executive, legislature and judiciary, was an act promoted by the spirit if not the letter of the conclusions of the Parliamentary Committee, but it evoked an almost violent response from British colonial officials in Africa as well as a felt need for a national army to protect the Fanti States’ role as middlemen in trade, a role threatened by Ashanti success in trading directly with the coastal and British merchants.\textsuperscript{99} In 1871, the Governor in Freetown, John Kendall, then responsible for the Gold Coast, characterized the Confederation as “too absurd and impracticable to be seriously considered,” done only for pecuniary gain by requiring tolls on goods passing through Mankessa between Kumasi and Cape Coast.\textsuperscript{100} The

\textsuperscript{98} Johnston, 77. In the mid nineteenth century, Brodie Cruickshank had written a more nuanced view of Gold Coast slavery as one of dependence and clientage where the “socially weak” entered into a subordinate relationship with a stronger patron. Slaves, according to Cruickshank, were only those purchased with money. See, Peter Haenger, \textit{Slaves and Slaveholders on the Gold Coast: Towards an Understanding of Social Bondage in West Africa}, Basel: Helbing & Lichtenhahn Verlag, AG, 1997, 3.

\textsuperscript{99} Francis Agbodeka, “The Fanti Confederacy, 1865-69,” \textit{Transactions of the Historical Society of Ghana}, Vol. 7 (1964): 82-123, 84. Agbodeka argues that many Fanti chiefs resented the assertion of jurisdiction by the British pursuant to the Bond of 1844 and did not feel compelled to honor such claims since the British had ceased to pay the chiefs the stipends for which the chiefs felt that British jurisdiction was the consideration. \textit{Ibid.}, 83.

\textsuperscript{100} BNA CO 879/4/2, Item No. 1, 12.16.71, Dispatch from the Governor of Sierra Leone and the Gold Coast.
Governor noted the report of Gold Coast Acting Administrator, C. S. Salmon, claiming that the people opposed the new Confederation, that he had declared the Fanti actions to be illegal, that he had arrested all members of the Confederation Ministry except those who disavowed any connection with the Confederation and that they would be tried in the Judicial Assessor’s court.\(^{101}\) The Governor justified his actions on the grounds that “[t]he authority of the protecting power [Great Britain] respecting life and death, the levying of taxes and the making of treaties with foreign powers and the \textit{supremacy of its courts} (emphasis mine) is well established by custom and precedent and could not be departed from without dire confusion resulting.”\(^{102}\)

Much to the surprise of those officials in West Africa, I am sure, the Secretary of State, Earl Kimberley’s response strongly criticized their conduct. “I cannot but regret that persons claiming to hold office under the Confederation should have been arrested” even though released on bail, he said. He continued that even though some provisions of the Confederation constitution were inconsistent with the Protectorate, the Administrator overreached. He should have warned the Confederation ministry that their constitution would not be recognized until approved by the Secretary of State, not arrested them. Kimberley directed the Administrator to stay any proceedings before the Judicial Assessor and to free everyone who had been detained. Her Majesty’s Government, Kimberley went on, does not want to discourage “legitimate efforts by Fantis to establish for themselves an improved form of government” although the British

\(^{101}\) \textit{Ibid.}, 12.4.71.

\(^{102}\) \textit{Ibid.}, 12.10.71.
Government must be consulted first. Despite protestations from an agent of the Confederation that "no rebellion against British supremacy, no defiance of British authority" was intended or shown, as well as Secretary of State Kimberley's expression of support for it, nothing more was heard about the creation of an indigenous Confederation subject to British rule.

**Creation of the Gold Coast Colony**

Those officials in the Colonial Office as well as on the Gold Coast desirous of remaining in power in West Africa prevailed over those eager to withdraw when, in August 1874, Her Majesty's Government issued a Royal Proclamation declaring the existence of a new Gold Coast Colony consisting of all of the coastal region of the Gold Coast to the Volta River on the east and the Ivory Coast on the west as well as the settlement of Lagos, Nigeria created by Royal Patent on July 24, 1874. The document declared the Queen's power and jurisdiction to administer justice, to outlaw panyaring, to abolish slave trading, human sacrifice, judicial torture and "other immoral, barbarous, and cruel customs," to take measures concerning domestic slavery and pawning (offering the services of one's self or of a relative as security for a loan or repayment of a debt) and to establish courts and enact laws. On August 6, 1874 an Order-in-Council issued implementing the power and jurisdiction proclaimed to exist in the Queen. It created a Legislative Council, gave the Governor a veto and authorized

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103 Ibid., 1.16.72, Dispatch No. 2.
104 Ibid., 1.2.72.
the Colonial Secretary to issue additional directions.107

In his initial dispatch to the new Governor, Colonial Secretary Lord Carnarvon rehearsed the history of the extension of judicial jurisdiction over the territories of the Gold Coast from the time of George Maclean, described the Bond but asserted that the definition of jurisdiction contained therein, “either from being an inadequate representation of the facts as they then existed, or from change of circumstances,” no longer represented the extent and scope of British power. He acknowledged that the Bond afforded no civil jurisdiction but justified, the exercise of such jurisdiction over the prior thirty years by the”sufferance and tacit assent” of the indigenous population. Negotiation of a new Bond was considered, he went on to say, but the recent victory over the Ashanti established British power and resources to the point that only “an act of sovereign power” was appropriate.108

With the creation of the Gold Coast Colony through the Order-in-Council of July 1874 came the necessity to erect a system of courts to administer justice. One of the main points of British policy in developing a system of British courts was to do away with, albeit gradually, the criminal jurisdiction of the native tribunals.109 In order to promote this policy, Sir Julian Paunceforte, the Legal Advisor to the Colonial Office recommended that the Supreme Court Ordinance to be enacted in the new Colony should take into consideration material similar to that found in the English Judicature

107 Metcalfe Documents, No. 303, Order-in-Council, 6 August 1874, Parliamentary Papers, 1875 [C. 1139], LII.
108 Metcalfe Documents, No. 304, Despatch from Colonial Secretary to G. C. Strahan, Acting Governor of the Gold Coast Colony, 20 August 1874, Parliamentary Papers, 1875 [C. 1139] 2-5.
109 BNA CO 96/112, No. 13, 9.27.1874, Minute from Sir Julian Paunceforte to Lord Carnarvon, Secretary of State, 10.1.1874.
Act, the Fiji Supreme Court Act then being drafted, ordinances concerning extraterritorial British courts in China and Japan, consular courts in the Middle East, the Hong Kong codes of civil and criminal procedure, the Hong Kong Summary Jurisdiction Ordinance (which afforded a model for small claims determinations), the Leeward Islands Summary Procedure Ordinance (which provided a good model for Magistrates’ jurisdiction), the Hong Kong Evidence Ordinance, the Indian Evidence Act, the Straits Settlements Penal Code and the English Criminal Procedure Act.\textsuperscript{110}

Paunceforte suggested Indian procedure for criminal cases as it authorized judges and magistrates to interrogate defendants. He sent copies of all of this legislation to the current Gold Coast Chief Magistrate, David Chalmers, who had been tasked with drafting such an Ordinance. There were to be no civil juries, but the judges were to be authorized to associate with them chiefs as assessors in appropriate cases.\textsuperscript{111} Since a Criminal Procedure Ordinance was to be prepared at the same time, consideration had to be given to whether trial by jury was applicable to the Gold Coast and if so whether to all or only to some criminal cases: “having particular regard to the fact that a European jury will not do justice to the case of a coloured man and that a black jury is quite worthless.” Edward Fairfield, a relatively junior but influential young officer, recommended jury trials only for capital cases.\textsuperscript{112}

The Court that Paunceforte envisioned would have all the jurisdiction of the Supreme Court of Judicature of England, law, equity, criminal assizes, probate and

\textsuperscript{110} Ibid.
\textsuperscript{111} BNA CO 96/112, No. 13, 9.27.1874, Minute from Sir Julian Paunceforte to Lord Herbert.
\textsuperscript{112} BNA CO/96/112, Confidential, 12.15.1874.
bankruptcy. The Court should apply principles of equity to tort and contract cases between “Civilized Persons and Mere Natives,” English law should be applied to cases involving Europeans and “Christian Natives who have adopted a civilized mode of life” as to personal rights and the mercantile law of England should govern commercial and shipping cases. The Ordinance should include a Reception provision as to the laws of England in force on July 24, 1874, the date the new Colony was proclaimed. It should provide for the enforcement of customary law in actions between natives, family relations, devolution of property upon death, marriage and land tenure. That is, in suits between natives, the governing law was to be the “well established Customs and usages provided these be proved to the satisfaction of the Court” and that are not repugnant to morality, the principles of equity or natural justice.113

Paunceforte told Robert Herbert, Permanent Undersecretary of State, that he thought the Court should have three judges, two Puisne Judges and a Chief Justice, which position, he told Herbert, he had promised to Chalmers. In addition, he proposed a staff of Magistrates who would be appointed by the judges, as would the District Commissioners, as Commissioners of the Supreme Court and would be empowered to hear motions, examine witnesses, conduct proceedings to enforce judgments and act as arbitrators. They would also have summary jurisdiction in petty criminal and debt cases. Paunceforte wanted the procedure to be as simple as possible so that a plaintiff would tell a clerk of court what his claim was and show up on the specified date with his witnesses for a hearing. The clerk would prepare a complaint on the basis of what the

113 BNA CO 96/112, No. 13, 9.27.1874.
plaintiff had told him and have it served on the defendant with a notice to show up on the specified trial date with his witnesses, There would be no necessity for a formal Answer or any other pleadings.

The new Supreme Court’s jurisdiction would be concurrent with that of the existing customary courts and would, it was anticipated attract considerable business that would otherwise have gone to such local courts. Lord Camarvon, the Secretary of State, expressed his expectations for the new Supreme Court:

When the Supreme Court is established, I should hope that its influence might be so widely extended as to supercede in most Districts of the Protectorates the Courts of the Native Kings which are in themselves open to objections, and in view of the present policy towards the Native Rulers, there is no political reason to encourage. The Natives do not place a high value on time and those living at a moderate distance from the Coast would probably report for justice to the nearest Magisterial post on the Seaboard. . . . wherever the Colonial Courts can be made to meet the requirements of the people of the District. I should as I have intimated be prepared for the suppression of the Native Courts of that District. . . . Where this cannot be effected, the Native Courts should be regulated . . . .”

Clearly the intent of the colonial power was to preserve customary law and the courts that enforced it only so long as it took for British courts and English law to take root in the society. Moving rapidly in accordance with these Colonial Office

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114 GNA ADM 1/1/39, 347-348, ¶15. The people of the Gold Coast had long ago learned to trust the British courts in land as in other cases. In 1910, when exclusive jurisdiction over most intra-native litigation, and all land litigation, was given to the customary courts loud complaints were heard that “is not right, that it is not fair,” because they had been told that they were imperial subjects and as such they should have the right to the protection of imperial courts. Magnus Sampson, ed., West African Leadership: Public Speeches Delivered by J. E. Casely Hayford, London: Frank Cass & Co., Ltd. [1951], 1969, 120.

115 The British had good reason to believe that such a result would not be long in coming. Various cases gradually imported ideas of English liberty and common law protections of such liberty, such as freedom from improper arrest, see Tamakloe v Mitchell [1892] Redwar 146. The idea that one could do or say what one pleased as long as no law was broken appealed to indigenous people who had been penalized for infractions against the dignity of the chiefs under traditional law, e.g. insults, etc. S. O. Gyandoh, Jr., “Liberty and the Courts, A Survey of the Judicial Protection of Liberty of the Individual in (continued...)
instructions, Governor George Strahan asked the Secretary of State for the immediate appointment of judicial officers who would "take their places in the new judicial system upon the courts of justice being established." It would be desirable for them to come quickly so as to have as much time as possible to familiarize themselves "in the peculiarities of unwritten native law" and the "native character" before they assumed responsibility of judging.\(^{116}\) In September, Strahan sent the draft Supreme Court Ordinance and Chalmers report on his drafting of the document to the Colonial Office. Chalmers particularly noted that he proposed to establish a Court not merely for the Colony but for the "territories near or adjacent thereto."\(^{117}\) No one in Accra or London caviled at this assumption of sovereign power in states linked to Great Britain solely by treaties of protection. Indeed, none of the customary authorities in those territories expressed any opposition either.

Pending submission to and enactment by the Colonial Legislature, the Gold Coast Government issued a Proclamation asserting jurisdiction, *inter alia*, to preserve public peace, property and protection of individuals, administration of civil and criminal justice, including creation of a Supreme Court in lieu of the Judicial Assessor' Court, magistrates courts, Native Courts [thus from the outset denying inherent jurisdiction of native courts] and such other courts as shall be deemed expedient; claiming the authority: to legislate as to crimes, civil wrongs, property rights, contracts and fiduciary

\(^{115}\)(...continued)


\(^{116}\) GNA ADM 1/2/20, No. 154, 7.10.1875; No. 237, 12.12.1875.

\(^{117}\) BNA CO 96/116, No. 181, 9.6.1875, Enclosure 1, 9.6.1875.
relations “framed with due regard to native law and customs where they are not repugnant to justice, equity and good conscience”; to determine appeals from Native Tribunals to magistrates or to the Supreme Court; to try criminal cases; to regulate native prisons; to extinguish human sacrifice, panyaring, judicial torture “and other immoral, barbarous, and cruel customs”; to abolish the slave trade, “Measures with regard to domestic slavery and pawning”; and settling, through the Governor, intertribal disputes. Gareth Austin argues that British courts were indifferent to pawning up to the late nineteenth century and did not enforce criminal prohibitions because they saw pawns as proper security for debt. In 1907 the attitude of the Colonial Office and Colonial Government changed and pawns were no longer recognized except as to women pawns whose existence continued to the 1940's in the guise of marriage payments.¹¹⁸

The draft ordinance submitted to the Colonial Office included rules common to civil and criminal cases and a separate schedule of rules for civil cases that Chalmers said reduced to writing prior practice. Separate rules for criminal cases were embodied in a Criminal Procedure Code, a draft of which was also sent to the Colonial Office. Chalmers proposed that the Supreme Court should include a Chief Justice, the Chief Magistrate of the Gold Coast Settlements and the Chief Magistrate of Lagos as Puisne Judges and additional Puisne Judges as might be needed. Chalmers recommended a Ful, that is an appellate, Court of two judges, since if all three judges were required for appellate work, no other work could be done. With no apparent concern for the conflict

of interest he was embedding in the administrative office of District Commissioner, his
draft created them Commissioners of the Supreme Court to do judicial work subject to
supervision by the Chief Justice with civil jurisdiction by consent of the parties if the
amount in issue did not exceed twice the amount of the maximum civil jurisdiction of
their courts. He limited appeals in civil cases to those where amount in issue was £50
or more, a provision that eliminated the right of appeal in the vast majority of the cases
that the Supreme Court was expected to hear. Moreover there would be no appeal to
the Full Court from an order of the Supreme Court affirming the judgment of a District
Commissioner without leave from the Supreme Court. His draft also contained
provisions regulating admission to practice as well as how practice by barristers was to
be conducted that were adapted from the Fiji Ordinance and were designed to limit fees
charged and to discourage unnecessary litigation. The Criminal Procedure Code
provided for jury trial only in capital cases and in such other cases as the Governor
might prescribe.  

Even before the Supreme Court Ordinance went into effect, Strahan and
Chalmers were petitioning the Colonial Office for more judges, as, they said, the two
existing Puisne Judges were “full up.” Five such judges would be necessary to handle
the work in the Gold Coast as well as Lagos and even that number might be insufficient
as the population was litigious, they preferred the British courts and the climate was so
insalubrious that frequent leaves were required to protect the health of the European
judges requiring more judges to cover for those on leave. Moreover, the salary of

119  Ibid.
District Commissioners should be doubled to attract candidates “learned in the law.”\textsuperscript{120} Lord Carnarvon rejected both requests, the former because “given the small number of white inhabitants, the existing legal establishment is ample,” and the latter because such a salary increases were not justified by the estimates as the cost of the judiciary was already too high.\textsuperscript{121} Evidently neither Carnarvon nor his advisers saw the Supreme Court as a forum for litigation between natives, although the Ordinance afforded such a forum and history taught them that Gold Coast litigants would happily seek their judicial remedies in British courts.

\textsuperscript{120} BNA CO 96/120, No 32, 1.22.1876.
\textsuperscript{121} Ibid., No. 65, 6.22.1876.
CHAPTER III – THE JUDGES – THEIR RECRUITMENT AND INDEPENDENCE

The title of “Judge” was officially conferred in the Gold Coast only on the men who sat on the Gold Coast Supreme Court, but they were not the sole officials to engage in adjudication. In addition there were the District Commissioners who performed judicial functions as part of their duties and, later, Police Magistrates and Provincial Commissioners, as well.¹ In this Chapter, I discuss the recruiting of candidates for judicial and administrative service on the Gold Coast, how they were selected and trained and issues concerning their independence from executive pressure and interference, including their tenure.

Anthony Kirk-Greene, whose work extended to the entirety of the colonial service, not just Africa, confirms through a statistical study the impression of the colonial governors that there were never a satisfactory number of colonial officials in the dependencies.² Kirk-Greene has done extensive work with respect to the origins, recruitment and training of District Commissioners, as has Henrika Kuklick. Kirk-Greene studied what he calls the “generic District Officer,” while Kuklick focused on the Gold Coast. Both dealt with District Commissioners as members of the Colonial

¹ A memorandum drafted by H. F. Wilson of the Colonial Office listed positions available in the Gold Coast as including the Chief Justice, three Puisne Judges, the Attorney General, the Solicitor General, the Chief Registrar to the Supreme Court and District Commissioners. The memorandum points out that in the Gold Coast Colony, District Commissioners are Magistrates with limited civil and criminal jurisdiction as well as performing whatever additional duties the Governor may assign them. District Commissioners are appointed to three year terms that may be canceled at the Governor’s discretion. BNA CO 429/18, 3.1899.

Administrative Service although both barely mention their magisterial and judicial functions. In so doing, they lend credence to the oft repeated criticisms of these officials as lacking judicial independence and exercising their judicial functions to carry out political policy. Indeed, Kirk-Greene emphasizes the continuing and “central involvement” with native authorities and administrators as political advisors.³ Judges were colonial officers subject to the discipline of the Colonial Service but sought the independence that characterized their metropolitan counterparts. Given the importance of their position, it is essential, I argue, to know who were the men, and they were all men, appointed to serve in the judiciary, even those like District Commissioners who fulfilled both administrative and magisterial roles and how they were appointed.

Kuklick argues that such training as the new appointees received prior to 1926 was superficial and inadequate, a three month smattering of many subjects, of which law was one. This, she contends was because of an “anti-vocational prejudice” in the Colonial Office. says, that to the men in the Colonial Office, social polish was more important than knowledge.⁴ Because she ignored the judicial functions of the colonial officials she studied, not even mentioning the creation of the Colonial Legal Service, Kuklick left an gap in the study of the men who served as judges in the Gold Coast. As noted above, the judges performed functions that were critical not merely to British

⁴ The Imperial Bureaucrat, 26 The three month course was thereafter extended to one year, primarily to attract more OxBridge applicants.
administration but to the lives of a populace that was considered to be very litigious. To decide their many disputes in a rational and peaceful fashion served not merely to avoid violence but to bind that populace to the British notion of the rule of law. Thus, I contend, it is important to know who there men were and how they were chosen and trained.

Among other historians, Sir Alan Ward and John J. McLaren, who studied legal appointments in Canada and Australia and the Empire in general, saw many lawyers who sought employment in the colonial service as failed barristers looking for advancement in the colonies.⁵ Martin J. Wiener observed that the Colonial Office sought compliant personalities that would not make waves in dealing with the administration.⁶ My examination of several dozens of applications for appointments and the Colonial Office notes on such applications tends to support the conclusion that many applicants were unsuccessful barristers, but does not show a prejudice for those who would simply follow the Governors’ orders.

The jurisdiction of the Supreme Court under the Supreme Court Ordinance was subject to expansion or contraction on the order of the Governor-in-Council which, pursuant to Section 20(a) could declare that such jurisdiction should not extend to any portion of the Colony specified in the order or could limit in any portion of the Colony

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specified in the order the class of causes or matters that might be heard by the Court. This provision afforded the Executive a powerful weapon with which to control a Bench that might decide matters contrary to the wishes of the administration. While it may have been unusual for judges to be removed, suspended or transferred for political reasons, as Wiener argues, “the sword of removal always hung over their heads, and sometimes . . . indeed fell.”

**Origins of the Judges: Education and Training or Lack Thereof**

The men who were recruited into the Colonial Service as administrative officers came principally from Oxford and Cambridge, Trinity College and the University of Edinburgh, and, unless they were barristers or solicitors, received little legal training for carrying out these judicial and magisterial duties. Indeed, from the earliest days of the colony, the Governors requested that District Commissioners have legal credentials. Information for potential recruits specified the necessity of such credentials, but more and more over the period under study, such requirement was ignored.

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7 Supreme Court Ordinance No. 4 of 1876, §20(A)(1) and 20(A)(2).
8 Wiener, 11-12.
9 Anthony Kirk-Greene notes his regrets at not having paid adequate attention to his Cambridge law tutorials because, he says, he was more interested in earning “a place in the University hockey XI than with the niceties of criminal law.” Anthony Kirk-Greene, “‘Court Adjourned’: A Colonial Service Literary Interlude,” *African Research and Documentation*, No. 100 (2006): 29-35, 29. The OxBridge origins of recruits to the colonial service was also true of the civil service generally. R. K. Kelsall, *Higher Civil Servants in Britain From 1870 to the Present Day*, London: Routledge, Trench, Trubner & Co., Ltd., 1955, 135. However, unlike the Colonial Service, entry to the Home and Indian Civil Services was generally by competitive examination. Ibid. See also, Ralph Furse, *Aucuparius: Recollections of a Recruiting Officer*, London: Oxford University Press, 1962, 150-152. Furse was for many years in charge of Colonial Service recruiting. 
As will be seen below, with one exception, no Supreme Court judge who served in the Gold Coast entered that service directly from the private sector but, rather, came from other Colonial Service posts, usually from positions as Judges or Senior Law Officers.\(^\text{10}\) District Commissioners, and occasionally Police Magistrates, usually came directly from Great Britain. Indeed the position of District Commissioner or Assistant District Commissioner was an entry level one.\(^\text{11}\)

Recruitment of District Commissioners was the same throughout the Colonial Service: an applicant made his desire for a position known through correspondence or reference by someone known to the Colonial Office. He then filed a formal application on forms provided stating his educational and other qualifications, including the sports in which he participated and the area of the colonial empire in which he sought to serve, or in which he did not wish to serve. All applicants for all posts prepared the same formal application and supported it with testimonials and references. Most often a personal interview followed. At various times, different officials decided upon the candidate to be chosen and so advised the Secretary of State who made the final decision.\(^\text{12}\) Unlike the situation with the Indian Civil Service, no special examinations were required for admission to the Colonial Service whether in legal or administrative positions. Rather, until about 1930, a Private Secretary to the Secretary of State would

\(^{10}\) G. F. Lumb was appointed to the Gold Coast Supreme Court in 1883 by Lord Derby. BNA CO 429/4, 13866. This was an exception. See Swanepoel, 46.

\(^{11}\) GNA ADM 8/1/1, 79-80.

\(^{12}\) Furse, 17.
make the choice from among candidates deemed to be qualified and recommend such choice to the Secretary of State who invariably accepted the recommendation. It was difficult to find candidates willing to serve in tropical Africa, particularly in the early days, because of what was considered to be an unhealthy climate and the plethora of diseases not treatable easily or at all.

The question of judicial independence is complex. An independent judiciary, that is one free from control by the administration or the legislature, was and is at the core of British government. It has been considered to be a shield of the rights of Britons and an essential part of their legacy of the rule of law. Despite Britain’s oft repeated claim that it was bringing the benefits of the rule of law to its Gold Coast dependencies, the independence of the judges of the Gold Coast Supreme Court was threatened, often by intrusive questioning from the administration as to how and why they made certain decisions, but I have found no evidence that they were transferred because of their judicial actions, albeit the threat was always there as they served at the pleasure of the sovereign. Yet the question of whether or not the colonial judges were independent of administrative and legislative interference relates to the manner in which the British colonial state functioned. The question of the independence of the District Commissioners in their judicial rule was different because their position inherently involved conflicts of interest; they were administrative officers but served as judges of minor criminal matters, as magistrates with respect to major criminal matters and as appellate judges with respect to decisions of Native Tribunals.
Qualifications and Recruitment

In the last decade of the nineteenth century, the Colonial Office prepared and published a brochure, *Legal Appointments in the Colonies*, known as “Memo 117,” setting forth the conditions for employment in a legal capacity. The brochure was repeatedly revised in insignificant respects and as revised remained in effect until creation of the Colonial Legal Service in the 1930's.

Initially, Memo 117 stated that better paid positions in “healthier” climates were almost invariably filled via promotions of officers who had rendered good service in the same or in other colonies: “The number of purely legal appointments in the Colonial Service filled from the Secretary of State’s list (i.e., from outside the service) in any one year would probably not exceed six at the most and would usually fall below that number; the majority of in these appointments would be in tropical Africa.” It went on to specify that nearly all imperial appointments were open only to barristers, but that solicitors occasionally were appointed to minor registrarships and as District Commissioners. Candidates were to be under forty years of age and would be given up to six examinations as to professional qualifications – a paper requirement only, as such examinations were never given as a condition for entry into employment. Barristers and solicitors were generally selected for posts in Tropical Africa that were partly administrative and partly magisterial, that is as District Commissioners. On the Gold Coast, these officials were both commissioners of the Supreme Court and were subject to supervision as such by the Chief Justice or the Puisne Judge of the Divisional
Court in the province or district in which they served as well as executive officers
subject to control by the Gold Coast Colonial Secretary. 13

As will be seen, the necessity for legal qualifications more often was a wish
rather than a requirement and as the years passed, fewer candidates selected for
positions as District Commissioners or Assistant District Commissioners had such
qualifications. However, In 1898, the Government’s record in recruiting legally trained
officials was good: all but one had legal credentials. 14 But by 1908, the Colonial Office
had given up on restricting appointments to lawyers. 15 According to Governor Matthew
Nathan, the District Commissioners who had acted as judges when he arrived in 1900
were very inexperienced – something he could only have learned from his extensive
correspondence with Chief Justice W. B. Griffith, Jr. -- and were “in constant
telegraphic communication with the Secretariat in Accra” as to how to deal with
magisterial issues. 16 Nevertheless, the Colonial Office persisted in claiming that legal
knowledge and qualifications were necessary for employment. 17 Indeed, so did the
Gold Coast Governor. He reported to London that the Gold Coast needed lawyers as

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13 BNA CO 885/7/117, 5th Edition, 12.07. See also Colonial List 1911, 443-444, Memo: Information
As To Colonial Appointments.
14 BNA CO 886/7/2, Schedule Misc. No. 118.
15 Thus C. C. Brown and C. C. Ballantyne, were both appointed as Assistant District
Commissioners on the Gold Coast although just out of Oxford and had no legal training. BNA CO 429/37.
16 Oxford University Rhodes House, MS Nathan 312, letter from Nathan to District Commissioner L.
N. Peregrine, 7.6.01.
17 See, for example, the draft letter from H.C. W. Vernon of the Colonial Office to N. Waterfield of
Oxford University saying that “As a rule on the Gold Coast, older men (between thirty and thirty five are
appointed and a knowledge of law is particularly essential.” BNA CO 429/31.
District Commissioners in Districts where there was much legal work.\(^1\)\(^8\) While the Colonial Office generally approved the Governor’s recommendations officials there expressed themselves as not satisfied that legally trained District Commissioners were necessary in Accra, because the Chief Justice and the Queen’s Advocate could help out with the judicial work.\(^1\)\(^9\)

The Gold Coast superior judges had all too frequent occasion to criticize these Commissioners for their inadequate knowledge of the law. In one judicial opinion, the court berated the District Commissioner for his lack of legal knowledge and Chief Justice Marshall expressed his hope that the decision would “promote legality in the Commissioners’ Courts” and would warn attorneys against “taking advantage of the ignorance of the law of District Commissioners as well as of “illiterate suitors.”\(^2\)\(^0\)

However, to the men in the Colonial Office charged with selecting judges and other magisterial officials for service on the Gold Coast, knowledge of English law and procedure seemed to be less important than knowledge of local conditions and the manner in which the courts functioned.\(^2\)\(^1\)

Knowledge of the local languages was another desirable trait to be sought in candidates for judicial positions. Indeed, according to H. B. Cox, Legal Assistant

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\(^1\)\(^8\) BNA CO 96/188, Confidential, 6.17.1887.
\(^1\)\(^9\) BNA CO 96/174, No. 199, 6.2.1886.
\(^2\)\(^0\) Cheetham v Bannerman, [1881] 2 Fanti Law Reports 23 (Full Court),
Undersecretary of State," it was of paramount importance in the case of judicial officers that a judge should be dependent upon the interpretation [of an indigenous language] is most undesirable in any court, that he should be so habitually in every case is dangerous to the administration of justice." Although District Commissioners were subsequently required to study one or more of the local languages, that requirement was never extended to members of the Supreme Court Bench or even to police Magistrates. By contrast, Sir Henry Maine noted that judges training for India were required to study the local languages as well as Indian law and usage.

Lord Selbourne, Parliamentary Undersecretary, reported to Colonial Secretary Joseph Chamberlain that getting good people, administrative, judicial and technical for West Africa very difficult, but particularly so with respect to those exercising judicial functions. Indeed, Kubicek points out, given the difficulty in recruiting able people for serve in the Gold Coast, Chamberlain went so far as to suppress his prejudice against

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22 Cox subsequently became Legal Advisor to the Secretary of State, the first of only three Legal Advisors during the period of this dissertation. J. S. Risley succeeded Cox and Grattan Bushe succeeded Risley. Each of these men advised on broad policy as well as legal matters. James Read argues that there was never a general legal policy that would bind the entire Empire. Legal matters were decided upon on a case by case basis. James S. Read, "Studies in the Making of Colonial Laws: An Introduction," *Journal of African Law*. Vol.23, No. 1 ((Spring, 1979), 1-9, 4, 8.

23 BNA CO 885/7/13, No. 123, Minute, 2.9.1899. Cox’s colleague, Edward Wingfield minuted that “I am afraid it is hopeless to expect to secure a supply of judges versed in native languages” in West Africa. *Ibid.*

divorced and intemperate men as well as his prior rule against married men serving in West Africa.  

A number of observers expressed less than positive views about the abilities of legally trained men who would leave the metropolis for life in the colonies. Sir Alan Ward argued that “[t]he man who joins the Colonial Legal Service after some years at the Bar in Great Britain or Ireland may have some personal reason for wishing to live in the colonies, or he may, through bad luck, have failed to make a good enough living at home; but there is at least a chance that he has failed to make a success of his profession in his own country through his own fault and that his legal knowledge is no greater, in fact, than that of the ‘briefless barrister’ who comes from the Administrative Service.” As one colonial office official put it, men who failed to create or maintain a successful practice as Barristers in the United Kingdom, who were “journeymen counsel” and who were uncertain of success at home were the ones who applied to the Colonial Office, often at the suggestion of a patron. Insofar as he and many other Colonial Office officials were concerned, and notwithstanding the views of the Gold Coast Governors, administrators with in-country experience were better able to judge than legal appointees from home or other colonies.  

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26 BNA CO 96/315.  
But the need for officers was such that despite the strictures of Memorandum 117, the Colonial Office appointed and the Governors were compelled to take whomever was appointed no matter the paucity of legal qualifications. Reginald Antrobus minuted at the same time that Secretary of State Chamberlain preferred “any suitable officer in the service” and said that they should not wait to find barristers. “It was clear that we could only get unsuccessfl lawyers and he did not see how they were any better than laymen.”28 When the Governor told London that he needed at least eight more District Commissioners and was willing to take men without legal credentials because of the difficulty in finding qualified men, he made the suggestion that he would have newly arrived candidates study law in the Colony and would train them in Accra as apprentices in the District Commissioner’s court.29 By its failure to adhere to its own stated requirements for appointment of District Commissioners, the British demonstrated once again its inabiliy to carry out policy in the context of small African colony.

The health of candidates was often an important prime consideration. When Thomas Jackson resigned as a Puisne Judge in 1880, in large measure because of ill health, three efforts to replace him failed because the candidates were unfit

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28 BNA CO 96/315.

29 BNA CO 96/215, No. 3, 1.6.1891. Practically none of the candidates appointed to positions as Assistant District Commissioners in the Twenties and Thirties had any legal training much less legal credentials and many were neither solicitors nor barristers; one was a surveyor. GNA ADM 8/1/1, 79-80.
medically. In 1891, Governor Griffith, Sr. reported the necessity to repatriate a District Commissioner because of ill health after just a few months in the Colony. The Colonial Office, per Edward Wingfield, lamented the mistake in appointing a man unsuited for service in the tropics and admitted the likelihood of more such mistakes with so few candidates from which to choose. Nevertheless, strong emphasis was placed on the health and physical constitution of candidates for positions in the Gold Coast, particularly in the nineteenth century. In 1882, Antrobus told the Governor that since Gold Coast judges had to travel a lot and often had to wade through the surf to land “at the risk of their lives,” it was necessary to find young, fit, unmarried men who were active and willing to move around.

Although judgeships were usually considered to be the sole province of barristers, on the rare occasion, a non-Barrister was considered to be a good candidate for the Supreme Court. In August 1899, Governor F. W. Hogdson told the Colonial Office that he could not recommend any of the District Commissioners for promotion to Puisne Judge and that he and Chief Justice Griffith agreed to recommend S. W. Morgan, the Assistant Colonial Secretary, even though he was only a solicitor, who is “otherwise well qualified, [and] understands native languages. He would be

30 BNA CO 96/133, Confidential, 2.20.1880; Confidential, 4.20.1880; Confidential, 5.14.1880; and Confidential, 8.18.1880.

31 BNA CO 96/216, No. 116, 4.20.1891. The Colonial List for 1897 pointed out that the death rate among Colonial Service officers in the period from 1891-1897 ran from 30.7/1000 to 88.33/1000. Colonial List 1897, 124.

32 BNA CO 96/142, Confidential, 8.19.1882.
useful for concession court work, they thought and there was “no local law against appointment of a solicitor. The Colonial Office staff was almost unanimous in supporting the nomination: Herbert J. Read, opined that Morgan, being very hard working, having served seven years on the Gold Coast and having worked well as a Registrar, District Commissioner and Clerk of Council, was more useful than someone from England or another colony; Lord Ampthill, the Parliamentary Undersecretary, observed that with knowledge of the Gold Coast and its languages, Morgan was probably better than alternatives from outside the Colony; Antrobus doubted that they could find someone willing to go to the Gold Coast for £800/year; Wingfield approved as did Chamberlain.33

How Appointments Were Made

The manner in which appointments to positions in the colonies changed over time from consideration and recommendation by junior officers to review and recommendation by Colonial Office committees whose composition varied from time to time. Applicants were never required to pass an examination for appointment and were usually asked to come in for a personal interview.

From the creation of the Gold Coast Colony a Junior Assistant Private Secretary to the Secretary of State, after 1899, Edward Marsh, another Junior Assistant Private Secretary, Mr. Harris, and an unpaid volunteer about his [Marsh’s] age, made all appointments subject to the Secretary of State’s assent, which was

33 BNA CO 96/342, Confidential, 8.6.1899.
seldom withheld. From 1910 to 1930 that position was occupied by Major Ralph Furse.34

Each applicant completed a form describing not only his education and professional qualifications but his participation in sports, his team captaincies and hobbies. Furse, particularly, was more interested in an applicant’s sports history than in his intellectual attainments.35 Legal appointments were entered into a volume labeled “Legal” (similarly, others were entered in volumes labeled “Administrative,” “Medical” and “Treasury – Audit – Customs”). No competitive examinations were held, but Marsh, Furse and/or their staff interviewed the candidates and noted their impressions, then passed on a recommendations. Before doing so, however, he asked the Legal Advisor to vet legal appointments.36 The official making the recommendation, Marsh, Furse or their staff relied to a substantial degree on testimonials, particularly from uninvolved referees such as school masters and professors, i.e. who you knew, as the primary recruitment method, one that Robert Heussler contends was “intuitive and elitist.”37

34 Furse, 12, 55. Furse entered the Colonial Office as Assistant Private Secretary (Appointments) to the Secretary of State. From 1924 to his retirement in 1948, he served as Director of Recruitment. Ibid. 64.

35 Kirk-Greene, Britain’s Imperial Administrators, 1858-1966,130.


37 Robert Heussler, Yesterday’s Rulers: The Making of the British Colonial Service, Syracuse, NY: Syracuse University Press, 1963, 21, 25. Anthony Kirk-Greene, however, says that lack of money was not an issue. Britain’s Imperial Administrators, 1858-1966, 129-131. Richard Symonds says that by contrast with Gordon Guggisberg, who was the Gold Coast Governor in the 1920’s and who was born and educated in Canada, most of the candidates for service in the colonies were public school graduates and (continued...)
In 1902 a committee of the Colonial Office was appointed to report on recruitment and promotion of officers in West Africa. It reported in January 1903 and concluded that “competitive examinations are neither desirable nor practicable.” It noted that judicial and legal candidates required special or technical knowledge and were usually sought within the colonial service and rarely from outside, but in so saying, despite the legal role played by District Commissioners, it acknowledged that these officials were recruited from outside the service. However, it went on, since District Commissioners were obligated to carry out magisterial and judicial functions, they should receive instruction in Evidence, Civil and Criminal Procedure and Criminal Law for a total of thirty six hours (compared to seventy two hours for Accounting, twelve hours for Hygiene and sixty hours for Economics) over a period of three months. They were also asked to state if they could swim, ride, and shoot or had other athletic qualifications.  

Moreover, applicants for positions in West Africa were warned not to expect transfers. Colonial Office Brochure No. 96 said that service in West Africa was for a minimum of five years, that the number of opportunities for transfer were very few and if granted would result in a reduction in pay. Apparently the thought behind this

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37(...continued)

document was that if the applicant persisted in the face of such discouragement, he would be a good officer.\textsuperscript{39}

In 1907, the Colonial Office created a promotions or patronage committee, reorganized in 1911, to gather and review applications for higher positions in the colonies. It consisted of the Assistant Permanent Undersecretary, the chief clerk of the General Department, the Principal Clerk of the West African Section, one of the Secretary of State’s Private Secretaries and, when dealing with judicial selections, the Colonial Office Legal Advisor.\textsuperscript{40} This committee was the medium for consideration of applicants until the early 1930’s, but was separate and apart from those that dealt with applicants for entry level positions. The Chair of the Committee in its early years, Alexander Fiddian, wrote a memo to the then Secretary of State, Lord Elgin, that the latter accepted, confirming the policy for considering candidates for promotion to judicial positions, recommending that prospects should first be sought among the local bar, then among serving judges and law officers and only then among barristers from the United Kingdom.\textsuperscript{41} Promotion from the local bar was not generally considered as the Colonial Office viewed general professional experience was more important than local knowledge and there was a great deal of concern about “complete detachment

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\textsuperscript{39} & BNA CO 885/6/96, 3.1908. \\
\textsuperscript{40} & BNA CO 885/21/26. \\
\textsuperscript{41} & BNA CO 429/25. \\
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from local politics or controversies.”

Thus, whenever a Governor sought to expand his Bench or find a replacement for a judge or magistrate, the committee would collect and review its records for potential appointees. Sometimes these would be shared with the Governor, but more often, the candidates would be interviewed if possible and those who agreed to have their names submitted discussed in the committee and one chosen. No Gold Coast Ordinance specified any particular qualification to hold a judgeship in the Colony other than that Article XIII of the January 13, 1886 statute describing the contents of Letters Patent stated that the Chief Justice held office during the pleasure of the Sovereign. Nothing was specified as to Puisne Judges, but since they, too, were appointed by Letters Patent, it may be inferred that they also held office during the pleasure of the Sovereign. Thus, the committee had relatively free reign in picking judges.

The Committee solicited appraisals as to all potential candidates. For example, in 1911, there were two vacancies for Puisne Judges; Gilbert Purcell had been sent to Sierra Leone and Albert Earnshaw, who had been in the Colony for less than three years, was being transferred to British Guiana. The Colonial Office Patronage Committee had six candidates serving in various places around the Empire, including L. E. Hawtayne, Stipendiary Magistrate in British Guiana (Winchester, Oxford, Lincoln’s Inn), but four persons recommended before him had declined the position.

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43 BNA CO 323/986/7.
The British Guiana Governor's Confidential Report which the Committee consulted, noted that Hawtayne had good general ability, was accurate and self reliant, and performed his duties with commonsense, care and efficiency." Thomas C. Rayner, a former Gold Coast Puisne Judge, reported that Hawtayne was the best Magistrate they had and was a good lawyer who recently acted as Solicitor General. Given these testimonials, Hawtayne was appointed.44

At the recommendation of the Fisher Committee, the Appointments Board would have no role in promotions, the primary method for appointing judges. Rather, a Promotions Committee consisting of the Assistant Undersecretary, the Legal Advisor and the appropriate geographical Assistant Secretary, would consider the requests of the Colonial Governors to fill vacancies, review available candidates and their confidential reports and make recommendations to the Secretary of State.45 In any event, the Secretary of State was not bound to utilize the Board and, in fact, made at least one appointment of a Puisne Judge from outside the Colonial Service on his own based solely on a Governor's recommendation.46

44 BNA CO 96/510, No. 514, 9.21.1911.

45 Report of A Committee on the System of Appointment in the Colonial Office & the Colonial Services, 27. The Fisher Committee dismissed the utility of these reports as being adequate in theory but too often unsatisfactory in practice because they were late in being filed or even missing. Ibid., 28.

46 BNA CO 877/9/16. The Secretary of State was to appoint three members from those nominated by the Civil Service Commission, including at least one from the colonial service. Candidates for entry level legal positions were to have been vetted by the appointments department and one candidate would be submitted to the Board for ratification, but in special cases a short list will be submitted. Board recommendations would be submitted to the Secretary of State who would have final say.
Originally, candidates for legal positions were not to be interviewed and the Chair might approve professional candidates without a meeting of the Board in order to expedite appointments. However a Board meeting in March 1931 decided that it was important to interview legal candidates as personality counted for so much.\textsuperscript{47} Furse went on to report that between 1913 and 1931, only one hundred fifty legal appointments, including Attorneys General, Solicitors General, Crown Counsel and Judges, but excluding District Commissioners who were administrative appointments even though they performed judicial functions, were made in all of the colonies in the Empire. The District Commissioners appointed numbered many times more. In 1931, all but two came from outside the Colonial Service through the Colonial Service Appointments Board, and in the three subsequent years about the same percentage of appointments came from outside the Colonial Service, but none were judges.

Grattan Bushe and his legal associates in the Colonial Office were dissatisfied with the product of recruitment through the Colonial Service Appointments Board, so in January 1933 he caused a Circular Dispatch to be sent proposing regulations as to appointments, promotions, transfers and retirements of legal and judicial officers to be made and approved by the Secretary of State in a Colonial Legal Service separate from the Administrative Service. The Service would come into being on April 1, 1933.\textsuperscript{48}

Another Circular Dispatch dated March 1, 1933 noted that in the past, four years

\textsuperscript{47} BNA CO 877/8/2, Memorandum (undated but apparently written in 1930).

\textsuperscript{48} BNA CO 54490/1, 1.1.1933. Because of economic circumstances, the start of the Colonial Legal Service was deferred to July 1st.
of legal experience had been required for appointment to legal positions and in choosing candidates the nature and extent of professional experience counted most, but that some Administrative officers without legal experience were given junior legal positions. Going forward, however, except in unusual circumstances, candidates for positions as Magistrates and Crown Counsel had to have necessary professional training and practice experience. Only judges appointed under Letters Patent would be exempt from compulsory transfer from one colony to another. Finally, no one not in the Colonial Legal Service could be appointed to a legal or judicial position except in exceptional circumstances.

Attempting to generate a greater number of potential recruits for the new Legal Service, Furse, the Colonial Office official then in charge of recruitment, sent a long memorandum to each of the Inns of Court describing opportunities for a career in the Colonial Legal Service. He suggested that each Inn, or the Inns collectively, establish a committee to present barrister candidates and provide the Colonial Office “with reliable confidential information about their character and qualifications.” Furse wanted the Inns to recommend barristers so that the Colonial Office could build a reserve in anticipation of openings to expedite the filling of vacancies.

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49 BNA CO 850/24/10, 3.1.1933.
50 BNA CO 885/34/9, ¶ 4. On the Gold Coast, the Chief Justice, the Puisne Judges, the Attorney General, the Solicitor General, the Commissioner of Lands, the Chief Registrar, the Magistrates, the Crown Counsel and the Assistant Commissioners of Lands were considered to be Colonial Legal Service officers and enrolled on the Legal Service List.
51 BNA CO 877/10/6, 11.6.1934. The fur Inns of Court were law schools for barristers, the attorneys who appeared in court. They examined candidates for admission to the Bar and also exercised (continued...)
and Sir Henry John Newbolt, Head of Recruiting at the Colonial Office, met with representatives of the four Inns of Court and described for them the recruitment process and, later that year, sent the Inns of Court Committee the Colonial Legal Service List showing the career track of all Legal Service officers to demonstrate promotion opportunities as Magistrates and legal officers in the Gold Coast and elsewhere.\(^52\)

Bushe took the recruiting effort to the legal press, publishing a memorandum on the Colonial Legal Service in the *Law Journal*\(^53\) and the *Irish Legal Times*. He wrote that it was his purpose to direct the attention of younger barristers to the opportunities offered by the Colonial Legal Service, comprising two hundred fifty judicial and legal appointments that were available throughout the Empire and consequently there was a good deal of movement from colony to colony since “the more important legal offices as they fall vacant are normally filled by promoting an officer who is already a member of the Service” and it would be unusual to fill an important post, such as a Chief Justiceship, from outside the Service as, he said, was sometimes done in India. He described the work of Crown Counsel, representing the colonial government in criminal and civil litigation and drafting legislation and that of a Magistrate, very similar to that in England but usually with a much larger criminal jurisdiction and often also including disciplinary functions. All barristers were required to be a member of one of the four Inns of Court.  

\(^51\)(...continued)  
\(^52\) BNA CO 877/13/4.  
\(^53\) Vol LXXXI, No. 8, June 13, 1936, 414-415.

-109-
civil cases. There was, Bushe said, an average of six appointments to these junior offices made annually.\textsuperscript{54} The creation of the Colonial Legal Service offered lawyers a second track for a career in the colonies. They could, as they always could, choose employment as a political/administrative officer, serving as a District Commissioner, in which position they would continue to exercise judicial functions. Or, they could now opt to serve only as a law officer or judge, totally divorced from political and administrative functions.\textsuperscript{55}

Those men recruited as District Commissioners, most, as we have seen without legal credentials, were, at various times over the seventy years discussed in this study, given training to perform their legal obligations. Between 1900 and 1925, they were given lectures in legal subjects at the Imperial Institute in London over a period of three months. Upon arrival in the Gold Coast, they were placed under the preceptorship of District Commissioners with whom they went to court to observe how cases were handled. They were encouraged to take on as many simple cases as they felt they could handle until their preceptors and the Colonial Secretary in Accra determined that

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\item[BNA CO 877/13/4.]
\item[BNA CO 850/96/5, 8.26.1937; 1.11.1938. Creation of this second career track came too late in the period under study here to permit us to see how those who selected it advanced on its ladder. However, Bushe did arrange to have an annual report compiled of all United Kingdom barristers appointed to colonial positions and to obtain reports from the Chief Justices about their work and to give the Inns of Court Committee a “private intimation” as to how the men they recommended were doing – the Permanent Undersecretary insisted that information be given only unofficially – as they did not want to wait three years until the Confidential Reports started.]
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they were ready to go off on their own.\textsuperscript{56} In 1926 a Tropical African Service course was begun at Oxford and Cambridge with a duration of two academic terms or about four months. This course was less practical than that at the Imperial Institute and was a theoretical introduction to colonial government with an emphasis on African languages, anthropology, agriculture and forestry and a smattering of law. The next year the duration of the course was expanded to one year with the students returning to the Imperial Institute for studies in surveying and accounting during the Christmas and Easter university recesses.\textsuperscript{57} Although indirect rule of the African dependencies through indigenous rulers as set out in the works of Lord Lugard was the governing philosophy of the Colonial Office, none of the courses dealt with the organization and operation of the several Gold Coast states or of those in the rest of Africa.\textsuperscript{58}

**Who Were The Judges**

With but a few early exceptions, all the judges who ultimately served on the Gold Coast entered the Colonial Service either in some primarily administrative capacity, as, for example a District Commissioner or Assistant District Commissioner,


\textsuperscript{57} Kirk-Greene, *Britain’s Imperial Administrators, 1858-1966*, , 133-134.

\textsuperscript{58} *Ibid.* Frederick J. D. Lugard served as Governor of only two colonies, Hong Kong and Nigeria for a total of only twelve years but had an overwhelming influence on the British policy of governing their colonies in West Africa and particularly in the Gold Coast, outlining a philosophical underpinning for the idea of indirect rule. Frederick J. D. Lugard, *The Dual Mandate In British Tropical Africa*, London: Frank Cass & Co., Ltd., 1922.
or as a junior legal officer. Of thirty eight Puisne Judges who were appointed to serve in the Gold Coast between 1883 and 1939, sixteen entered the Colonial Service as administrative officers while twenty two entered in various primarily legal capacities such as Crown Counsel, Police Magistrate, conveyancer or departmental legal adviser. One, William P. Michelin, served initially for a short time as a Crown Counsel before being named a District Commissioner. Similarly, W. Brandford Griffith, Jr., was initially appointed Acting Queens Advocate before being named a District Commissioner of Accra.

Kirk-Greene describes the members of the Colonial Service as an elite who were carefully selected through “scrupulous choice.” They were, he says, a small, well defined, homogeneous group made such because of their training and occupation. The group was not a fixed caste and, indeed, were drawn primarily from the middle and upper middle class. They became an elite not through family but by the education they received in the public schools and, to a lesser extent, in the universities. He asserts that they learned in the public schools “to rule.” Nor were they all English. Many came from Wales, Ulster and particularly Scotland. Of the English, most came from the Home Counties. Less than ten per cent were Catholic or Jewish.

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59 Sir James Marshall served as Judicial Assessor before the Colony was created. The Colonial List, 1882.
60 The Colonial List, 1923.
61 The Colonial List 1886.
62 Kirk-Greene, Britain’s Imperial Administrators, 1858-1966, , 7-9, 14, 136.
63 Ibid., 17.
discussed above, up to about 1900, almost all applicants with at least University degrees, no matter what was thought of their abilities or their legal qualifications, were offered appointment because, it was often noted, the tropical climate deterred acceptance of many offers.\footnote{See, e.g., BNA CO 429/9, 19988/94, “there would be, I fear, no chance for him except on the West Coast of Africa.”} Indeed, some of those who applied expressly stated an unwillingness to serve on the Gold Coast.

Of seventy one offers to barristers and solicitors of posts as District Commissioners in the several West African colonies between 1894 and 1918, forty applicants declined because they were “a little squeamish as to climate,”\footnote{BNA CO 429/12, 23478/96. One such was Phillip C. Smyly, later to become Chief Justice, whose application stated that he would serve in “any colony with the exception of the Gold Coast.” He agreed to go to Sierra Leone where he served until 1912 when he was appointed Gold Coast Chief Justice. BNA CO 429/9, 3785/94.} or would “only accept a healthy climate.”\footnote{BNA CO 429/14, 11296/97.} Some were rejected for reasons of prejudice, such as the barrister, A. J. Wallach whom Lord Ampthill, the Parliamentary Undersecretary, dismissed as “a disreputable looking little Jew,”\footnote{BNA CO 429/16, 1653/927.} H. S. Williams, disqualified as a black nationalist although he was told it was because of his age,\footnote{BNA CO 42930, 16848/07.} and R. T. Orpen, because “Governor Nathan doesn’t particularly want an Irishman.”\footnote{BNA CO 429/21, 49265/02.} At least one, A. Ffoulkes, who had not attended a university and had no legal qualifications, was appointed an Assistant District Commissioner on the Gold Coast despite disapproval of his clothing,
“an extraordinary get up, singularly unsuitable for a visit to this office” because of his
good references and an affection for his family.\footnote{70}{Kirk-Greene, \textit{Britain’s Imperial Administrators, 1858-1966}, , 21.}

Almost all accepted applicants presented degrees from Oxford, Cambridge, University College, London, Trinity, Dublin or Edinburgh University, albeit eighty per cent during the period from 1919 through 1937 came from Oxford or Cambridge, with most of that group from Oxford.\footnote{71}{Most of those with degrees from other universities, Liverpool and Birmingham, for example, were rejected. BNA CO 429/66, 44325/13, 24991/13. Although one graduate of the University of Manchester was offered an administrative post in West Africa. BNA CO 429/66, 33285/13. The Fisher Committee reported that from 1926 through 1929 forty four per cent of all university educated candidates came from Oxford or Cambridge. \textit{Report of A Committee on the System of Appointment in the Colonial Office & the Colonial Services}, 22.} Three had been privately tutored.\footnote{72}{John McLaren, “Judges and the Politics of Empire,” in \textit{Legal Histories of the British Empire}, edited by Shaunnagh Dorsett and John McLaren, New York: Routledge, 2014, 1-12, 16.} All barristers had read law at one of the four Inns of Court or Kings Inn, Dublin or was certified as a Scottish Advocate. One had attended New York Law School. About half of the solicitors seeking employment had not attended university. Most, according to John McLaren, were “‘also rans’” of the metropolitan bar who were not going to the top of the professional ladder as barristers or advocates in the United Kingdom and who thus sought colonial posts.\footnote{73}{John McLaren, “Judges and the Politics of Empire,” in \textit{Legal Histories of the British Empire}, edited by Shaunnagh Dorsett and John McLaren, New York: Routledge, 2014, 1-12, 16.}

All candidates except those specifically noted above had practiced as solicitors or barristers for at least three years prior to applying for Colonial Service employment, but only a relatively few were offered specifically legal jobs. After 1900, more applicants without legal training or qualifications were appointed to posts as Assistant
District Commissioner or District Commissioner because, as some personnel files noted, of a paucity of qualified candidates.\textsuperscript{74}

Grattan Bushe had research done on the prior tenure of judges of the Gold Coast in various colonies: Chief Justice Deane served in three colonies, two in the West Indies and Malaya, Michelin served in four colonies, including the Gold Coast in 1903, Howes served in Uganda, Sawrey Cookson served in North Borneo and the Gambia, Yates served in the Bahamas and Jamaica, Barton (Circuit Judge in Ashanti) served in the East African Protectorate and the Gambia.\textsuperscript{75}

\textbf{Judicial Independence and Tenure}

One of the fundamental characteristics of the serving judge in the English tradition is his independence from direction by the executive or legislative branches of government. Such independence was insured by a certainty of tenure so that his actions could not punished by removal from office except upon due process. In this section, I discuss first the manner in which judges could be removed. Thereafter I look at efforts by colonial judges to preserve that measure of independence accorded their English colleagues, principally by preventing compulsory retirement. Finally, I examine some examples of collusion between judges and executive officers. These latter were not always interested in an independent judiciary. According to Martin J. Wiener, what

\textsuperscript{74} See, e.g., BNA CO 429/42, 22782/10; 429/ 66, 24991/13.

\textsuperscript{75} BNA CO 554/91/1.
they wanted were men who would cooperate not contend with the colonial executive, who would be arms of an “authoritative, if not authoritarian government.”

The 1701 Act of Settlement gave such legal protection to English judges by providing that they held office during good behavior, but afforded no such comparable legal nor legislative protection to colonial judges whose independence and tenure depended entirely upon constitutional practice, the effect of which was less than believed since it was not applicable to the colonies and prescribed procedures for removal of a judge also not applicable in the colonies. As noted above, judges appointed by Letters Patent, who constituted all colonial judges, held office only during the Sovereign's pleasure.

Colonial judges, as other colonial officers, found a measure of security in the Colonial Regulations that provided that a colonial judge might not be removed without cause, but he could be suspended by the Governor pending removal proceedings which might last a very long time. The first legislation applicable to the colonies was Burke’s Act of 1783 that authorized the suspension of a judge by the Governor and Executive Council pending removal because of neglect, misbehavior or absence and that the judge might appeal to the Privy Council. In 1836, the Secretary of State, Lord Glenelg, agreed not to dismiss any colonial judge anywhere in the Empire except

76 Wiener, 12.
77 *Terrell v. Secretary of State for the Colonies*, [1953] 3 WLR 331.
79 22 Geo 3, c. 75, §2, 1783.
on the advice of the Judicial Committee of the Privy Council. At that time this rule was incorporated in the Colonial Regulations applicable to the entire colonial service and subsequently applied to the Gold Coast colony. Nevertheless, a judge could be transferred to different colonies freely as there was a “very constant and substantial flow of promotion from the junior to the senior legal and judicial posts.”

Procedures established shortly afterward by the Privy Council provided that a Judge accused of wrongdoing might be suspended by the Governor pending a hearing by the Privy Council, and a judge accused of “a cumulative case of judicial perversity” tending to “set the community in a flame” could be suspended by the Governor with a right of appeal to the Secretary of State and/or to the Privy Council. In addition to these procedures, the legislative council still retained the right to initiate removal by a petition.

McLaren argues that despite formal removal procedures and regulations, “[u]doubtedly there existed other less formal methods of putting pressure on colonial judges to resign or retire that would have appealed to the local government or the Colonial Office, if not to the jurist himself.” While he cites no cases in West Africa, McLaren argues that appointed judges often colluded with crown law officers, particularly in political cases such as those involving sedition. He points out that

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82 McLaren, Dewigged, Bothered and Bewildered: British Colonial Judges on Trial, 1800-1900
although outside of West Africa judges were removed from legislative councils after 1812, – they remained on the Gold Coast Legislative Council until 1911 -- all over the world they remained as “close advisers to governors on political, legal and cultural matters.” Finally, he argues that the Colonial Office wanted to ensure that colonial judges did not challenge or embarrass colonial governments and that they supported the executive whenever necessary, it not being acceptable to the Colonial Office for judges to press their own agenda, but to display loyalty not independence.

Another method of getting rid of unwanted older judges was to retire them. Governor Slater told Secretary of State Leo Amery that he and a committee of the Executive Council had reviewed the files of all officers over the age of 55 as to whether or not they should be compelled to retire. Governor Slater was in doubt, he said, as to whether the Senior Judges were subject to the provision of the Ordinance permitting him to retire colonial officers, and he asked Secretary of State Amery to decide, but opined that he saw no reason that the judges should be treated any differently than

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83 Ibid., 40-41. This was certainly true of the Gold Coast judges, particularly the Chief Justices who were close advisors to the Governors as evidenced by the massive correspondence between W. B. Griffith, Jr., and Matthew Nathan. Oxford University Rhodes House, MS Nathan 312.

84 McLaren, *Dewigged, Bothered and Bewildered: British Colonial Judges on Trial, 1800-1900*, 262, 271, 277. Judicial opposition to executive action was not always condemned. For example, in 1896, the Colonial Secretary, acting as Governor, reported the opposition of Chief Justice Griffith to a piece of Government sponsored legislation (that Griffith had also opposed in the Executive Council). John Bramston, an Assistant Undersecretary of State, advised that “[t]he general rule is that a Chief Justice in a Crown-Colony should abstain from speaking against a Bill introduced by the Government. But it would not be desirable to insist on the observance of the rule in the case of bills of a legal character not connected with the general policy of operation of the Government.” BNA CO 96/279. No. 493, 11.17.1896.
political officers.\textsuperscript{85} Amery advised that the Ordinance governing compulsory retirement “strictly does apply to members of the Bench, but that ordinarily they should not be called upon to retire under the provisions of [the Ordinance] unless their efficiency has become impaired by ill-health or old age.”\textsuperscript{86} However, in September 1928 a Circular Dispatch required that judges should be retired at age 62 with one extension of their term of service for three years at the option of the Governor with approval of the Secretary of State.\textsuperscript{87} One case of possibly enforced retirement, discussed more fully in the next chapter, is that of W. Brandford Griffith, Jr., the Gold Coast Chief Justice who ruled the Colonial Office as well as the local Executive with his opposition to the Native Jurisdiction Amendment Ordinance of 1910 and soon thereafter left the Gold Coast ostensibly because of ill health and was then retired from the Colonial Service although he continued to engage in colonial activities as a judge and author.

In addition to the possibility of being forcibly retired, a possibility that became more probable as the twentieth century wore on, or being transferred to a less desirable colony, colonial judges, as were all other officials, were subject to annual Confidential Reports.\textsuperscript{88} The vast majority of those reports contained little more than bland but positive phrases such as “satisfactory,” “efficient,” does legal work with “care

\textsuperscript{85} GNA ADM 12/3/47, Confidential, 3.10.1928.
\textsuperscript{86} GNA ADM 12/1/64, Confidential, 4.19.1928.
\textsuperscript{87} BNA CO 850/96/3, Colonial Office Circular Dispatch, 9.20.1928.
\textsuperscript{88} \textit{Ibid.}, 12.14.1937. They could also be moved to another colony and there was frequent movement of judges between colonies. From the perspective of the Colonial Office “The amount of movement in the legal service has, I think, always been a matter of admiration.”
and ability, “specially careful and painstaking.”\footnote{GNA ADM 12/5/60, 3.20.1913. In the group of reports quoted here, there was only one less absolute note: “fairly satisfactory on the whole.”} From time to time, the reports got more specific, but whether positive or negative, there is little evidence that they had any impact on the career of the judge who was subject to the report.\footnote{GNA ADM 12/5/61, 3.30.1914.}

For example, the Governor’s report on Chief Justice Smyly for 1913 described Smyly as “patient, painstaking” but “is so obsessed by the idea of the length of his list of cases awaiting hearing that he appears to spend much time talking about it that might be spent in tackling it.” He continued: “as a Chief Justice he is somewhat weak.”\footnote{BNA CO 96/557, Confidential, 6.26.1915. Risley minute, 5.15.1915.}

The Colonial Office response to these Confidential Reports in 1915 may shed some light on their effect on the judges’ career. In minutes on a confidential dispatch from the Gold Coast Governor, a Colonial Office junior official, J. Hood, noted that “the judges are not improving with time, Mr. Watson being the best spoken of. The Gov. (sic) thinks Mr. Gough’s health is weak and his ability going. It will be remembered that there were doubts whether he would be fit to act as Chief Justice when Sir P. Smyly took leave.” Following up that those comments, Ellis minuted that “Pressure shd (sic) I think be put upon Mr. Gough to retire when he next comes on leave.” Risley, the Legal Advisor, said that “Mr. Gough has, I believe, been a fairly good judge in the past but it seems clear that there is not much more work left in him.” “The Gold Coast bench
wants depth. The C. J. (sic) is really painfully weak and the 2 (sic) best men are probably Mr. Watson and Mr. King-Farlow. The latter is a very fair lawyer and will bring plenty of energy and common sense to bear upon his work.”92 As may be seen from these comments, the Governors were perhaps overly concerned with the perceived “weakness” of the judges about whom they reported. Such concern may very well cover questions as to whether that judge would be influenced by local barristers in cases of importance to the colonial administration.

On occasion, a Confidential Report worked to the advantage of a judge. Thus, following a highly complimentary Report on Chief Justice Hutchinson by Governor Griffith, the former’s salary was increased by £300.93 In 1942, Puisne Judge Doorly reported to Chief Justice Petrides that a particular District Magistrate should be confirmed because, among other things, “‘He is a strong upholder of the rights and independence of the Bench and is occasionally a little intransigent, maybe, in his dealings with Government Officers.’” Within two years, the Magistrate, one Harbord, was promoted to Northern Rhodesia.94

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92 In 1915, the Governor said of Gough, “I do not consider Mr. Gough to be mentally capable for his duties. His memory is most capricious and defective.” Smyly commented that Gough appeared to be “not very strong,” but that the last time he saw him he understood that his health was improved by his last leave. GNA ADM 12/5/62, 4.2.1915. Gough soon retired.

93 BNA CO 96/221, Confidential, 11.18.1891, Governor reports that Hutchinson is “clear-headed, patient, considerate and painstaking with the result that he has won the confidence of the people . . . . he has carefully avoided mixing himself up in any way with political affairs in the Colony or with any local cliques; while I have found him always ready and willing to give me the benefit of his advice and support when I have considered it desirable to confer with him upon questions and matters relating to the public interest of the Colony under my charge.”

94 GNA PF 2/13/4, Item # 1, 6.12.1942.
The requirement that the Chief Justice report as to the Puisne Judges caused a considerable row when Judge Arthur B. Howes protested that the Chief Justice was merely *Primus Inter Pares* and had no right to comment on other judges and their work. Moreover, he complained that many of the questions on the form were childish and irrelevant to his qualifications and duties in a senior position such as his and “derogatory” to him as one of the few officers appointed by Letters Patent other than the Governor, the Chief Justice and the other Puisne Judges. Despite the clear implication that his judicial independence was being infringed, Howes found that neither Chief Justice Deane nor Governor Slater supported him.95

The view that Confidential Reports compromised judicial independence was shared by many both inside and outside the Colonial Office. Sidney Abrahams, former Gold Coast Attorney General and Colonial Office official wrote that the confidential reports of the Chief Justice on the Puisne Judges, Magistrates and District Commissioners [in their judicial capacity] that were used “as a means of assessing individual fitness for promotion or sometimes retention in the [colonial legal] Service” was an implied threat to judicial independence.96 Another former Gold Coast Attorney General, Sir Harry Blackall, concurred, writing that although it was necessary to report

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95 GNA ADM 12/3/58, Confidential, 2.6.1932.
96 Sir Sidney Abrahams, “The Colonial Legal Service and the Administration of Justice in Colonial Dependencies,” *Journal of Comparative Legislation and International Law*, Third Series, 30, 3/4 (1948): 1-11, 7. I remind the reader that by “judicial independence” I mean the absence of administrative control over the manner in which judges carried out their duties and decided the cases before them. While this term may not be self evident to lay people, it was to attorneys who were repeatedly imbued with these ideas at all stages of their legal education.
on judges for purposes of promotion, such reports were inconsistent with judicial independence. However, in the context of reporting to the Gold Coast Colonial Secretary with respect to confirmation of the appointment of magistrates, he took a more nuanced position, suggesting that the Attorney General, to whom many complaints about the judges came that would not be known to the Chief Justice, such as defects of temperament such as anti-police or anti-prosecutor bias, as well as the Commissioner of Police and the Provincial Commissioners should be permitted to express an opinion. Indeed, he would caution administrative officials to consider carefully the view of the Chief Justice who, although he wouldn’t mind being told of a magistrate’s purported defects, is

very tender about the independence of the judiciary so I do not think he would be altogether favourable to some of my suggestions. But with all due respect to his Honour I think he carries the doctrine too far. Everyone agrees that the Executive should not interfere with the decision or discretion of a Magistrate or attempt to influence him in the slightest way in any particular case coming before him. But when it comes to deciding whether or not a District Magistrate should be confirmed, a member of the Judiciary Department is in exactly the same position as any other officer. It is the Governor, not the Chief Justice, who has to decide whether or not a District Magistrate should be recommended for confirmation and to enable him to do this it seems to me that it is only right that his excellency should be in possession of the fullest information. He will naturally attach great weight to the Chief Justice’s views, but he is not bound by them.98

What Blackall seemed to perceive in his earlier statement but not in his later one is the negative impact on judicial independence of the confirmation process itself.

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97 Oxford University Rhodes House, Blackall Papers, Mss Brit Emp 5.447. 175.
98 GNA ADM 15/120, 283.
He seems insensitive to the effect on a Magistrate's, or a Judge's, mind of having to be reviewed by executive officials as to his "judicial temperament."\textsuperscript{99} Sir Kenneth Roberts-Wray, a one time legal advisor to the Secretary of State, also took the position that reporting on judges compromised their independence. but that it couldn't be helped as it was necessary to enable the Secretary of State to determine which judges to promote and/or transfer. Independence of judges ultimately relied on public opinion that they should be independent.\textsuperscript{100} They should be free from concern that because of some decision they made that was not in line with administrative policy that they might not be confirmed in their position or promoted or transferred. And public opinion did not clearly support the idea that the judges were independent in the sense set out in the previous sentence. Robin Luckham quotes E. E. C. Sekyi, head of the Aborigines Rights Protective Society after the mid 1920's:

> The judges are very human and have always an eye to promotion including a possible knighthood and a fat pension. Although in theory they are appointed by the Crown, yet since the time at least of Sir Gordon Guggisberg when . . . a highly flattering report and reference concerning the case [of two lesser chiefs suing Ofori Atta, the Colonial Secretary, the Secretary of Native Affairs and a District Commissioner] was found officially to reflect favorably on the learned Chief Justice who non-suited the plaintiffs, . . . one cannot help feeling that the judges are, as to some of them at any rate, not above considering the possibility of deserving more such reports and references or "mentions in despatches."\textsuperscript{101}

\textsuperscript{99} Nevertheless, it should be noted that United States Magistrate Judges are appointed to fixed terms subject to renewal albeit that the appointment and the renewal are by Article III judges who are themselves appointed to life terms.


A negative view of judicial independence in the Gold Coast was not limited to the West African dependency. A leading article in the Manchester Guardian of September 6, 1930, attacked the jurisdiction of District Commissioners who “are so closely dependent upon the Crown as morally to disqualify them from acting in Crown cases” and complained that judges were not independent. A minute by Alexander Fiddian noted that the administration of justice by Administrative Officers without legal training was undesirable but could not be avoided.102

Most of the Governors lent at least lip service to the ideal of judicial independence. For example, Governor Guggisberg quoted his predecessor, Alexander Ransford Slater on the question of judicial salaries, that no Governor should make any recommendation as to such salaries, “in view of their independent position and of the fact that transfers between colonies are the rule rather than the exception.”103 Only the Secretary of State should bear the responsibility of fixing compensation for the Bench. 104

101(...continued)
cases of threat to the British colonial polity, such as the Mau Mau rebellion in Kenya, the judges lost their impartiality and donned the dress of prosecutors. James S. Ejakait Opolot, A Discourse on Just and Unjust Legal Institutions in African English-Speaking Countries, Lewiston, New York: The Edwin Mellen Press, 2002, 44.
102 Report of A Committee on the System of Appointment in the Colonial Office & the Colonial Services, 36
103 Wraith, 154.
104 GNA ADM 12/3/32, Confidential, 12.15.1919. See also BNA CO 96/604, Confidential, 8.19.1919.
M. B. Hooker argues that judges on the Gold Coast had no real independence until a 1954 Order-in-Council\textsuperscript{105} provided for appointment of the Chief justice by the Governor after consultation with the Gold Coast Prime Minister and of Puisne Judges after consultation with (and after 1955 on the recommendation of) a newly formed Judicial service Committee of the Legislative Assembly. No judge could be removed except upon a two thirds majority vote of the Legislative Assembly and then only upon proof of misbehavior or bodily or mental infirmity. Nor could their pay be reduced during their tenure of office.\textsuperscript{106} This Order-in-Council, made long after the close of the period under study here, implicitly recognized that colonial judges were too often dependent on the Governors of the dependencies in which they served and thus were potentially inclined to decide cases involving the administration not in accordance with their studied view of the applicable law but rather to carry out some administrative policy.

Although colonial judges could not be easily removed from office, they could be and were often transferred. Comment by local attorneys and newspapers tended to complain that judges came and went, with the notable exception of Griffith and Smyly, all too quickly and had no real opportunity to have any but “vague ideas of the Native

\textsuperscript{105} Statutory Instruments, Vol. 2, §§ 60(1), 63 and Third Schedule Part II, 2788 (No. 351).

customary law and procedure.\textsuperscript{107} The Gold Coast press often expressed strenuous objection to the Colonial Office policy of frequent changes on the Bench. One newspaper listed the names of judges who had come and gone or who were going to leave in the seven years since November 1918: King Farlow Nettleton, Porter, Beatty, Dalton and Logan, the only remaining veterans being Smyly and Hall. It takes time, the article argued, to learn to deal with the native law and custom that the judges must administer and that the best judges, whom it named as Griffith, Jr, Redwar, Rayner, Francis Smith, and Nicoll, all served long terms. It decried the impending transfer of Logan whom it said was a good judge. It objected to what it saw as the Gold Coast being used as a training ground for judges being sent to other colonies. It urged the Government to pay more, if necessary, to keep good judges who should commit to a ten year stay and complained that it was difficult to lose a judge just when he had “acquired a firm grip of local usages and customs.”\textsuperscript{108}

The jurisdiction of the Supreme Court under the Supreme Court Ordinance was subject to expansion or contraction on the order of the Governor-in-Council.\textsuperscript{109} This provision afforded the Executive a powerful weapon with which to control a Bench that might decide matters contrary to the wishes of the administration. Moreover, pursuant to Section 22 of the Supreme Court Ordinance, the Governor could specify the place

\textsuperscript{107} GNA CSO 4/1/420, 1.19.1945, 212-213. Memo from Francis Awoonor Williams, a barrister to the Havers Commission.

\textsuperscript{108} Gold Coast Independent, 3.14.1925, 310.

\textsuperscript{109} Supreme Court Ordinance No. 4 of 1876, §20(A)(1) and 20(A)(2).
where each judge was assigned or to which he might be transferred either temporarily or permanently, thus retaining the power to punish each judge for conduct the Executive found to be distasteful or to reward him for decisions favorable to the administration by moving him to a more or less propitious location.\footnote{Ibid., §22.} There is no evidence that the Executive ever exercised its power to limit the jurisdiction of the Supreme Court at all or to transfer a judge for punitive purposes, nevertheless, the existence of such power was an unspoken infringement upon the independence of the judiciary, that is their ability to decide the cases before them on their merits without concern as to potential punishment for a result that might be contrary to administrative policy.

Pursuant to Section 20(a), the Governor-in-Council could declare that such jurisdiction should not extend to any portion of the Colony specified in the order or could limit in any portion of the Colony specified in the order the class of causes or matters that might be heard by the Court.\footnote{Supreme Court Ordinance No. 4 of 1876, §20(A)(1) and 20(A)(2).} This provision afforded the Executive a powerful weapon with which to control a Bench that might decide matters contrary to the wishes of the administration. Moreover, pursuant to Section 22, the Governor could specify the place where each judge was assigned or to which he might be transferred either temporarily or permanently, thus retaining the power to punish each judge for conduct the Executive found to be distasteful or to reward him for decisions
favorable to the administration by moving him to a more or less propitious location.\textsuperscript{112}

Criminal assizes were to be held when and where the Governor ordered.\textsuperscript{113} There is no evidence that the Executive ever exercised its power to limit the jurisdiction of the Supreme Court at all or to transfer a judge for punitive purposes, nevertheless, the existence of such power was an unspoken infringement upon the independence of the judiciary.

\textbf{An Independent Bench: the Executive and the District Commissioners and Judges}

Since the District Commissioners were front line officers in constant contact with the indigenous population, their conduct as magistrates and their relationship with the colonial administration in Accra gave rise to questions of their independence as judges.

As noted above, District Commissioners were administrative officers who, while neither judges nor magistrates, also exercised judicial jurisdiction, both criminal and civil, as the first level of appeal from Native Tribunals. Among the questions arising from the dual role played by the Gold Coast District Commissioners was whether they interfered with operations of Native Tribunals in pursuit of Government political policies despite the Government’s proclaimed policy that such should not be the case.\textsuperscript{114} The evidence to support this argument is equivocal. Indeed there are at least several

\textsuperscript{112} Ibid., §22.

\textsuperscript{113} Ibid., §24.

instances where a District Commissioner was challenged for failing to execute political policies. In 1916, Governor Clifford reported that the District Commissioner of Winneba, having imprisoned a chief for fourteen days after finding him guilty of a misdemeanor, was excoriated by the Secretary of Native Affairs, Francis Crowther, for having committed "a political blunder" for having imprisoned the chief without having considered the political consequences and first discussing the matter with the Provincial Commissioner. The District Commissioner's action, while legally justified, had "permanently injured" both the Chief's and the District Commissioner's authority. Governor Clifford sided with his Secretary of Native Affairs and told the Secretary of State, Andrew Bonar Law, that the District Commissioner's explanation was unsatisfactory, that he was "dangerous" and that he should be encouraged to resign.

In 1903, Governor Nathan, somewhat forcefully, requested that Francis Smith, then acting as Chief Justice, make an order in the exercise of his discretion with respect to the conduct of an attorney in a case in the manner that the Governor requested. Smith declined, saying that he did not "understand in what way the legal practitioners work to the great detriment of the Government" as Nathan contended.

115 The Department of Native Affairs was created in the first decade of the twentieth century. The Secretary who headed the department was charged with supervising relations with the traditional authorities as well as determining whether or not a litigant would be permitted to appeal the judgment of a District Commissioner reviewing the decision of a Native Tribunal. He was relieved of this latter obligation under the terms of the Native Jurisdiction Amendment Ordinance of 1910 discussed below.


117 Oxford University Rhodes House, MS Nathan 289-300, 16, Francis Smith to Governor Nathan, 1.8.1903.
Nathan, perhaps because he was a former army officer, attempted to intervene in judicial matters more often than other Governors. On one occasion, he wrote to Chief Justice Griffith telling him that he [Nathan] had been asked to intervene to have Griffith quash a clearly frivolous legal action. Griffith told the Governor that as the Chief Justice he would take no steps to stop the lawsuit; the action had to proceed to judgment even if frivolous as everyone had the right of access to the courts. “In uncivilized countries like this,” Griffith said, “it must often appear that the powers of the Court and the acts of the Executive will conflict, but I think the right course is for the Executive to admit . . . that the power of the Court is above everything except the law.” The litigant who sought the Governor’s intervention, Griffith advised, should be told that the Governor cannot interfere with the action or with the operations of the Court.118

The case of Chief Justice Griffith, Jr. seems to be the exception that proves the rule as he not only voted against the Government’s position on the Native Jurisdiction Ordinance Amendment Bill of 1910, but petitioned the Secretary of State to disallow it.119 Perhaps not coincidentally, he soon received a negative medical report along with a recommendation that he be retired, which, in fact, he was.120

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118 Oxford University Rhodes House, MS Nathan 307, 90, W. B. Griffith, Jr. To Governor Nathan, 5.1.1902.
119 See Chapter VII, below.
120 GNA ADM 12/1/32, 11. 8.1910 Report from Chief Medical Officer: “He is lax, senile looking, debilitated and anaemic; he can do one more tour but should then probably be retired.” GNA ADM 1/2/76, No. 92, 3.2.1911, Governor grants him retirement leave.
On occasion, the Secretary of State was obliged to intervene to protect the independence of the Bench from overreaching governors. In 1914 he reproved the Acting Governor for giving directions to a judge although no insult was intended. While a Governor can tell a Judge to hold assizes at a certain time and place, if that judge is occupied at the time, the Governor cannot direct him to stop what he was doing and go do something else. "In other words, a Judge ought not to receive a definite order from the Governor to stop a part-heard case and go elsewhere, but difficulties arising from the business to be disposed of exceeding anticipations should in practice be left for arrangement between the Chief Justice and the other Judges." 121 On another occasion, the executive weighed in against a judge, in this instance a Magistrate, whom the Attorney General accused of being too lenient in fining hawkers in Cape Coast who failed to obtain and pay for hawking licenses. Blackall, the Attorney General, reported that the President of the Cape Coast Town Council complained that the Magistrate was too difficult to approach and would see it as "'interfering with his judicial functions,'" which, in fact, it was. Blackall took the complaint to Chief Justice Petrides who, apparently, spoke to the Magistrate, for his fines against unlicensed hawkers increased. 122

The issue of administrative officers acting as judges was strongly opposed by African attorneys. J. E. Casely Hayford, an indigenous barrister, scholar and author,

121 GNA ADM 12/1/36, Confidential, 5.25.1914, Secretary of State, Lewis V. Harcourt, to Acting Governor.
122 GNA PF 2/13/13, 5.10.1941, 6.3.1941.
wrote to the Governor objecting in the strongest terms to civil and criminal cases being decided by untrained and unqualified administrators. The Attorney General admitted that some District and Provincial Commissioners lacked necessary legal credentials but defended the practice with the explanation that it was more important to know the people and their customs that to know the law. How that assertion explains why a lay person is qualified to adjudge guilt or innocence of a charge of crime is inexplicable. He said that on the whole the results were satisfactory and the right to appeal to judges was still available.123 That utterly insensitive response to Casely Hayford’s complaint characterized the British attitude toward the administration of justice on the Gold Coast. While insisting on the necessity for the rule of law, the colonialists refused to consider the consequences for the rule of law to their having executives act as judges, to their indifference to the conflicts of interest inherent in having unqualified political personnel engaging in judging both civil and criminal cases, the lessons about justice they were teaching their colonial dependents.

The ARPS attacked the Native Administration Ordinance of 1927 in part because it gave judicial functions to administrative officers in contravention of what the

123 GNA ADM 12/3/35, Confidential, 6.2.1921, Enclosures Nos. 1 (Letter dated 4.7.1921, J. E. Casely Hayford to Governor) and 2 (undated Minute by Attorney General). Joseph Ephraim Casely Hayford was the son of a well to do Methodist minister. Educated at the Fourah Bay College in Sierra Leone and the Inner Temple in London, he became a prominent voice in opposition to British land policies and other efforts to interfere, in his view, with the rights of the indigenous population. Magnus J. Sampson, Gold Coast Men of Affairs (Past and Present), 143.
ARPS characterized as British traditions and principles of the separation of powers and judicial independence.  

Grattan Bushe prepared a report, Part III of which dealt with the questions concerning Executive Officers acting as Judges, which questions he deemed as being “of great importance and [going] to the root of the proper administration of justice both in the Gold Coast and elsewhere in West Africa.” Bushe was hostile to political officers executing judicial functions, reminding his readers of the principal of judicial independence and noting that for no principle has there been a greater fight through English history. Asserting the necessity for those acting as judges to be trained lawyers, he said that there “is no particular reason why a layman should be able adequately to administer the law any more than he should be able to set a broken leg or survey a railway. The only difference was in the likelihood of the discovery of his incapacity.” Merely sending reports of cases decided by administrators to judges for review was inadequate as no evidence accompanied the reports. Except in cases of "gross errors of a primitive sort when, for example, a man has been convicted of a non-existent crime", such review was “worthless “ In the Gold Coast “it is not uncommon for the man to have served the whole or a large portion of his sentence before such action can be taken. . . .” But for Bushe, whether or not the administrator was a capable judge was not the primary concern. “No man,” he wrote, “can adequately act

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124 GNA ADM 11/1/974, 2.10.1928, Petition of the ARPS.
125 GNA ADM 12/1/80, Confidential (A), 7.8.1932, Enclosure.
as prosecutor and judge at the same time. Sometimes the attempt to do so is tragic. Sometimes it merely approaches the ridiculous. . .” Moreover, the District Commissioner is not only the Prosecutor and Judge but often “the complainant and the detective who has “got up” the case.” Finally, as the political officer responsible for order in his district, it was “inevitable that political considerations must frequently conflict with his duties as judge.”

As evidence of the truth of his last statement, Bushe pointed out that he had looked at the Occurrence Book at a Police Station and found a note from a District Commissioner saying that it was “politically desirable” to prosecute a certain person who should be charged with a specified crime and “it was most important that a conviction should be obtained.” Of course Bushe noted, the District Commissioner, who wrote the note would be the one to try the case. But, and one must always consider the but, Bushe says, that “in a lightly staffed” primitive country, the combination of executive and judicial functions is unfortunate bu unavoidable.” That simply was not true. Such contravention of the principles of justice could have been easily avoided merely by the appointment of more Magistrates. But the British refused to spend the money necessary to avoid continuing hypocrisy.

In determining whether or not those serving in a judicial capacity were, as were most of the Chiefs and indigenous authorities, mere agents of the colonial

\[126\] Ibid.
\[127\] Ibid.
\[128\] Ibid.
administration, we must distinguish between those who sat on the Gold Coast
Supreme Court and District Commissioners. As we have seen, the latter were all to
often intermediaries between the central administration in Accra and the people of their
districts. The available evidence shows, however, that the instances of Supreme Court
judges carrying out administrative policy were very rare, albeit given the immense
number of decisions of these judges during the seventy years under consideration
here, it is impossible to say with certainty if they decided because of administrative
pressure and, if so, how often.

In their judicial capacities, the District Commissioners as well as the Puisne
Judges and Magistrates were subject to oversight by the Chief Justice of the Supreme
Court. Between the formation of the Colony in 1874 and 1944, nine men filled that
position. Of those nine, four were exceedingly important to the administration of
justice in the Colony and the Protectorates governed along with the Colony. In the
next chapter, I discuss those four men and their role in the judicial history of the Gold
Coast.
CHAPTER IV – SOME JUDGES WHOSE CONTRIBUTIONS WERE SIGNIFICANT TO THE HISTORY OF THE COLONIAL GOLD COAST

Of the many judges who served in the Gold Coast between 1876 and 1944, four stood out in consideration of their contributions to the creation and operation of a colonial state as well as development of a Gold Coast judiciary and common law.¹ As such they were critical to the administration of justice in the Colony. William Brandford Griffith, Jr. and Phillip G. Smyly served as Chief Justice sixteen and seventeen years respectively, demonstrating an unusual capacity for surviving, indeed thriving, in a climate so unhealthy for so many Europeans while making many decisions establishing precedents followed even into the era of Ghanaian independence. These four provide a continuity of service almost unbroken from 1876 to 1927. Their long service engendered a stability in the courts of the Gold Coast that the shorter tenure of most judges could not duplicate. No historian whether European, American or African, has seen fit to examine any of these men or their place in the administration of justice except with respect to Griffith, and he only briefly.² I was unable to find any secondary sources that do more than mention any of the other judges except in passing in noting one or more of their judicial decisions, or, in the case of David Chalmers, his report on

¹ No records exist that would enable me to profile any of the many Puisne Judges who served in the Gold Coast Colony until 1944. Accordingly, I have chosen the four men who seem to me to have had the greatest impact on the administration of justice in the Colony. All were Chief Justices.

emancipation of slaves.\textsuperscript{3} Indeed, none of the four are even mentioned in the Dictionary of National Biography.\textsuperscript{4} As will be seen, they fit into the work of Kuklick and Kirk-Greene as to their background and education. Because they may have been seen as little more than agents of the colonial bureaucracy, their lives and role were ignored by historians, but, I contend, they are of great significance to the history of British colonial rule in the Gold Coast and the role of judicial administration in such colonial rule. They were critical to the creation of a number of Gold Coast and West African institutions and significant in the formulation and implementation of colonial policies as to land tenure and Native Administration. They exemplify as well both the manner in which judges were moved from colony to colony as well as the stability in the administration of the law desired by the colonial authorities and the creation of a hybrid colonial law that has endured to this day.

All four of these judges were recruited to the colonial service in the nineteenth century when recruitment criteria were almost entirely subjective. Each had served as a judge elsewhere in the colonies and were transferred from other posts. D. P. Chalmers and Joseph T. Hutchinson served as Chief Justices of other colonies following completion of their Gold Coast service, Chalmers in British Guyana and Hutchinson in Ceylon, now Sir Lanka. W. B. Griffith, Jr. and Philip G. Smyly were


\textsuperscript{4} Indeed, the entry for Griffith, Jr. In the \textit{Historical Dictionary of Ghana} is merely nine lines stating the most basic biographical information. Daniel Miles McFarland, \textit{Historical Dictionary of Ghana}, Metuchen, NJ: The Scarecrow Press, Inc. 1978, 93; David Owusu-Ansah, \textit{Historical Dictionary of Ghana}, 4\textsuperscript{th} ed., Lanham, MD: Rowman & Littlefield, 2014, 162. There are no entries for the other three judges.
unusual in the length of their tenure on the Gold Coast, the norm being the four to seven years served by Chalmers and Hutchinson and almost all of the Puisne Judges who served under them. Smyly came to the Gold Coast after long service as Chief Justice of Sierra Leone while Griffith, Jr. had been on the bench in Jamaica. All but Smyly also served as Official Members of the Legislative Council and often as extraordinary members of the Executive Council thereby compromising to some extent the independence that Griffith, Jr. particularly championed.

Griffith, Jr. was a most energetic individual, writing extensively on legal and political questions. His decisions made law in important areas of Gold Coast law that were followed throughout the colonial period. Moreover, he is an example of a judge who took the concept of judicial independence very seriously and was often at loggerheads with the Governor and other administrators until he left the Gold Coast under a cloud. Smyly, although not the intellectual equal of his predecessor, Griffith, Jr., created and maintained superior relationships with both colonial administrators and the Gold Coast Bar and was the primary moving force in creation of the West African Court of Appeals, a project he pursued over many years of difficult negotiations with his opposite numbers in Sierra Leone and Nigeria. Smyly and Griffith, Jr. shared a passion for the law and the ability to withstand the illnesses rampant on the Gold Coast and each left his mark on the administration of justice in that dependency.

David Chalmers made his mark as the author of the Gold Coast Supreme Court Ordinance and as its first Chief Justice. As with other “firsts,” he created precedents
that his successors felt bound to follow. He closely supervised the work of the District Commissioners and particularly their relations with the Native Tribunals. Finally, Joseph T. Hutchinson drafted and pressed for legislation, albeit never enacted, governing land transfers and native jurisdiction. He was a close adviser to Governor W. Brandford Griffith, Sr., preparing the first directives to District Commissioners on the execution of their magisterial and appellate duties. He earned the respect of the people and the Bar of the Gold Coast.

**William Brandford Griffith, Jr.**

The towering figure among the judges of the Gold Coast in the period covered by this study was Sir William Brandford Griffith, Jr., Chief Justice of the Gold Coast Supreme Court between 1895 and 1911. A man of immense intellect and many contradictions, close advisor to Governor Nathan, draftsman of some of the most important legislation of the era and of an ego as immense as his intellect. His importance derives in large measure from his willingness to oppose the colonial administration of which he was a part as well as because of the precedents he established in his numerous decisions and his role as the draftsman of much significant legislation. Griffith, Jr. was born in 1861 in the West Indies and received his early education there. He received his university degree from the University of London and studied law at the Middle Temple being called to the Bar at the relatively early age
of twenty.\textsuperscript{5} Almost immediately, he wrote to Robert Herbert, Undersecretary of State for the Colonies, introducing himself as the son of the Lieutenant Governor of the Gold Coast and applying any job anywhere, even in West Africa.\textsuperscript{6} Herbert minuted to Lord Kimberly, the Secretary of State, to say that Griffith, Jr. called to say that he was going to Lagos to join his father and practice law: “If he does well there and can stand the climate he will probably be a useful man for Col [sic] employment afterwards.”\textsuperscript{7} Herbert told Griffith, Jr. that there was no immediate prospect of employment, but within a year Griffith, Jr. came to the Gold Coast having been appointed an Assistant Queens Advocate in an administration in which his father was serving as Lieutenant Governor. Despite his Government position, Griffith, Jr. also engaged in private practice appearing before, among others, Mr. Justice Mcleod in a land case in which he prevailed.\textsuperscript{8} Two years later, Governor Young reported that Griffith, Jr. had been exemplary as an Assistant Queen’s Advocate and had been acting very satisfactorily for some months as a District Commissioner and Deputy Sheriff in Accra, particularly with respect to the prisons and prison discipline. The Governor proposed that since Griffith, Jr. satisfied the Governor’s requirement that District Commissioners be legally qualified, he should be appointed as a District Commissioner. Young’s recommendation was accepted despite his being the son of the Gold Coast Lieutenant

\textsuperscript{5} Colonial List 1895.
\textsuperscript{6} BNA CO 439/2, Letter, 9.22.1881.
\textsuperscript{7} Ibid.
Governor and though, the Colonial Office noted, it was not usual to have two men from the same family serving in the same Colony, there seemed to be no real obstacle to Griffith, Jr.’s appointment.\(^9\)

The younger Griffith was ambitious. In 1886, he sought appointment as a Puisne Judge or Queen’s Advocate, then the equivalent of Attorney General. Despite his service as an Acting Puisne Judge for two months at Lagos and one month in the Gold Coast, the Colonial Office said that it had made other arrangements and that he was too young and not experienced enough.\(^10\) Griffith, Jr. pursued appointment as Queen’ Advocate and secured the Acting Governor’s endorsement as “steady and temperate” and an “independent character” who was “held in respect by the public and his brother officers.”\(^11\) Despite this testimonial, the Colonial Office expressed concern about appointing him to such a post in a Colony where his father was the Governor despite his superior performance while acting as Queen’s Advocate and offered him the post of Queen’s Advocate at Lagos since he was seen as one of the ablest, most energetic men in the service.\(^12\) He declined that appointment and the Colonial Office’s Reginald Antrobus argued that he was the best man for the Gold Coast appointment despite his relationship to the Governor and that sending him elsewhere would be a great loss to the Gold Coast. Nevertheless, the contrary views of Edward Wingfield

\(^9\) BNA CO 96/159, No. 450, 9.18.1884.
\(^10\) BNA CO 96/174, No. 203, 6.4.1886.
\(^11\) BNA CO 96/183.
\(^12\) *Ibid.*, Confidential, 9.16.1887.
and Robert H. Meade, the Assistant Permanent Undersecretary, prevailed and he was offered the position of Resident Magistrate in Jamaica, one that he accepted. He left the Gold Coast in January 1888.13

Four years later, Governor Griffith, Sr. told the Colonial Office that his Colonial Secretary’s office was severely undermanned and that he needed his son – then in Jamaica – as he could rely on him. The Colonial Office replied that it did not think it was right to send Griffith, Jr.14 The Governor persisted in asking for a transfer for his son as a matter of personal consideration to him. If he could not be permanently reassigned, Griffith, Sr. asked that the Governor of Jamaica be requested to lend Griffith, Jr. to him to act as his private secretary for twelve months since only Griffith, Jr. had the requisite local experience and other qualifications to satisfy the requirements of the Colonial Secretary’s office and as Griffith, Sr.’s private secretary the younger man would not be involved with judicial, legal or fiscal issues so that the relationship would be less important.15 When Griffith, Jr. did return to the Gold Coast, he came after his father had retired as Governor and in the exalted position of Chief

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13 BNA CO 96/189, 1.19.1888, 1.20.1888. Governor Griffith was equally unsuccessful in obtaining the Colonial Office’s support in having his son named a Queen’s Counsel, an honorary position conferred on senior barristers. Despite Griffith, Jr.’s having complied and indexed the Gold Coast Ordinances while he was on leave, and his service as Acting Queens Advocate, Acting District Commissioner and Acting Puisne Judge, Robert Herbert, the Permanent Undersecretary of State declined to recommend him, noting that the designation of Queen’s Counsel was reserved for practitioners and that Griffith, Jr. had not practiced in the Gold Coast or Jamaica. BNA CO 96/00, No. 20,1.22.1889.

14 BNA CO 96/223, Confidential, 4.19.1892.

15 Ibid., No. 90, 4.22.1893. His request was once again declined. Ibid., No. 113, 5.16.1892.
Justice of the Supreme Court.\textsuperscript{16} The Accra to which Griffith returned was of “the glaring tropical area, ugly with squalid buildings and general air of disheveled undress.” Unlike the Jamaica from which he recently come, “this was a bare existence, a place to work and dree out one’s time with a small amount of social amenity then prevailing.”\textsuperscript{17}

For reasons upon which the archival evidence throws no light, Griffith sought to leave the Gold Coast almost as soon as he assumed the position of Chief Justice. In January 1896, he asked Governor Maxwell to forward to the Colonial Office his application to be Attorney General of Jamaica where he had served as Acting Chief Justice for eight months. The Colonial Office turns him down saying other arrangements had been made.\textsuperscript{18} At about the same time, Griffith wrote requesting to be appointed Governor of Lagos. Antrobus noted that Griffith had been to see him while on leave to pursue the request and that he held out no hope to Griffith but that Griffith seemed to stand the climate well and the Colonial Office might need him one day.\textsuperscript{19} In 1897, just over two years after he assumed office in Accra, Griffith sought appointment as Chief Justice at Demaraua (sic), British Guiana or to “any other

\textsuperscript{16} GNA ADM 6/20, 258. He was appointed as of 5.29.1895 and assumed the office on 8.26.1895.
\textsuperscript{17} W. B. Griffith, Jr. \textit{The Far Horizon}, , 138.
\textsuperscript{18} BNA CO 96/270, No. 17, 1.17.1896.
\textsuperscript{19} BNA CO 96/286, Antrobus minute, 2.10.1896.
vacancy.” His application was rejected. Finally, at the beginning of 1899, Griffith asked to be Chief Justice in Trinidad. Again he was rejected.

It would not seem to be the case that Griffith did not get along with Governor Maxwell or Hogdson; there are no dispatches complaining about him or their relationships. And when Matthew Nathan took office as Governor in 1900, he and Griffith developed a close connection. Nathan’s papers disclose almost daily communications from Griffith to him offering both solicited and unsolicited advice on all kinds of subjects outside of issues involving the judiciary or the administration of justice. The Chief Justice made recommendations as to ports from which cocoa should be shipped, volunteered to make inquiries as to rubber production in the Gold Coast and said that the natives were beginning to harvest latex without killing the trees. In January 1901, he advised against holding a special meeting of the Legislative Council as to the Queen’s death but proposed a draft resolution to be telegraphed to London that should be signed by each Judge, prepared a proclamation as to the accession of Edward VII and made recommendations as to a religious service to be held at the time of the Queen’s funeral. However most of Griffith’s communications

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20 BNA CO 96/299; 96/300, Confidential, 12.4.1897, 12.9.1897.
21 BNA CO 96/327/2424/1.30.1899 and 4977/ 2.2.1899.
22 He did however confide to his diary that Maxwell “was not a popular man either with Natives or Europeans.” W. Brandford Griffith, Jr., The Far Horizon, 138.
23 Oxford University Rhodes House, MS Nathan 307.
24 Oxford University Rhodes House MS Nathan 307, 2.1.1901.
dealt with legal issues and pending cases. In addition, Griffith offered Nathan his opinions as to what District Commissioners would give good service as Magistrates and the prospects for success of newly appointed legal officers and judges. Griffith seems to have had a close relationship with Nathan whom he thought to be a good and strong man, “brilliantly clever, as well as a strong administrator – not always the same thing.” Griffith also retained decent relations with Nathan’s successor, John Roger, about whom he wrote that although they did “see eye to eye” on many matters, “they learned to appreciate each other.”

During his tenure, Griffith had several disputes with other judges in which he tried to assert a dominance over the other judges in the Colony of which two required intervention by the Colonial Office. In this and other disputes, we may see Griffith’s efforts to maintain a primacy over the Puisne Judges beyond mere primus inter partes. In 1896, he became annoyed by the habit of Hays Redwar to sit only three hours per

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25 See, e.g. MS Nathan 307, 252-271; 185, 8.25.1903, in which Griffith advised Nathan that a pending application for leave to appeal in a criminal case was just dilatory and frivolous and should not be considered; 145, 9.10.19 in which Griffith sent Nathan a long explanation of the case of the King of West Akim v. the Chief of Obo and offered suggestions as to how the Governor should handle the matter.

26 GNA SCT 2/1/9, 39, 11.17.1900: O’Brien was all right as a Magistrate but “He is too fond of asking for advice on points which are solely for his own discretion.” Oxford University Rhodes House, MS Nathan 289-300, 176-177, 12.3.1902, one District Commissioner is “not so methodical” as two others; three District Commissioners should take some courses in law; “we are all very glad to hear that Osborne is appt’d (sic) to be A. G. (sic); opines that Pennington [a newly appointed Puisne Judge] “is a good man and should be a success.”

27 W. Brandford Griffith, Jr., The Far Horizon, , 174. The Rhodes House Library archive contains a file of several hundred memoranda, notes and letters sent from Griffith to Nathan, whom he considered to be a personal friend, but nothing from the Governor to Griffith. Oxford University, Rhodes House MS Nathan.

28 Griffith, Jr., The Far Horizon, 190.
day. He requested of the Acting Governor, and that official ask a ruling from the Colonial Office confirming his power as Chief Justice to regulate the hours of judicial sittings. Governor Hogdson agreed with him, saying that he could not see why a judge, merely because he was a judge, should be exempt from supervision by his superior of his hours of work. Redwar contended that no one had the right to interfere with the manner in which he did judicial business, an element of judicial independence. Griffith, Hogdson reported, told Redwar that he, Griffith, was responsible to advise the Governor if the working of the Judicial Department was unsatisfactory, Divisional Courts, that is Puisne Judges, should sit at least five hours per day, five days per week and that all previous judges, whom he named, kept those hours. Short days, he went on, imposed hardships and additional costs on parties and witnesses. Griffith noted that in 1895, the Chamber of Commerce had remonstrated that courts throughout the Colony should sit at least six hours per day so that cases could be concluded in one day as it was done in Accra. Redwar responded to the Chief Justice that he would sit as long as necessary but not according to a fixed schedule and that the Chief Justice had no right to regulate his working hours. Thus this dispute highlighted the sometimes contrary concepts of administrative authority (Griffith was acting in an administrative capacity in seeking to fix hours) and judicial independence, the right to remain free from administrative interference with the exercise of judicial duties. The Attorney General, favoring the view that Griffith, Jr., could fix the hours in which a

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judge sat although no provision of the Supreme Court Ordinance permitted the
Governor or the Governor-in-Council to fix court sittings. He noted that both one of
Griffith, Jr.’s predecessors, Chief Justice Bailey as well as Griffith, Jr., as Head of
Department and not as a Rule of Court under the Supreme Court Ordinance, had fixed
the hours at eight to eleven and one to four. The Attorney General, however,
recommended legislation authorizing the Governor to fix hours, saying that the
existence of such power itself should fix the problem and would probably not be
required to be exercised and that five hours per day and three on Saturday should be
the standard.30 The Colonial Office questioned whether such power could be effective
since the Executive could not interfere with a Puisne Judge’s discretion to organize his
work and he could if he chose only list cases that would take only five hours to
conclude. The Colonial Office recommended that the Secretary of State, Joseph
Chamberlain, express his opinion that five hours per day was the correct amount of
time to sit for the convenience of the public rather than trying to impose such a rule.
Redwar wrote to the Governor, saying that he was gratified that the Chamberlain
agreed with him that a Court need sit as long as necessary and not fixed hours.31 The
record does not show Griffith’s reaction to this seeming rebuke although the Colonial
Office determination seemed to accord with the Chief Justice’s view that judges should
be independent of administrative interference.

30 Ibid., Enclosure.
31 Ibid., 11.2.1896.
The second dispute shows an aspect of his personality that offended many colleagues as well as Colonial Office Officials. In March 1908, Gilbert K. T. Purcell, a Puisne Judge then serving in the Gold Coast Colony, applied to become Chief Justice of Northern Nigeria. In reviewing that application, Fiddian noted that in 1906 Griffith had made an unfavorable confidential report on Purcell. Harris minuted to Lucas that he and his colleagues were not altogether satisfied with “the justice” of Griffith’s reports and that they were not sure that Griffith “is at all fair to his Puisnes.” At the end of 1908, Griffith prepared to go on leave, but he declined to recommend Purcell to act as Chief Justice while he was away, saying that Purcell didn’t possess the confidence of the Bar or the respect of the public. He was very short on specifics to back up his claim, relying only on hearsay and vague hearsay at that. Since Griffith wouldn’t agree to having Purcell act for him, the Colonial Secretary applied to the Colonial Office to decide the question. In connection with that application, Griffith produced what he contended were the facts underlying his objections. Although quite detailed, they established nothing that indicated professional wrongdoing, just personal pique. The Secretary of State, Lord Crewe, responded that nothing in Griffith’s indictment justified depriving Purcell of his right, as Senior Puisne Judge, to act as Chief Justice during Griffith’s leave. Again, the record provides no evidence of Griffith’s reaction.

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32 BNA CO 96/467, Colonial Office Minutes on Confidential, 3.6.1908.
33 GNA SCT 2/1/9, 12.1.1908, 175.
34 Ibid., 12.7.1908, 179, 180-187.
The third act of the Griffith v. Purcell drama involved a request from the Governor of Southern Nigeria for a loan of a Puisne Judge for three months. Griffith wrote to Governor Rodger who had consulted him: “Then there is Purcell, who could be spared, but he is not suitable.” Griffith contended that Purcell had coerced a guilty plea with an implied threat of a heavier sentence if the defendant took the case to trial. “But as his judgment was reversed because of this conduct, he will probably not continue it.” Charles Harris, a clerk in the West African section, suggested that Griffith might be jealous of his [Purcell’s] independence and that Griffith’s complaints seemed to be “very minor.” Risley belittled Griffith’s criticisms as to the failure to note facts, saying that barristers always pushed for more and he rebutted each of Griffith’s claims. After reading a few of Purcell’s decisions, Risley agreed with A. Willoughby Osborne, the Gold Coast Attorney General, that Purcell was the best criminal lawyer on the Bench in the Gold Coast. Moreover, he thought that Osborne was the ablest law officer in West Africa and that his opinion was of the highest value. Risley opined that Purcell’s way to promotion was being blocked by Griffith’s “enmities.” and that there was no need for Purcell to answer Griffith’s charges (Cox agreed). These apparently unimportant disputes are noteworthy primarily for the reluctance of the

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36 BNA CO 96/473, Confidential, 12.23.1908.
37 *Ibid.*, Colonial Office minutes. Such archival material as is available suggests that Griffith got along reasonably well with the Law Officers who appeared before him and such barristers as J. Mensah Sarbah. See, *e.g.*, Oxford University Rhodes House, Mss Afr 5.2133, Sir John Maxwell, Solicitor General then Attorney General, Diaries, 4.22.10, 12.21.10. GNA SC Sarbah Papers, No. 6.
Colonial Office to involve itself in internecine personality disputes among colonial judges that clearly did not involve issues of colonial governance.

Although Griffith worked well as a member of the Legislative Council with other members, both official and unofficial, on most matters, he was not shy about executive policies he opposed. As early as 1899, he had asked the Acting Governor to be permitted to abstain from voting in the Council as he “had frequently to dissent from Government propositions.” Despite Governor Hodgson’s refusal to excuse Griffith from voting, the latter insisted. According to Griffith, Colonial Secretary Chamberlain supported Griffith’s position.38 Griffith’s opposition to the Government came to a head in connection with the Native Jurisdiction Amendment Bill of 1910, more about which below.

Nevertheless Griffith more often than not worked well with his Legislative Council colleagues on many issues, including the special committee appointed to look into the amendment of the Marriage Ordinance, and expressed his opinions, mostly dealing with drafting issues and mostly helpful, on almost all legislation enacted during his tenure, his position on the Native Jurisdiction Amendment Ordinance that passed through multiple iterations before being enacted in July 1910, made many enemies in the colonial administration and can be said to have brought an end to his service on the Gold Coast. As noted elsewhere, Griffith opposed the Government’s position on that Ordinance. Governor Rodger reported that the Chief Justice opposed “almost

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38 Griffith, Jr. The Far Horizon, , 160.
every clause of the Native Jurisdiction Bill, both on the second reading and in Committee." “[Griffith] clearly demonstrated, if any demonstration were needed, the inadvisability of a member of the Judicial Bench being also a member of the Legislative Council.” It seemed to him to be significant that Griffith’s opposition was not supported by the native members.39 Fiddes’ minute reflects his bitterness towards Griffith’s conduct: “The dignity of the judicial office is un[dermin]ed [?] by Sir W. B. Griffith’s continuing to hold it.” Lucas concurred: “I agree that it is undesirable to have a C. J. (sic) on the Council, particularly one with such decided views as Sir W. B. Griffith. We might ask Sir. J. Redwar if there is any prospect of Sir W. B. G. (sic) retiring after this year.”40

Although there is no direct evidence that the Colonial Office forced Griffith’s resignation, the report of the Chief Medical Officer clearly indicated that Griffith’s days were numbered: “He is lax, senile looking, debilitated and anaemic; he can do one more tour but should then probably be retired.”41 Undoubtedly having taken the hint, Griffith submitted his application to retire as of September 13, 1911 and received six months retirement leave.42 But Griffith effectively withdrew from service well before he

39 BNA CO 96/497, No. 519, 10.10.1910. Ironically, Fiddes noted that Griffith was not the only judge creating problems as a legislator: “Mr. Purcell as Ag. C. J. [sic] has made himself disagreeably prominent on occasion.” Ibid.
40 Ibid.
41 GNA ADM 12/1/32, 11.10.1910.
42 GNA ADM 1/2/76, No. 92, 3.2.1911; BNA CO 482/17, Letters from the Colonial Office to Acting Governor Bryan dated 5.13.1911 and 5.29.1911 advise of receipt of W. Brandford Griffith’s request for retirement and his pension.
formally retired.\textsuperscript{43} He took no part in the Legislative Council after October 28, 1910. At meetings subsequent to January 28, 1911, Purcell acted as Chief Justice and sat in the Council until the Constitution was changed to eliminate that official from the Legislative Council effective after July 12, 1911. The Legislative minutes from November 1910 to June 1911 show not a single word about the service of W. Brandford Griffith, Jr. as a member of the Legislative Council or as Chief Justice. He seems just to have disappeared.\textsuperscript{44}

In his view, Griffith’s departure from the Gold Coast had nothing to do with the abrasive debate over the Native Jurisdiction Amendment Ordinance. Indeed, his brief discussion of that matter in his autobiography is focused entirely on the rectitude of his position.\textsuperscript{45} He claims that in late January, 1911, he learned that he was suffering from “haemeomurmurs due to anemia” and had to leave West Africa as soon as possible, which he did on March 4th. He wrote that he was “‘chagrin[ed]’” when the Colonial Office told him that he had to retire.\textsuperscript{46} The circumstantial evidence tends toward the inference that he was forced to retire for other than health reasons. That Griffith’s

\textsuperscript{43} GNA ADM 14/1/7.

\textsuperscript{44} On November 6, 1911 long after he left the Colony and his successor had assumed office, his absence was finally noted by T. Hutton Mills, an African barrister and unofficial member, in the course of a debate on the estimates when he said that “the community has lost a strict and conscientious officer” to which there was no response, official or otherwise. GNA ADM 14/1/8.

\textsuperscript{45} Griffith, Jr.,\textit{ The Far Horizon}, , 196-197. He characterized those who opposed his views as a “very pigheaded majority.\textdagger\textsuperscript{46} He thought that his work on the Native Jurisdiction Amendment Bill was “best bit of work” that would do much for the “People, . . . although they don’t think so.”\textit{ Ibid.}, 193.

\textsuperscript{46} \textit{Ibid.}, 201.
health was not all that bad is demonstrated by his return to West Africa in 1913 as a member of a special Sierra Leone court convened to try cannibalism cases. 47

Griffith may have been gone, but he remained involved with Gold Coast affairs whose immediate legacy was further irritation. After he left, he revised a pamphlet of Instructions to District Commissioners that was amended by the Attorney General and the new Chief Justice. In January, 1912, Griffith wrote to the Governor strongly criticizing the changes made to his (emphasis mine) work and demanding that the draft he had prepared and signed should be issued unchanged. 48 The Attorney General responded, saying that Griffith had drawn the wrong conclusions from the facts. “I will only add that the late Chief Justice always appeared to me to suffer from some mental confusion which induced him to believe that he himself had become that which it had so long been his duty to administer (that is, the law).” 49

The criticism of his conduct from men in the Colonial Office did not prevent them from calling upon him to serve in various capacities at home and in the colonies. In later years, he served from 1918 until his death in 1939 as Legal Adviser to the

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47 Griffith, Jr., The Far Horizon, 217. He wrote the preface to fellow judge, K. J. Beatty's book describing the cases on which they both sat involving allegations of ritual murder and cannibalism by members of an outlawed secret society. Since the allegations extended to a number of chiefs who normally sat with the Circuit Judge as assessors, the Legislative Council in Sierra Leone passed an Ordinance establishing a special three-judge commission to try the cases. Griffith was selected by the Colonial Office to be the President of the Court and came to Freetown on December 8, 1912, giving the lie to the view that he was sick and disabled. Kenneth James Beatty, Human Leopards, An Account of the Trials of Human Leopards Before the Special Commission Court. London: Hugh Rees, Ltd., 1915, v-ix, 14.

48 GNA ADM 15/118, 291.

49 Ibid., 7.8.1912, 292.
Ministry of Pensions.\textsuperscript{50} He testified at length before the West African Lands Committee. He prepared an Index and Digest of 18 volumes of Gold Coast Decisions that then Chief Justice Deane, at Griffith’s request, told the Secretary of State, William Ormsby-Gore was “of considerable assistance.” In the early 1930’s, he wrote \textit{A History of the British Courts On the Gold Coast} that the Acting Attorney General M’Carthy positively reviewed.\textsuperscript{51} Then in retirement in London, he prepared an edition of the Gold Coast Ordinances as of 1914 and offered them to the Government. The Colonial Office ordered five hundred copies and Colonial Secretary Harcourt extended his thanks.\textsuperscript{52}

Griffith, Jr. never forswore his opposition to the whole system of Native Tribunals, which he saw as “effete and impractical,” writing that the indigenous people clearly preferred to have their disputes settled in British Courts.\textsuperscript{53} In \textit{A Note on the History of the British Courts in the Gold Coast Colony With a Brief Account of the Changes in the Constitution of the Colony}, written in 1935, he attempted to refute the implication that the British had forced themselves on the indigenes rather than the latter placing themselves voluntarily under British protection. Indeed, he claimed that the

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\item \textsuperscript{50} BNA CO 879/117/ 230.
\item \textsuperscript{51} GNA 15/74, per the Secretary of State’s 8.7.1937 Dispatch, 39, 725.
\item \textsuperscript{52} BNA CO 96/554, Confidential, 4.27.1914.
\item \textsuperscript{53} Griffith, Jr., \textit{The Far Horizon}, 160.
\end{itemize}

-155-
responsibilities of governing the Gold Coast “were gradually forced (emphasis in the original) upon” the British.\textsuperscript{54}

\textbf{David P. Chalmers}

The second of the four important judges I discuss here is David P. Chalmers, the last Chief Magistrate and the first Chief Justice of the Gold Coast. He was important to the issues of the administration of justice in the new British Colony because he was the draftsman of the Supreme Court Ordinance, the Criminal Procedure Ordinance and the first, never implemented, Native Jurisdiction Ordinance and established precedents that his successors felt obliged to follow. Chalmers was serving as Queen’s Advocate in Sierra Leone when the then Chief Magistrate, Sir James Marshall became ill and had to take leave to recover. He advised the Gold Coast Governor, George C. Strahan that he did not approve of the Accra District Commissioner acting for him and wanted Chalmers to come to the Gold Coast. The Secretary of State, Lord Carnarvon, approved Marshall’s request and Chalmers assumed the duty of Chief Magistrate and Judicial Assessor in July 1874.\textsuperscript{55} Just a few months after his arrival and the declaration of the new Colony, Chalmers was relieved of duty as Judicial Assessor so that he could devote himself to work on preparation of basic ordinances necessary to administer the Colony. However, Chalmers recommended that it would be inadvisable to close the Judicial Advisor’s Court as that

\textsuperscript{54} \textit{Ibid.}, 298-299.

\textsuperscript{55} GNA ADM 1/2/19, 7.1.1874, 315; 7.24.1874, 358.
would be misinterpreted as implying “a new mode of dealing with native cases,” something for which the British were not yet ready.\footnote{\textit{Ibid.}, 9.16.1874, 386-87.}

Chalmers set to work preparing a Supreme Court Ordinance based in large measure on ordinances adopted in other colonies adapted to his ideas of local conditions. The Supreme Court he proposed would consist of a Chief Justice, an office that he had been promised, and two Puisne Judges and could be enlarged later as circumstances warranted. It’s jurisdiction would extend to the Colony and those Protectorates where the British asserted jurisdiction. Chalmers proposed to create the office of District Commissioner whose occupants would be both magistrates and political executives, thus bringing into being the problem of dual jurisdiction that continued throughout the remaining life of the Colony.\footnote{BNA CO 96/116, No. 181, 9.6.1875, Enclosure, 9.4.1875.}

As might be expected in a new institution, the duties of the Chief Justice involved as much judicial administration as hearing and deciding civil and criminal litigation. For example, Chalmers prepared and disseminated circular letters to the District Commissioners on various subjects such as how to deal with Chiefs who were summoned in actions for debt or were subpoenaed to appear as witnesses.\footnote{GNA ADM 11/1/1011, 6.4.1878.}

Chalmers’ tenure on the Gold Coast was less than one might have liked for one whose every action amounted to setting a precedent albeit about average for judges, with the exception of Griffith, Jr. and Smyly. In May 1878, he was appointed to be
Chief Justice of British Guiana although he would remain on the Gold Coast for some time to come to finish work on the Native Jurisdiction Ordinance of 1878.\textsuperscript{59} He achieved a great deal in the four years he held office although his masterwork, the Supreme Court Ordinance was severely criticized by at least one newspaper as a “mishmash that is not understood by suitors, and is so unclear that even judges have stumbled over [it].”\textsuperscript{60} This criticism may be accurate as far as lay litigants were concerned, but it was not echoed by the Gold Coast Bar nor the members of the judiciary who were called upon to interpret it.

**Joseph T. Hutchinson**

Joseph T. Hutchinson became Chief Justice of the Gold Coast Supreme Court a mere ten years after being called to the Bar at the Middle Temple. He served as Queen’s Advocate and succeeded Hector Bailey as Chief Justice in 1889. He got along very well with Governor Griffith who sought his advice on issues as diverse as land tenure reform and native jurisdiction. Hutchinson excelled at legislative drafting and prepared both the Criminal Code and the Towns Ordinance for the Colony. At Governor Griffith’s behest, he led commissions to study land tenure and native jurisdiction and drafted both a Native Jurisdiction Ordinance Amendment Ordinance and the original Lands Bill.\textsuperscript{61} Of great importance, in 1893, he prepared the original set of Directions to District Commissioners that established the guidelines for how those

\textsuperscript{59} GNA ADM 1/2/22, No. 124, 6.19.1878, 136.
\textsuperscript{60} Gold Coast Chronicle, 4.4.1895, 2.
\textsuperscript{61} BNA CO 96/249. Confidential, 11.29.1894.
officers and particularly enabled those not legally qualified to act as Magistrates were to carry out judicial duties.  

Hutchinson consulted closely with the Governor and the Colonial Office as to the appointment of new District Commissioners, pressing, as did the Governor, for legally trained men and ultimately recommending Hays Redwar for promotion to Puisne Judge. Governor Griffith described Hutchinson as “clear-headed, patient, considerate and painstaking with the result that he has won the confidence of the people . . . . he has carefully avoided mixing himself up in any way with political affairs in the Colony or with any local cliques; while I have found him always ready and willing to give me the benefit of his advice and support when I have considered it desirable to confer with him upon questions and matters relating to the public interest of the Colony under my charge.” Griffith, Sr. told the Secretary of State, Lord Ripon, in 1892 that Hutchinson should receive a knighthood as he deserved a reward for his service. Hutchinson was “all that could be desired” as Chief Justice and he had gained “the esteem, regard and confidence of all parties,” and a mark of distinction for him would make the entire colony happy and proud. It should be emphasized that although Griffith, Jr., and Smyly also received knighthoods, neither of them were the beneficiaries of such fulsome accolades. When, in late November 1894, Hutchinson

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62 BNA CO 96/233, No. 135, 5.10.1893, Enclosure.
63 BNA CO 96/231, Confidential, 2.11.1893.
64 BNA CO 96/221, Confidential, 11.18.1891.
sought appointment as Chief Justice of Jamaica, Governor Griffith, Sr. endorsed his application, saying that he filled the office of Gold Coast Chief Justice extremely well, that he could not praise him highly enough and that his work as a judge was “sterling.” In January 1895, Governor Griffith, Sr. announced that Hutchinson was leaving the Gold Coast to assume the post of Chief Justice of Granada. The Colonial Secretary minuted that he believed Hutchinson to have been as good or better than any preceding judge both as a judge and as an officer willing to counsel and assist the Executive. The Attorney General added that Hutchinson had steadily improved judicial administration in the Colony from the moment he assumed office. Hutchinson was also much admired by the Christian missionaries in the country who considered him to be an expert on Christian education. The Legislative Council joined in extolling Hutchinson, congratulating him on his legislative service as a member of the Legislative Council and his executive service as a member of the Executive Council. Colonial Secretary Hogdson reiterated that “To the Executive, His Honour has always been ready to give his counsel and assistance.” It is interesting to point out that while Chief Justice Smyly also received many accolades on his departure from the Colony, W. Brandford Griffith, Jr., left in relative silence with only a single statement from a member of the Legislative Council to mark his departure.

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66 BNA CO 86/249, Confidential, 11.29.1894.
67 GNA ADM 14/1/6, 1.22.1895, 538-541.
69 BNA CO 96/268, Confidential, 5.30.1895.
Hutchinson’s work on the land tenure and native jurisdiction commissions did not produce any of the noteworthy results he hoped and expected they would. His draft Native Jurisdiction Amendment Ordinance was disdained by Griffith, Sr.’s successor as Governor, William Edward Maxwell, opined that both it and the proposed land legislation were too favorable to the traditional rulers and did too little to promote British authority. Although Hutchinson was clearly aware of the problems surrounding the operations of the Native Tribunals and the charges of corruption, he did not provide in his draft for the kind of oversight necessary to respond to such problems and charges.70 Nevertheless, Hutchinson’s initiative in preparing the first set of Instructions to District Commissioners that sought to overcome the lack of legal training in most of the men serving as District Commissioners by setting out clear rules for the conduct of those officials in their magisterial role, marks him as one of the most significant judges to hold the position of Chief Justice.

**Philip C. Smyly**

Philip Crampton Smyly was the only Chief Justice of the Gold Coast born and educated in Ireland. He graduated from Trinity College and was admitted to the Irish Bar from King’s Inn in 1888. His only posting prior to the Gold Coast was in Sierra Leone where he was Solicitor General, Attorney General and Chief Justice from 1893 until he was transferred to the Gold Coast, effective September 14, 1911.71 Smyly got

70 See Chapter VII, *infra*., 281. His mild view of judicial oversight of traditional chiefs was supported by the Attorney General who told Governor Maxwell that stricter oversight would be “impolitic.” *Ibid.*, 293.
71 BNA CO 482/17, Telegram, 8.3.1911; No. 673, 8.8.1911.
right into the work in the Gold Coast, revising, together with the Attorney General, the
*Instructions to District Commissioners* authored by Chief Justice Hutchinson and
previously revised by Chief Justice Griffith.\(^2\)

Governor Clifford found Smyly to be weak, as he did much of the Gold Coast
Bench, by which, I assume, he meant the judges’ willingness to be convinced by local
barristers to decide cases that might conflict with government policies in their favor.
Nevertheless, Clifford was unwilling to have him replaced by Purcell who had
succeeded Smyly as Chief Justice of Sierra Leone. Sir J. Anderson of the Colonial
Office thought that Purcell was “abler” (emphasis in original) than Smyly and was a
“fearless” (emphasis in original) judge, and because of these characteristics, he had
left enemies behind in the Gold Coast when he went to Sierra Leone.\(^3\)

Despite these perceptions of weakness, Smyly worked hard on his caseload
and administered the Judiciary fairly and effectively, promoting the interests of his
fellow judges as to questions of increased pay and particularly as to the necessity for
more judges. Smyly convinced the Governor to argue for at least one addition to the
bench because the increase in land litigation as cocoa production and land values also
increased led to courtroom battles being fought with “peculiar pertinacity.” Governor
Clifford argued that such court battles were seen as a substitute for personal and tribal
wars of the past and were part of the Akan culture. Moreover, the Governor continued,

\(^2\) University of Manchester Main Library, Special Collections, Foreign and Commonwealth Office
Pamphlets.

\(^3\) BNA CO 96/566, 3.13.1916.
once again at Smyly’s behest, it was highly desirable to hold Assizes outside of Accra, Cape Coast, Sekondi and Axim and that congestion of court dockets was so very serious that an additional Puisne Judge was needed as soon as possible. Evidently neither Smyly nor Clifford convinced the Colonial Office since, Ellis minuted, that before Earnshaw was transferred to British Guiana, he had complained of a lack of work and Ellis now thought the Governor’s statements as to congestion were exaggerated and temporary.

The press continually supported the efforts of the Chief Justice Smyly and, Governors Clifford and Guggisberg to pressure the Colonial Office to appoint more judges for the Colony. Leaders pointed out the congestion on the dockets in the principal towns and the frequent inability of the Full Court to dispose of its list, pointing out that the Bar was often pressing for additional sessions. It supported a Bill pending in the Legislative Council in the mid-Twenties to eliminate the cap on the number of Puisne Judges permitted, then four, as a necessary step toward improving “the quality of the work carried through from day to day in the Divisional Courts.” It commended Smyly for recommending the regular Bar resolutions for additional judges to the Government.74

Smyly’s apparent low key personality was often seen as a lack of intellectual energy. Ellis stated that in his appearance before the WALC, Smyly had impressed

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74 Gold Coast Independent, 2.17.1923, 10; 3.31-4.7.1923, 232. The Gold Coast Independent generally represented the views expressed by Casely Hayford and the National Congress of British West Africa, devoting a column in each issue to the affairs of that organization or written by one of its leaders and often carrying leading articles describing and supporting its views.
the Committee as “wanting in mental vigour.” Whatever the truth as to Smyly’s “mental vigour,” he certainly displayed energy in getting his work done and in exerting efforts to have all the judges, as well as the Bar, work to their capacity. In 1915, he argued that there was no point to a legal vacation. The judges couldn’t leave the Colony and could use the time of the former vacation to reduce or eliminate the arrears in civil cases. While agreeing with Smyly’s point, the Attorney General noted that the senior members of the Gold Coast Bar, who were also solicitors used the six weeks of the legal vacation to deal with office work and would oppose abolition, although junior barristers might agree as they could pick up some business.75

In addition, Smyly vigorously pressed the case of the judges for adequate pay. Concern for compensation for judges was a continuing one and was linked with the belief that increased emoluments were necessary to attract better judges. Pressing for a salary increase in a letter to the Governor, Smyly argued that the judges’ pay had not been increased since before World War One – the Governor noted that Smyly’s pay had not increased for twenty years – and were unsuited to post war conditions. Governor Clifford supported Smyly saying that since the judges have a wider jurisdiction than in any other West African colony and have the busiest courts and serve in an increasingly developed economy with an increasing case load, their pay should be increased. However, he told Smyly, in view of judicial independence, administrative officers should not make recommendations with respect to judicial

75 GNA ADM 15/36, 12.20.19.
salaries. He told the Colonial Office that it should fix the judges’ pay rates. The Colonial Office directed the Governor to tell the judges that their pay will be considered along with that for administrative officers.76

Smyly’s greatest contribution, however, was in negotiating the conditions under which the WACA came into being. The details of his role in getting the law officers and judges of the West African dependencies to sit down and work through their disagreements as to the jurisdiction and procedure of the trans-colonial appellate court have already been set forth and will not be repeated here.77 His last year as Chief Justice was almost entirely taken up with the back and forth involved in the effort to achieve agreement among the judges and law officers, none of them short of ego, of three colonies. When Smyly, whose last tour of duty had been extended six months to enable him to do as much as possible to complete the WACA work, gave notice of his intended retirement in December 1928, the response was very different from that which met Griffith’s retirement. Governor Slater asked Smyly to remain in the Colony long enough to lay the cornerstone of the new Courthouse. The Secretary of State, Leo Amery, expressed his appreciation for Smyly’s work and service and the appreciation of the Empire. Smyly’s work in both Sierra Leone and the Gold Coast for twenty eight years, said Amery, was “distinguished and noteworthy,” and “invaluable.”78 Slater expressed what he characterized as “our deep sense of the invaluable and

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76 BNA CO 96/604, Confidential, 8.19.1919; BNA CO 96/605, Confidential, 12.15.1919.
77 See British Jurisdiction, below.
78 GNA ADM 6/81, 7.1.1929, 1287-88.
devoted service which Your Honour has rendered to the Colony during an unprecedently long and arduous term of office in the office of Chief Justice.” He wrote that Smyly’s leaving would “long be felt both by the Administration and by all sections of the community.”

Nana Sir Ofori Atta, the senior unofficial member of the Legislative Council, congratulated Smyly on his “valuable work” and particularly on “the institutions and customs Your Honour had by various decisions and Judgments supported and upheld.”

The *Gold Coast Independent* said that Smyly’s record was unique in the length of his service in Sierra Leone and the Gold Coast and the paper believed that, were he to have his way, he would stay on for another ten years. The article characterized Smyly as suave, long suffering, almost inexhaustibly patient and respected by all who appeared before him, attorneys, parties and witnesses as he treated them all with exceptional courtesy. It described his close relationship with the Bar, both African and European, and his entertaining them at his home. However, it could not let him go without criticizing him for his taking of extensive notes that delayed hearings and increased costs of appeal and his failure to extend the jurisdiction of magistrates to several towns [something which was not within his authority] as well as his failure to

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79 Cambridge University Library, RCMS 137/2, Letter from Governor Slater to Philip C. Smyly 5.28.1929, Misc. No. 141, Letter from Slater to Smyly, 6.27.1929, Misc. No. 167 and Letter from Secretary of State Amery, 6.3.1929, No. 488. Slater had the letters and telegrams published in the *Gold Coast Gazette*.

encourage African Magistrates or to make WACA operative with as extensive jurisdiction as the *Independent* wanted.\textsuperscript{81} These remarks echoed in a small way the observation of Governor Clifford that Smyly was weak, albeit he showed no weakness in dealing with the Sierra Leone Chief Justice during the preparation of the WACA legislation. Nevertheless, complimentary comments from the Gold Coast bar and press about a senior judge must have pleased the officials in the Colonial Office as a positive reaction British administration of justice at a time when there was much opposition to the content of the Native Administration Ordinance recently enacted by the Legislative Council.\textsuperscript{82}

George Deane, Smyly’s successor as Chief Justice, although not of the same stature as his predecessor, established an excellent relationship with the Bar and people of the Gold Coast to the extent that when he was involuntarily retired in 1935, the African Unofficial Members of the Legislative Council petitioned that he be permitted to remain as Chief Justice. The Petition spoke of Deane’s “wisdom, courtesy and patience” and expressed the Petitioners’ offer to pay any increased costs incurred if Deane were permitted to remain in his post. Governor Hodson reported that Deane was willing to stay and recommended that he be allowed to do so because he had the confidence of the people.\textsuperscript{83} Despite such an outstanding testimonial from the

\textsuperscript{81} *Gold Coast Independent*, 8.27.27, 1.  
\textsuperscript{82} See Chapter VIII, *infra*.  
\textsuperscript{83} GNA ADM 1/2/210, No. 54, 1.26.35; GNA ADM 1/2/211, No. 164, 3.21. 1935.
elected representatives of the Gold Coast people, Deane was retired from office and replaced by Phillip Petrides.84

Reviewing this brief report of the lives of these four judges, one can see the intense attachment each had to the prerogatives of his office, the sensitivity, indeed the touchiness, he felt at what he considered any infringement on those prerogatives. Griffith, Jr., in particular, felt no qualms about opposing legislation supported by the administration or seeking to impose his will on fellow judges. At the same time we can see that none of them were truly independent in the sense that we insist that American judges be independent, constantly counseling with and advising the Executive, drafting legislation that they might later be called upon to interpret and judge all while being subject to removal from the colony and transferred to a possibly more difficult post.85

Nevertheless and despite the restriction of their jurisdiction embodied in the Native Jurisdiction Amendment Ordinance of 1910, the British courts of the Gold Coast were as busy as ever and demand for “British justice” increased throughout the period under study here. Even so, the British courts were limited, as are all courts, in solving the problems of society. They, unlike the executive and legislative branches, are

84 The Gold Coast Independent, 7.13.1935, 660, opined that Deane had endeared himself to the people and that they would miss him. It characterized Deane’s departure as “a grievous loss.” Deane, it went on, had studied the “idiosyncracies of the people” and was a conscientious judge who had succeeded in severing the judiciary from the executive, replacing District Commissioners with Magistrates, appointed Africans as Magistrates (an accolade not justified by the facts), saw the appointment of an African Puisne Judge and as Solicitor General, halted imprisonment for debt (another accolade not completely justified by the facts) and saw the West African Court of Appeals commence operation with judges no longer sitting on appeals from their own decisions.

85 American judges have not always been shy about advising executive officials. See, e.g., William Freeman, ed., Roosevelt and Frankfurter: Their Correspondence, 1928-1945, Boston: Little, Brown, 1968.
responsive institutions that handle matters brought to them. They are incapable of reaching out to discover and deal with problems.\textsuperscript{86}

\textsuperscript{86} For an excellent study of the limitations of the judiciary, see Alexander M. Bickel, \textit{The Least Dangerous Branch}, New York: Bobbs-Merrill, 1962.
CHAPTER V – AFRICAN JUDGES AND THE GOLD COAST BENCH

Here I discuss the paucity of local judicial appointments and the British rationale for such paucity: fear that indigenous judges would be more susceptible than Europeans to local influence. In the late nineteenth century, this rationale does not seem to have prevented the appointment of Francis Smith to the Supreme Court or the naming of several Africans as District Commissioners and Assistant District Commissioners. The British attitude toward the abilities of indigenous attorneys as judges changed at the beginning of the twentieth century and following Smith’s retirement in 1907, no African was named to the superior court bench until the 1930’s.  Following a discussion of Smith’s role in the judiciary, I describe the discussions related to the decisions of Governor Clifford to appoint an African to the position of Police Magistrate, the problems with finding acceptable African candidates among the local Bar to fill such positions and problems with some appointments in the 1920’s and, ultimately, the decision in 1917 to appoint Woolhouse Bannerman first as a Police Magistrate, then to Circuit Judge for Ashanti and then to a seat on the Supreme Court. Clifford and Guggisberg both made efforts to overcome resistance in the Colonial Office and from Chief Justice Smyly to appointment of Africans to judicial positions with little success. It was not until Woolhouse Bannerman demonstrated skill

87 The failure to appoint Africans to senior judicial and other positions seems to have derived, albeit, very slowly, from a directive by the then Secretary of State, Lord Kimberely in 1873 that “Except in quite subordinate posts, we cannot safely employ natives. . . . I would have nothing to do with the ‘educated’ natives as a body. I would treat with the hereditary chiefs only, and endeavour as far as possible to govern through them.” William Gervase Clarence-Smith, “The Organization of ‘Consent’ in British West Africa, 1820’s to 1960’s,” Colonial Hegemony: State and Society in Africa and India, edited by Dagmar Engels and Shula Marks, eds., London: British Academic Press, 1994, 55-78, 67.
and tact in performing his duties that such resistance disappeared leading to a subsequent appointment of Leslie M’Carthy to the superior bench shortly before the close of the period under study.

Appointment of judges from among the colonized populations varied widely in the Empire. India presented an instance where indigenous barristers were often appointed to magisterial positions while no West Indian held a superior court judicial position until after 1944. Mitra Sharafi bemoans the lack of historiography that deals with indigenous lawyers and judges other than as nationalist politicians or as “cultural translators or ethnographic intermediaries.” Nevertheless, that is apparently the manner in which the British viewed them. Schmittthener points out that as of 1862 native judges were supposed to receive one third of judicial appointments in order to permit “uniting the 'legal learning and judicial experience of the English Barristers’ with "the intimate experience of Indian customs, usages, and laws possessed by the civil servants." However, the appointment of indigenous judges in India stirred much racist opposition. An 1883 paper written by Baron Arthur Hobhouse on behalf of the British India Committee quoted Lord Lytton in a speech to the House of Lords as to how members would feel if their “life or honour were exposed to the decision of some

tribunal consisting of a coloured man.” Arguing against such racist opposition, Hobhouse pointed to the effective administration of criminal law by an increasing number of indigenous Indian magistrates as well as by Indians appointed as judges of High Courts. Nevertheless, while there were numerous Indian magistrates handling both criminal and civil cases, few such men reached positions on the High Court. Indeed, as Bernard Cohn points out, many experienced and well qualified Indian magistrates had to defer to far less able and junior British officials who, albeit the newest recruits, were considered to outrank indigenous officials.

Historians seem to have ignored the story of indigenous judges in colonial Africa. Swanepoel discusses the colonial judiciary in Kenya without reference to a single African judge. Indeed, John McLaren’s monograph on colonial judges is limited to those of the white dominions and doesn’t mention native judges at all. Only Bonny Ibhawoh, a Nigerian attorney, discusses the role of non-British judges and then only on the Privy Council. The case of the Gold Coast, discussed in this chapter was almost

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8 Swanepoel, 47.
9 McLaren, *Dewigged, Bothered and Bewildered: British Colonial Judges on Trial, 1800-1900*

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unique in West Africa where prior to 1900, a few Africans held the mixed administrative and judicial position of District Commissioner and one man, Francis Smith, served first as a Magistrate in the Gambia and later as a Puisne Judge of the Gold Coast.\textsuperscript{11}

Ibhawoh argues, although without specification of the evidence upon which he asserts his opinion, that the failure of the Colonial Office to appoint African judges stemmed from British racism, based on the assumption that African were simply inferior to Europeans.\textsuperscript{12} It was not until the 1930's that Africans began to be considered as proper candidates for superior court judgeships.\textsuperscript{13} In the 1944 Kibi murder case where relatives of Sir Ofori Atta were charged with ritual murder, no Africans sat on the Privy Council committee hearing the defendants’ appeal although two Indian judges participated.\textsuperscript{14} Historians have been silent as to the reasons for the absence of indigenous judges in the Gold Coast and we are obliged to rely on the evidence of communications among officials in the Colonial Office found in archival material, most of which carefully avoid reference to race except as discussed herein. Governors Clifford and Guggisberg promoted recruitment of indigenous men into the service in the Colony and, as discussed below, accepted local barristers as magistrates of

\begin{flushleft}
\textsuperscript{11} Ibid, 40, 42. \\
\textsuperscript{12} Ibid.,158. Writing of a small group of Western-trained African attorneys who played a growing role in the colonial legal system, Ibhawoh said, “[t]he fact that these indigenous lawyers were not seriously considered as candidates for the JCPC [Judicial Committee of the Privy Council] until the 1960's had more to do with racial restriction imposed on non-white judges than with anything else.” Ibid. \\
\textsuperscript{13} Ibid., 40. At that point, two Africans, Bannerman and M’Carthy served on the Supreme Court and four Africans served as magistrates. Moreover, as sitting Puisne Judges, both men served on the WACA. Ibid., 41. \\
\textsuperscript{14} Ibid., 99. As a committee of the Privy Council, the members of this court were appointed by the Government.
\end{flushleft}
inferior courts. The success of all but one, whose case is discussed below, made it easier for Gold Coast Governors minded to engage local Africans in colonial government to convince the London authorities to make such appointments.

Insofar as the appointment of judges is concerned, it appears that the Gold Coast established precedents in West Africa and in the subsequently created colonies in East and Central Africa. These latter all came into being after creation of the Gold Coast Colony, most at a time when racism prevailed in the Colonial Office and fewer and fewer men of color were appointed to responsible positions in the colonies. Thus, at the time Francis Smith retired from office, he was the only African serving on a superior court in all of Africa. Accordingly, the Gold Coast was unlike other British colonies in Africa.¹⁵

**African Judges in the Gold Coast Colony**

Prior to creation of the Gold Coast Colony and thereafter up to about 1900, educated Africans served in judicial and quasi-judicial positions. As early as 1823, British officials sat with men denominated as “gold takers” who received and examined gold given and taken in trade who were charged with the duty to settle all disputes between ship captains and natives involving trade. In addition, the Chief’s council

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arbitrated disputes between natives and Europeans.\textsuperscript{16} In 1880, Governor Ussher reported to the Secretary of State, Lord Kimberley, as to the excellence of the African District Commissioners at Winneba and Saltpond who had made their courts attractive to the indigenous population who had filled them with work. Mr. Bartels, the District Commissioner at Winneba in particular was “very good at court work.”\textsuperscript{17} He told the Colonial Office that the Chief Justice spoke “highly of their administration in judicial matters” and that insofar as he, the Governor, was concerned, they compared favorably with Europeans as did four other African Officers who greatly exceeded European’s generally poor expectations.\textsuperscript{18}

With the exception of Francis Smith, who had been educated in Sierra Leone and at the Middle Temple and had served as the Chief Magistrate of The Gambia, no Africans were appointed as a Puisne Judge until the 1930’s. Smith came from The Gambia in 1887 and served honorably, often as Acting Chief Justice, until his retirement in 1907.\textsuperscript{19} Kelly argues that many African professionals had equal or

\textsuperscript{17} BNA CO 96/130.
\textsuperscript{18} GNA ADM 1/2/24, No. 86, 3.25.1880, 11.
\textsuperscript{19} Colonial List, 1907; Sue Beth Kaplow, “The Mudfish and the Crocodile: Underdevelopment of a West African Bourgeoisie,” \textit{Science and Sociology}, Vol. 41, No. 3 (Fall 1977): 317-333. 331. When Chief Justice Griffith reported to Governor Rodger that Smith had applied for retirement with a pension and had asked for two months terminal leave with pay, he endorsed the request saying that Smith had rendered “solid service,” “during his entire tenure friendly to everyone” and gave the Bench the benefit not only of his legal knowledge but of his knowledge and experience with native customs. He said that the Colony had saved considerable money because Smith only went on leave once every three years, thereby averting the need for another Puisne Judge. Griffith concluded that Smith would be missed by the Bench and Bar of Southern Nigeria as well as that of the Gold Coast and by the public of both colonies. A December 8, 1908 dispatch expressed the Secretary of State, Lord Crewe’s’ "regrets the loss of his (continued...)
superior educational qualifications than the colonial civil servants in the Gold Coast, but that the colonial Government had no mechanism for integrating the Africans they had educated into the colonial system and were extremely reluctant to acknowledge the claims of the educated class that they had created and viewed them as obstacles to the colonial Government’s relations with the chiefs whom they valued more highly as agents of colonial rule.20

Although Francis Smith was seen retrospectively has having served with honor and distinction, at the outset of his career on the Gold Coast, he was viewed with suspicion. The Acting Governor reported information he received as to Francis Smith’s relationships on the Gold Coast. P. A. Renner, a leading member of the Cape Coast bar, was his brother-in-law. The Acting Governor felt that this connection was prejudicial and was being commented upon in the community. He moved a criminal case and caused a Political Detention Ordinance to be passed because he lacked confidence in Judge Smith’s fairness and because Renner was the accused’s attorney. Robert Herbert, commented that this showed the problem of employing “natives’ in high positions in West Africa. Educated Africans were a small number who intermarried and thus had relationships all over the Colony “and unfortunately they cannot be trusted to be impartial when dealing with their relatives.” Herbert rued the

19(...continued) services.” BNA CO 96/473, Confidential, 11.30.1908; GNA SCT 2/1/9, 11.23.1908, 149.
20 Gail Margaret Kelly, The Ghanaian Intelligentsia, University of Chicago, 1959, 48, 72-75. As early as 1900, the Gold Coast Bar was petitioning for the appointment of more African judicial officers and objecting to abandonment of the policy of appointing African District Commissioners. BNA CO 96/373, Confidential, 2.2.1900.
fact that they could not send Smith elsewhere because “what Colony will put up with a black judge?” Unfortunately, this casual expression of racism was typical of the feelings of colonial officials, more so in London than Accra, but common there as well. Since nothing was done to limit Smith’s activities, it can be concluded that the prejudicial views expressed by the Acting Governor were never justified by anything Smith did during his twenty year tenure on the Gold Coast Bench.

However, Smith was treated differently than his European colleagues in a number of respects. For example, he asked for full pay and paid passage to England for his forthcoming leave as European Judges received.; Governor Maxwell referred to the ordinariness of such requests for “Native Officials,” that were invariably resisted by both local and home governments. On this occasion, Smith’s application was supported by Chief Justice Griffith who said that native judges should be treated just as European ones were, if not, it “might have very far-reaching and inconvenient results in a service where there are two sets of officials subject to separate leave rules.” Nevertheless, Smith’s application was not be granted. Similar treatment was meted out to Charles E. Woolhouse Bannerman who had requested a £120/Year personal allowance, a request supported by Governor Guggisberg, because he had

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21 BNA CO 96/183, Confidential, 10.27.1887.
22 BNA CO 96/299, No. 419, 11.9.1897. By 1921, the policy of the Colonial Office as to equal treatment of African judicial officials had eased considerably. In that year, the Acting Governor confirmed that pay for African Magistrates was to be the same as for European Magistrates. A Colonial Office minute said that the policy with respect to equal pay had not been definitely decided but that the policy of appointing qualified Africans would be useless if pay were not equal. BNA CO 96/623, Telegram, 3.5.1921.
maxed out his salary and did excellent work as a Magistrate. The Colonial Office felt that Bannerman’s seniority allowance and salary made him better off than a European who received a personal allowance but had to support an “Establishment” in the United Kingdom. Bannerman also complained about being passed over for promotion and pointed out that two Europeans with less seniority than he had, had been promoted.\textsuperscript{23}

Even into the 1930’s, such Africans who had been appointed to magisterial positions were victims of discrimination. The two African Magistrates, A. Casely Hayford and S. D. Quashi-Idun, who were third and fourth in seniority, respectively, were paid less than their European counterparts who had less seniority, e.g., Quashi-Idun, who had four years service, was paid £690 and Archie Casely Hayford who had three years service, was paid £660, while P. N. Dalton who had been serving for only two years, was paid £720, W. H. Irwin with three years service, received £810, while R. M. H. Rodwell, who had arrived only fourteen months previously, was paid £750.\textsuperscript{24} It is unclear whether or not Casely Hayford, the poorest paid Magistrate or Quashi-Idun were aware of this pay disparity, but it is clear that the British did not feel that it was improper or unjustified.

As noted above, several Africans served as District Commissioners in the 1880’s and 1890’s. In 1887, barrister Peter Awoonor Renner applied and was considered for a judicial post. He had been educated at the University of London and

\begin{footnotes}
\footnote{GNA ADM 12/5/100, Confidential, 11.30.1926.}
\footnote{GNA ADM 12/3/80, 11.28.1939, 29.}
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Lincoln’s Inn and was called to the Bar in 1883. He had more than a little legal experience, having practiced in England, Sierra Leone and at Cape Coast and had acted as a Prosecutor in the Western Province. The Colonial Office told the Governor to inform Renner that the position of Chief Magistrate in the Gambia, for which Renner had applied, had been merged with that of Queen’s Advocate and Governor was asked to report on Renner’s qualifications for the position as a law officer. In the interim, the Governor might consider appointing him as a temporary District Commissioner until Colonial Office could decide on an appointee for the existing vacancies. Renner was not appointed, a European was. In the first decade of the twentieth century, the British briefly considered appointing African Magistrates to enforce newly enacted labor labors. Sir Francis Hopwood, the Permanent Undersecretary of State, minuted to an Assistant Secretary of State, R. V. Vernon, that they had not appointed any natives to magisterial positions that enforced labor laws, but now that a Royal Commission had reported on the issue, he thought that they had to do so. Vernon replied that there would be a “tremendous row” if an Englishman were appointed and so they dared not do so, but there is no record of an African Magistrate being appointed in the Gold Coast at this time.26

In the summer of 1919, Acting Governor Slater sent the Secretary of State, Lord Milner, an application from C. E. Woolhouse Bannerman to be a Police Magistrate or

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25 BNA CO 96/188, Confidential, 7.18.1887.
26 BNA CO 429/27, minute, 2.27.1908.
District Commissioner in Accra. Bannerman was 34 and had been called to the Bar in 1913. He was descended from the Bannerman who had been Chief Magistrate and Governor of the Colony in 1850. His family was very prominent and some of his relatives rendered useful service to the Government, but the Acting Governor said that he would not recommend Bannerman for an Accra position because “no matter how impartial and judicial Mr. Bannerman might prove, the jealousy which exists between the inhabitants of the various quarters of the town would render his decisions suspect in the eyes of many whose cases would come before him, and would be calculated to place both him and the Government in a radically false position.” However, he continued, Cape Coast needed a Police Magistrate and he would like to see Bannerman appointed to a twelve month probationary position there. Bannerman was offered the position on conditions of employment different from those for European Officers, but his objections were overruled.\textsuperscript{27} He decided to swallow the discriminatory terms and to accept the position as offered, but in advising Lord Milner of Bannerman’s acceptance, Slater, acting as Governor, said that in the future, probation should be three years, just as it was for European officers and that discrimination in Bannerman’s case was not justified.\textsuperscript{28}

\begin{footnotesize}
\begin{itemize}
\item GNA ADM 12/3/30, Confidential, 8.25.1919, 205-207, 210.
\item GNA ADM 12/3/32, Confidential, 9.2.1919, 10..
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\end{footnotesize}
Guggisberg’s Efforts to Appoint Africans to the Inferior Courts

Bannerman was the first African to be appointed to a judicial position in the twentieth century, but opportunity for additional appointments soon presented itself. The new Governor, Gordon Guggisberg told the Colonial Office that court work in the three principal towns had increased so much that additional assistance was urgent. The District Commissioners were obliged to spend so much time in court that they couldn’t tour their districts or conduct their political work. He told Milner that the Chief Justice, the Provincial Commissioners, the Attorney General and the Solicitor General had conferred and unanimously recommended the appointment of more District Commissioners in preference to an additional Police Magistrate, provided that these additions to the “minor judiciary” had legal training and were to be independent of the executive. It would be important to have such post or posts made available to local, that is, African, barristers forthwith (it would be a “wise policy”). Lest one get the idea that racism was disappearing on the Gold Coast, attention should be paid to Guggisberg’s recommendation that Europeans should also be appointed so that they could train for higher judicial positions, a clear statement of intention not to permit Africans to be appointed to the Supreme Court Bench. However, he continued, the recently appointed native Police Magistrate (Woolhouse Bannerman) was doing well so he wanted to appoint one native Magistrate in addition to two European District Commissioners and six Assistant District Commissioners [presumably also European
although he was silent on this point). While acknowledging the request for a native Magistrate, the Colonial Office made no commitment to accommodate it.\footnote{BNA CO 96/605, No. 949, 11.17.1919.}

Over the course of the next year, the Accra administration found candidates for most of the nine positions approved by the Colonial Office, including for those as Police Magistrates. Three applications were from natives, but the Chief Justice turned down two allegedly because of lack of experience as a barrister. I say “allegedly,” because a white candidate eventually approved was not even admitted to the Bar although he promised to seek to be called to the Bar on his next leave. The third candidate was the son of Peter A. Renner, a well known barrister, who had un成功ously sought appointment as a Magistrate of District Commissioner twenty years previously. As to this young man, the Chief Justice expressed a “high opinion of his ability and attainments,” but who, so the Government said, apparently wanted too much money to fit into the Governor’s estimates.\footnote{BNA CO 96/617, No. 1133, 11.29.1920. Shortly afterward, Renner, père applied to be appointed a Puisne Judge. In recommending against the appointment, the Acting Chief Justice, Sidney Charles King Farlow Nettleton, quoted W. Brandford Griffith in 1902 saying that Renner should not be a judge, because, although he was a great advocate, no one with local connections should be a Gold Coast judge. Notwithstanding Bannerman’s service for almost three years, Nettleton agreed. BNA CO/96/625, Confidential, 7.5.1921; GNA ADM 12/3/35, Confidential, 7.5.1921.}

Shaloff notes that appointment of Africans to judicial and other senior positions was an important grievance among the intelligentsia in the inter-war period. Guggisberg proposed some Africans for judicial positions because he said it was
consistent with “the spirit of justice.”\textsuperscript{31} The first of these was Leslie E. V. M’Carthy, a graduate of Oxford and Gray’s Inn, whom he proposed to appoint Crown Council or Police Magistrate. The Governor said that M’Carthy had declined the post of Crown Prosecutor in Sierra Leone and would probably decline appointment as Police Magistrate in favor of becoming a Crown Counsel in the Gold Coast Colony because the pay was better. Guggisberg reported that the Sierra Leone judges knew him and his work and thought highly of him and that the Attorney General recommended him. Guggisberg said that M’Carthy had taken honors at Oxford and that “it is very desirable to give more posts to natives when candidates appear who are notable in character and qualifications.”\textsuperscript{32} M’Carthy soon accepted the appointment as Crown Counsel.

In 1924, T. Hutton Mills, son of a former Legislative Council member applied for a position as Crown Counsel or Magistrate and Guggisberg advised the Colonial Office that he wanted to give Hutton Mills an opportunity “to prove his worth.” Since, according to the Governor, Hutton Mills was not yet sufficiently experienced for a permanent appointment, Guggisberg asked Colonial Office approval for a temporary appointment to a post normally held by a European. The Colonial Office’s Ellis thought it a good idea and approved, although as one junior official noted, the response should be confined to Mills and nothing should be said about any principle involved.\textsuperscript{33} Thus, in


\textsuperscript{32} BNA CO 96/622, Telegram, 1.8.1921.

\textsuperscript{33} BNA CO 96/650, No. 942, 11.28.1924.
this somewhat grudging fashion, the Gold Coast obtained its second indigenous Police Magistrate.

The third African Magistrate to be appointed did not fare as well as either Bannerman or Hutton Mills. Peter A. Renner, the younger, previously passed over for appointment was named a Police Magistrate in 1924, shortly after Hutton Mills. Not long thereafter, complaints as to his work habits began to be heard. A District Commissioner reported to the Governor that he rarely appeared in court before nine o’clock or remained after twelve o’clock and was sometimes absent entirely. Guggisberg wrote to the Chief Justice complaining of unnecessary adjournments in an important case and then, because of “partiality” or “fear” denied the Government’s application that, Guggisberg maintained, the evidence showed should have been granted.34 One year later, the new Governor, A. Ransford Slater, wrote to Chief Justice Smyly saying that it was time to decide whether or not to extend Renner’s probation or terminate him. He asked the Chief Justice to collect and report the Judges’ views to him. Judge R. E. Hall reported that Renner had been signing blank arrest warrants and summonses and had unjustifiable arrears in his case load. Judge Gardiner-Smith said that he was careless and not serious so that there was no reason for “public confidence and satisfaction.”35 Guggisberg called in P. A. Renner, Sr., and told him that his son was not doing his job and under normal circumstances would not be

34 GNA ADM 12/5/100, 11.26.1926;.

confirmed but would be terminated. However, as he had already told the Chief Justice, he would allow young Renner to resign rather than suffer the stigma of termination but that he had to do so forthwith. Renner, Sr. told the Governor that his son would resign. 36 Despite Governor Slater’s expressed desire to appoint an African to succeed Renner, and Chief Justice Smyly’s statement that he would recommend one of the three nominees, when it came time to forward a recommendation to the Colonial Office, Thomas, then Acting Governor, decided, albeit with regrets, to appoint a European, R. T. Egg, formerly Stipendiary Magistrate in British Guiana, described only as a “good routine magistrate,” because the Chief Justice had changed his mind and now thought none of the three African barristers was suitable. 37

The sincerity of that statement may be tested by considering the dispatch the Gold Coast Colonial Secretary, J. Maxwell, then acting as Governor, sent to Amery the previous year with respect to a vacancy produced by the transfer of a Police Magistrate to Nigeria. He told Amery that the qualifications for a Police Magistrate are a European (Emphasis mine) of five years experience at the Bar. These qualifications, he went on, were inserted by Chief Justice Smyly who wanted to assure himself of a reserve of minor court judges who could act as a Puisne Judge when need arose.

37 GNA ADM 12/5/100, 3.15.1928, 5.23.1928, 5.31.1928; BNA CO 96/678/4.
Maxwell said that he agreed such qualifications were desirable but that it would be difficult to find a qualified candidate among local lawyers.\footnote{GNA ADM 12/3/45, Confidential, 5.13.19. See also GNA ADM 12/3/46, Confidential, 11.17.1927. Governor tells Amery that there is another vacancy for a Police Magistrate because of a transfer of the occupant to the Leeward Islands and his promotion to Puisne Judge. Smyly still wants only a European with five years experience.}

Indeed, there was antipathy, if not real hostility to local lawyers as judges. When Bannerman applied to become a Puisne Judge, the Governor expressed his concern that a local judge would be subject to family influence, “no matter how great the integrity of the individual judge,” the same argument put forward against appointing Bannerman as a Magistrate.\footnote{GNA ADM 12/3/42, Confidential, 3.7.1925, Enclosure, 1.28.1925.} Smyly commented that he liked Bannerman and respected his work and that he’d done very well as a Police Magistrate and would not oppose him acting as a Puisne Judge temporarily on the condition that Bannerman knew it would not be a permanent position. Questions of local influence aside, Smyly argued that others had more seniority at the Bar, including Hutton Mills, Coussey and even Solicitor General M’Carthy. Puisne Judge Roger E. Hall, expressed a “high opinion” of Bannerman’s work and said that there was “little doubt he would be an able and efficient judge if he were appointed.”\footnote{Ibid., Enclosure, 1.19.1925.} Governor Guggisberg endorsed both these views of Bannerman’s credentials, saying that he was a man “of such moral courage as to lead to him ignoring family influences in the discharge of his work” and would resist all influence, particularly if he were appointed to a post outside the area where his family resided. He told Amery that Smyly had reported confidentially that he was
sure Bannerman would have “acquitted himself well” had he been given the chance to
 preside at assizes.” Nevertheless, Smyly declined to support him for a permanent
 appointment, so the Governor, although eager to give Bannerman the opportunity to
 act as a Puisne Judge was unwilling to recommend that he be appointed on a
 permanent basis.41 Three years later, Guggisberg’s successor, Ransford Slater told
 Bannerman that it was unlikely that he would be promoted in the Colony because
 Colonial Regulation No. 55 usually barred anyone “connected to the Colony by birth,
 family or otherwise,” in order to prevent aspersions on a blameless judge and
 Governor.42 This rationalization must be seen as just that, a rationalization for refusing
to recognize the abilities of an indigenous judge simply because he was an African.
 He had been serving with admitted skill and honor for nine years, yet the same
 ridiculous explanation was offered for refusal to promote him. Moreover, the
 Regulation cited in support of such refusal arguably applied only to Chief Justices and
 was never used to prevent Francis Smith from serving as a Puisne Judge or
 Bannerman himself or Hutton Mills from appointment as Magistrates. Indeed, when
 Bannerman was ultimately named an Acting Puisne Judge, the Governor reported the
 appointment in terms of his being “forced” to do so because there was no “practical
 alternative” as the Attorney General declined to spare the Acting Solicitor General,
 M’Carthy – another African – no one else was available and Bannerman was the

41 Ibid.
42 GNA ADM 12/3/48, Confidential, 4.28.1928.
Senior Police Magistrate. No wonder that in 1929, J. B. Danquah expressed both disappointment at the paucity of African Magistrates and despair as to the likelihood that Africans would be promoted to the Supreme Court as other than Acting Puisne Judges without hope of a permanent appointment.

Fiddian reported that in 1930, the Promotions Committee had received twelve applications to fill the position of a Police Magistrate transferred to Granada and another resulting from death of the incumbent. None were recommended to Major Furse, the Private Secretary for Appointments, so it was decided to ask Governor Slater to recommend a candidate for one position. He suggested T. Hutton Mills, the son of a former Magistrate and Legislative Council member, but Chief Justice Deane opined that such an appointment would be “a calamity.” Rather, the Governor put forward the name of Alexander Mills, another son of T. Hutton, Sr. and the brother of T. Hutton, Jr., who was appointed.

A breakthrough occurred insofar as Bannerman was concerned when R. E. Hall, then acting as Chief Justice, recommended that he be appointed an Acting

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43 GNA ADM 12/3/48, Confidential, 4.28.1928, 4.17.1928.
44 J. B. Danquah, “Introduction,” in Magnus J. Sampson, Makers of Modern Ghana, Accra: Anowuo Educational Publications, 1969, 28-29. Even those few, Shaloff argues were sneered at by the European officials, whom he characterizes as “frightened administrators who interpreted the slightest signs of national or racial consciousness as communist inspired sedition,” because, they complained to one another, the Africans were insufficiently submissive. Shaloff, “The Africanization Controversy in the Gold Coast, 1926-1946,” 495.
45 Shaloff argues that Deane (BNA CO 96/716/21718/3) opposed the appointment of Thomas Hutton Mills, Jr. as a magistrate because he was “not sufficiently submissive” to overcome European fears of nationalism and “communist inspired sedition.” Shaloff, “The Africanization Controversy in the Gold Coast, 1926-1946”, 485.
46 BNA CO 96/692/3; GNA ADM 12/3/52, Confidential, 1.8.1930, Deane memorandum, 12.20.1929.
Puisne Judge for a period of a year during the leave of Puisne Judge Ernest Gardiner-Smith and the return from leave of Chief Justice Deane.\(^{47}\) Then, in 1933, a vacancy occurred in the position of Circuit Judge for Ashanti. Bannerman, Governor Thomas reported, was the most senior Police Magistrate and was very well qualified. Deane was still unwilling to consider Bannerman on the basis of his abilities, telling Thomas that fourteen years of service without complaint of his submitting to outside influence, Bannerman, would be subject to family influence and that was why he had kept Bannerman assigned outside of Accra. However, the Chief Justice went on, more than a little grudgingly, if it was politically necessary to appoint an African to the position, he’d recommend Bannerman for a Circuit Judgeship and even as a Puisne Judge. Thomas said that he regretted that the Chief Justice limited his recommendation to political need, as he considered that apart from the “incident of his birth, Bannerman performed “admirably” as an acting Puisne Judge, was “thoroughly fit for promotion” and should be considered on the same basis as a European. He knew Bannerman and his family well and was convinced that the former would not be influenced and the latter would not try to influence.\(^{48}\) Bannerman was appointed to the position of Circuit Judge of Ashanti in March 1934. Moreover, the Secretary of State, Sir Philip Cunliffe-Lister, advised the Governor that when Supreme Court jurisdiction was extended to Ashanti – as it was in 1935 – Bannerman would become a Puisne Judge. The

\(^{47}\) GNA ADM 15/69, 538.

\(^{48}\) GNA ADM 12/3/58, Confidential, 4.25.1933; Deane memorandum, 4.14.1933.
Governor, and Deane as well, decided that Bannerman should receive the same salary as his European predecessor rather than the reduced amount usually paid to Africans.49

When Bannerman became Circuit Judge for Ashanti, a vacancy occurred for a Magistrate, for which the Governor tried to appoint an African. However, his telegram requesting the Colonial Office to hold up an appointment until he could send a recommendation arrived too late and an appointment of a European was made and accepted.50 Fiddian expressed great displeasure that the Governor and the Chief Justice delayed giving the Colonial Office the information about the two African candidates and thus made the Colonial Office look bad. Fiddian says that Deane knew eighteen months previously that he wanted Awere but said nothing when the vacancy occurred, giving “justifiable cause for complaint and resentment to African agitators and Africans generally.” It appeared to him that Deane was “unconsciously” against African judges.51 Ultimately, the position was offered to and accepted by Quashi-Idun, a Cyprot. Bushe expressed skepticism because whites in the mining

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49 BNA CO 96/716/7, 3.14.1934; Confidential, 4.4.1934. At the behest of his Attorney General, Governor Hodson requested Letters Patent for Bannerman who would automatically become a Puisne Judge on July 1, 1935, the effective date of the Courts Ordinance of 1935. GNA ADM 15/77, 5.14.1935. Shaloff impliedly argued that Bannerman was only appointed as Circuit Judge, and subsequently as a Puisne Judge, because he had proved his reliability to the Government by ruling against the Aborigines Rights Protective Society petition to set aside the 1928 Cape Coast elections for a member of the Legislative Council. Shaloff, “The Africanization Controversy in the Gold Coast, 1926-1946,” 485

50 He would accept Deane’s candidate, but that if Ofei Awere declined, he would like Quashie Idun, whom Deane said (Enclosure No. 2, 12.14.1934) was a “man of character and good professional attainments.” GNA ADM 1/2/209, No. 628, 12.31.1934, Sub Enclosure No. 1, 2.27.1933.

51 BNA CO 96/716/8, Minute 2.1.1935.
district complained about being dealt with by an African Magistrate there. He
recommended that the Colonial Office not appoint more Africans, “for the moment we
have gone far enough.” However, the Colonial Office decided not to tell Governor
Hodson not to push Africanization so fast. 52

However, the decision not to decelerate Hodson’s program of Africanization did
not last long. Demonstrating a typical inability to make and stick to a decision, the
Colonial Office first telegraphed the Governor asking him to reconsider his
recommendation to appoint an African Magistrate as it felt that Africanization has gone
far enough for the moment. The Governor replied defending his recommendations,
saying that they were based “on policy and the successes of recent African
appointments,” but then backing off by saying that he wouldn’t object to the
appointment of two Europeans. Now the Secretary of State, William Ormsby-Gore,
reversed course, telling Hodson that he had reconsidered and that he would entertain
the Governor's recommendation for appointment of an African. 53 The Governor had
two candidates, A. Casely Hayford, son of the eminent barrister and scholar, J. E.
Casely Hayford, and C. F. Hayfrom-Benjamin. Hodson reported that Chief Justice
Petrides and the Attorney General both thought that Archie Casely Hayford was the
best qualified and most experienced, with which view the Governor agreed, as did

52 BNA CO 96/723/9. The mining interest representative had asserted that an African Magistrate
would be overly inclined in dealing with defaulting laborers charged with theft or breach of their labor
contracts. White magistrates had fined and imprisoned African laborers promoting, according the mining
representative, labor discipline. Ibid. Since corporate agriculture was absent in the Gold Coast, similar
problems did not exist among growers that were primarily African family enterprises.

53 BNA CO 96/728/5, Telegrams, 7.4.1936, 7.11.1936, 7.22.1936.
Ormsby-Gore who appointed Archie Casley Hayford a Magistrate. In a minute on the dispatch, Bushe disclosed the disagreement among the senior staff of the Colonial Office, dissenting from the decision to appoint Casely Hayford because three Africans, two Magistrates and a Puisne Judge (Bannerman) are “as much as we can safely have for the moment.” Objecting to Bushe’s position, A. J. Dawes minuted that if they were qualified, Africans should be appointed as Africanization was the approved policy. Ormsby-Gore who had assumed office only four months previously, declared that it was desirable to appoint worthy Africans as examples to African barristers as to where they can go “if they show credit in their profession.” Shaloff argues that Ormsby-Gore hoped to convince the coastal elite to forego politics by holding out the possibility of judicial appointments for barristers.

Guggisberg had initiated a debate on inclusion of Africans in superior positions in the Gold Coast civil service in his 1926 speech to the Legislative Council advocating promotion of worthy African candidates in part to save money. Opposition from European officials arose immediately based, according to Shaloff on “racism and self interest” by European officials unwilling to be subordinate to Africans whom they believed to be morally and politically unqualified and unreliable. Nevertheless,

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55 Shaloff, “The Africanization Controversy in the Gold Coast, 1926-1946,” 496. He says that both the Attorney General and the Inspector General of Police opposed Casley Hayford’s appointment because his wife was a Polish Jew and therefore, they felt, had to be a communist; Ibid., 497.
56 Ibid., 493, 494. Guggisberg proposed a plan that would have made the number of Africans in senior positions equal to that of Europeans by 1945. Ibid., 493.
despite a lack of enthusiasm expressed by Guggisberg's successors, Ransford Slater and Shelton Thomas, some effort was made to follow Ormsby-Gore's suggestion and to promote Africans. Given the difficulty discussed below experienced by the two most obvious candidates for judicial promotion, Woolhouse Bannerman and Leslie M'Carthy, on the basis of the flimsiest reasons, Shaloff’s argument appears to be correct.

However, when Arthur Hutton Mills died suddenly while on leave in the United Kingdom, no African candidate acceptable to the Chief Justice and the Attorney General came readily to mind. Both the deceased’s brother, Thomas Hutton Mills, and A. C. Acolatse, were rejected for lack of sufficient experience. Despite the Governor's fear of criticism if a European were appointed to replace an African, two Europeans, L. C. Langley and P. M. Dalton, were appointed.57

In 1939, Attorney General Blackall wrote to the Governor reminding him that both Puisne Judges Yates and Savary had transferred from the Colony and that Puisne Judge Barton would soon go. He asked the Governor for assurance that M'Carthy would be considered for one of the vacancies. He reminded the Governor that M'Carthy was appointed Crown Counsel in 1931 and Solicitor General in 1933, in which capacity he had been serving ever since. M'Carthy revised the Gold Coast statutes and had exceptional knowledge of the law and local conditions, was painstaking and sound and would add strength to the Bench and would be very

57 BNA CO 96/757/7, Confidential (A), 1.16.1937.
popular with the Bar and the people of the Colony and “would be regarded as an
earnest of the Government’s endeavour to promote Africans to higher appointments
where they possess the requisite experience and qualifications.” Petrides supported
Blackall’s recommendation and expressed the hope that M’Carthy would be
appointed.  

Hodson supported the views of his Chief Justice and Attorney General,
reminding the Colonial Office that M’Carthy had acted as Puisne Judge on several
occasions “with credit.” Although accepting Hodson’s recommendation, the Colonial
Office specified that M’Carthy be appointed last of the three judges to be named so
that the two Europeans to be raised to the Bench would be his seniors. Hodson balked
at that proposal and demanded that M’Carthy be named first followed by Mustapha
Fuad Bey who was being transferred from Cyprus. London reluctantly agreed, but not
to grant M’Carthy the same salary as a European judge despite local opinion
supporting equal pay. Rather, it would discuss with the Governor how to phrase the
appointment so as not to offend either man and to justify a disproportionate salary for
M’Carthy.  

Thus for the first time, the Supreme Court of the Gold Coast had two
indigenous judges.

In concluding this survey of the judges of the Gold Coast, one must point out
that during the seventy years covered by this study, the judges for the most part lived

58 BNA CO 96/756/10, Memorandum, 3.25.1939.
apart from the peoples of the Colony, socialized primarily with the European members of the Colonial Administration, neither spoke nor understood more than a smattering of any of the local languages and, except for the rare occasions when they dined with members of the Bar, were isolated from the people they judged. In addition, they left the Colony for several months of home leave after each year of service and thus had limited opportunities to study the customary law and mores of the people. Almost all of what they knew they learned only through the evidence of “expert” witnesses in court.  

Albeit this was the standard manner in which British judges administered justice in the Empire, particularly in the Tropical Empire, it cannot be said to have been conducive to bringing colonizers and colonized together except to support British economic policies and to keep the peace.

British official often expressed fear that judges appointed from the local population would be susceptible to corrupt influence from family and friends, by which was meant rendering decisions based on family connections rather than the evidence presented. Yet the archival evidence discloses not a single case of where any Africans considered for appointment to magisterial or superior court positions could be found to have been susceptible to such improper influence. Unlike the case of indigenous chiefs who were continually being criticized for their corrupt exploitation of litigants, by imposition of excessive costs and fees and deciding cases other than on

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the merits, the judges of the British courts in the Gold Coast, African and European alike were deemed to be men of honor and integrity.

This brief study also demonstrates once again the vacillation of Colonial Office authorities in creating and carrying out a policy. Thus efforts to bring indigenous people into the administration, including the judiciary, was encouraged, then discouraged and then encouraged again, evidencing the *ad hoc* nature of British colonialism.
CHAPTER VI – BRITISH JURISDICTION: BUILDING A DUAL SYSTEM OF JUSTICE

It was the essence of British imperial rule that justice according to British ideas of jurisprudence be brought to the colonies.¹ Indeed, British law required that the common law be introduced into its many colonies for the benefit not only of British settlers but of the indigenous community as well.² To do so required the establishment of courts in which causes might be heard, the appointment of judges to hear those causes and the adaptation of rules of law to an environment completely different from that in which those rules of law were created. In Chapter II, I described how the British on the Gold Coast first came to decide disputes among British merchants. In Chapters III through V, I discussed the identity and appointment of those who would decide the causes brought before them. In this chapter, I shall set forth the nature and extent of the jurisdiction exercised by British judges and how those judges created and administered a common law based on the statutes and common law of England but peculiar to the West Africa and particularly to the Gold Coast. This hybrid common law resulted from the statutory injunction to apply customary law unless the parties expressly or implicitly agreed that English law should prevail. I describe who was entitled to proceed under customary law and how the British courts determined what that customary law was.

¹ Indeed, as Allan Mcphee has noted, in the second half of the nineteenth century, viewed from their position as imperial masters of almost one quarter of the planet, the British believed that English law was the best law for any country at any stage of development. Allan McPhee, The Economic Revolution in British West Africa, 2d ed., London: Frank Cass & Co., Ltd., 1971, 138.

In this chapter, I discuss how British, as distinguished from native, jurisdiction was defined and asserted. I describe how the British judges created a hybrid common law for their Gold Coast Colony and Protectorates, defining the customary law they were charged to enforce. I go on to show how the colonial judges treated customary law as a matter of fact to be proved by evidence, evidence most often supplied by indigenous experts whose testimony the judges were not bound to accept. I describe and discuss the repugnancy doctrine, which enabled the British courts to reject customary law they deemed to be repugnant to their own moral standards. I discuss the role of the District Commissioners as judges as that of other judges of the inferior courts and how they also shaped the hybrid Gold Coast jurisprudence. I look at the appellate process including the long struggle to create a trans-colonial West African Court of Appeal. I describe the judicial reforms of the 1930’s and, finally, I describe the manner win which the British dealt with debt and debtors and the amelioration of the harsh treatment prescribed by the common law that came about particularly under the aegis of Chief Justice George C. Deane.

Roger Gocking wrote of the British courts as a medium of cultural interchange exercising both direct and supervisory interventionist jurisdiction, the former over disputes between Europeans and a limited number of Africans and the latter over the Native Tribunals. He concludes that the cultural interchange brought about by this exercise of British jurisdiction profoundly changed both customary law, but was not imposed on the people of the Gold Coast. The evidence adduced in this dissertation tends to refute Gocking’s conclusion, particularly in the area of supervisory jurisdiction

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and supports Julius Lewin’s argument that the British courts in reviewing cases arising under customary law imposed the concept of precedent and through invocation of the repugnancy doctrine, imposed its own jurisprudence on the people of the Gold Coast.⁴

Similarly, Modibo Ocran points out that the necessity for the British to “retain their posture as an imperial power” by introducing Africans to civilization almost compelled creation of a repugnancy doctrine.⁵ The repugnancy doctrine endured throughout the colonial period. Indeed even after independence, Ghanaian courts were determining matters on the basis that some act was repugnant.⁶

In French West Africa, too, morality as seen from the perspective of the colonizing power played a role in developing law. Alice Conklin notes that the Governor-General of French West Africa issued a set of instructions to French judges in which he required that customary law be applied “in accordance with the dictates of French civilization.” Custom was to be clarified as a first step in modifying it “according ‘to the fundamental principles of natural law, the original source of all legislation.’”⁷

Unlike the common law tradition of reliance on decided cases as a source of law, French law was almost entirely based on statute. Statutes enacted in France were applicable in the colonies along with decrees of administrative authorities and special

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⁴ Julius Lewin, “The Recognition of Native Law and Customs in British Africa,” *Journal of Comparative Legislation and International Law*, Third Series, Vol. 20, No. 1 (1938), 16-23. Repugnancy was defined in the Supreme Court Ordinance in terms of inconsistency with morals and natural law, these latter terms deriving from a British rather than an African sense of morality or the laws governing the universal conduct of people toward one another.


⁷ Conklin, 92.
acts applicable only in Africa. However, in French West Africa, French courts were open in civil matters only to French citizens except in cases involving commercial transactions. As in the Gold Coast, criminal jurisdiction lay only in French courts.

**Application of Customary Law**

The Supreme Court Ordinance, No. 4 of 1876, enacted on March 31, 1876 provided for enforcement of customary law by that Court. Section 19 provided authority for the Court to enforce customary law in cases where the parties were “natives” of the Colony, provided that such law was deemed not to be “repugnant to natural justice, equity, and good conscience, nor incompatible either directly or by necessary implication with any enactment of the Colonial Legislature.” Customary law was to apply particularly in cases relating to marriage and to the tenure and transfer of real and personal property, and to inheritance and testamentary dispositions. The Ordinance provided that in cases between natives and Europeans customary law would apply where the Court determined that “substantial injustice would be done to either party by a strict adherence to the rules of English law.” However, an indigenous party could waive resort to customary law he agreed by express contract to do so or if the nature of the transactions underlying the claim were such that it could be said that the indigene agreed that his obligations in connection with such transactions should be regulated exclusively by English law. The Ordinance gave the Court complete discretion in cases where no express rule was applicable to formulate rules based on

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9 *Ibid.* 122

“the principles of justice, equity and good conscience.” In other words, the British would engage in the pretense that Africans could live by their own custom and tradition provided that they would determine who were Africans, what that custom and tradition was and whether or not it applied in any given circumstances.\(^{11}\) So, too, in French West Africa, the courts were directed to apply customary law in civil disputes between indigenous people, mainly a hybrid of classic Islamic law and pre-Islamic customary law.\(^{12}\)

In implementing Section 19 of the Supreme Court Ordinance, the courts initial question was whether the party seeking the benefit of customary law was a native. This question would not appear to be difficult as people of color in the Gold Coast would necessarily appear to be natives of Africa. However the courts held otherwise. Thus, in *Brown v Miller*, [1921] F. Ct. ’20-’21, 48 the appellate court held that repatriated blacks from Brazil and the West Indies were not natives within the meaning of Section 19 entitled to claim the benefit of customary law despite long residence in Sierra Leone and the Gold Coast.\(^{13}\)

Next it was necessary to find whether or not the party claiming benefit of customary law was in fact entitled to such benefit, the Court then had to decide what

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\(^{11}\) Julius Lewin, “Native Courts and British Justice in Africa,” *Africa: Journal of the International African Institute*, Vol. 14, No. 8 (October, 1944): 446-453, 449. Lewin argued that British willingness to accept and permit its courts to administer customary law was based on the unarticulated assumption that it would be all right to apply traditional law “in its own limited sphere” but the extent and method of application were “matters to be determined by the rules and doctrines of English law.”

\(^{12}\) Salacuse, 47, 54. However, population of four Senegalese towns, Dakar, Gorée, St. Louis and Rufisque, were deemed to be citizens of France to whom French law applied. *Ibid.*, 49-50.

the applicable law was. Relatively early in the history of the Colony, the British courts decided that in order to qualify as a custom, the particular practice had to have been recognized as having existed since ancient days, which meant at least since 1189. To be recognized as a custom, the practice had to be notorious, that is widely known and used, but, according to the Privy Council, this requirement was satisfied if it was described in a textbook, e.g. Sarbah’ *Fanti Customary Laws or Fanti National Constitution*, or had been discussed in several judicial decisions.

Having determined whether or not a litigant was a native entitled to the benefit of customary law and that the custom sought to be applied was in fact a custom, the courts then had to decide if the matter in issue was one suitable to the application of customary law and/or the parties intended customary law to apply as indicated by their conduct. Some cases were relatively clear. Thus, for example, the courts held that corporations were unknown to customary law so that corporate parties would never

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14 *Ayim v Mensah* [1911] Div. and F. Cts. 1911-1916, 4, aff’d Div. and F. Cts. 1911-1916, 6, held that it was for the Court to determine the existence of a custom as to the right of an occupant to continue cultivating land sold by a Chief to a third party.

15 *Wellbeck v Brown*, [1884] F.C. L. 185, where the Full Court, per Hector Bailey, the Chief Justice, said that in order to be seen as valid, a custom had to have been of long standing and not recent. It is not a custom if one knew the date when it first is said to have become a custom. Smalman Smith, P. J. said, in his judgment in the same case, that in accordance with *English law* (emphasis mine) a custom “must have existed in the colony since time immemorial” so that a custom only sixty years old is no custom. Sarbah, argued that *Wellbeck* was wrongly decided. Custom, he contended is not limited to ancient usage even under English law. Even new usage, if “universal or a fair and reasonable result of development of a progressing community is a ‘custom.’” Sarbah, *Fanti Customary Laws*, , 29. By 1925, the Courts had eased that strict rule by holding that if a practice was in use at the date of enactment of the Supreme Court Ordinance, that is, 1876, it would be recognized as a valid custom. *Mensah v. Wiabo*, [1925] D. Ct. ‘21-’25, 170. By contrast, this seemingly absurd rule was never applied in many other parts of the Empire. L. C. Green, 88.


intend other than English law to apply. In doing so, however, they ignored the corporate qualities of customary institutions such as stools and families and the ability of customary law to adapt.18

Intention to have English law apply need not have been express, but could have been implied by words or deeds.19 Moreover, where the transaction at the heart of the case was unknown to customary law – and the English courts stretched the term “unknown to customary law” to all transactions usual in western economies, e.g. where English forms were used as with leases, bills of sale and financing documents – English law was deemed to have been intended to apply.20 But not all documented transactions required application of English law. Thus, merely because documents evidenced a transfer the Native Tribunal did not lose jurisdiction.21 To the contrary, the Privy Council determined that native law did not always apply even when all parties were natives, but only when the matter in issue was so connected to native life as to require it. One court whose decision was accepted as precedent in Gold Coast courts held that where, “the matter before the court contains elements foreign to native life,

18 Thus they held that the corporate personality was unknown to customary law and thus corporations and matters integral to it could not be subject to customary law since they were not “native.” A. K. Fiadjo, “A Century of Company Law - An Overview,” in Essays in Ghanaian Law, Supreme Court Centenary Publication, 1876-1976, edited by W. C. Ekow Daniels and Gordon R. Woodman, Accra: Ghana Publishing Corp., 1976, 224.

19 Adoo v Bannerman, [1895] Renner’s Reports 189.

20 Tandoh v Williams [1923] F. Ct. ‘23-’25, 18 held that a power of attorney under which the plaintiff acted as to defendant’s property was a document unknown to native custom or law and thus evidenced an intent that the parties be bound by English law so that the Statute of Limitations applied to bar the action.

21 Azzu v. Akadiri, Full Court (Smyly and Gough), 8.13.1912. In Azzu v. Cooper, Full Court (Smyly, Hawtayne and Watson), 2.24.1913, citing Azzu v. Akadiri, held that the mere existence of a document in connection with a sale did not oust the Tribunal of jurisdiction and the evidence [not described in the report] of an intent to be bound by English law was insufficient. In Kwaku v. Kofi (Div. Ct. [Smyly, C. J.]), 11.10.1913, the Chief Justice transferred the case to a Native Tribunal because the sale was first executed per native custom and only later ratified by a registered deed. BNA CO 96/541, No. 125, 3.24.1914.
habit and custom, the Court is not bound to observe native law and custom.”

Some examples of “elements foreign to native life, habit and custom” were found in written executory contracts, written mortgages containing a power of sale, and a written note made by an African to a European firm. In such cases, the burden of proving that customary law rather than English law applied fell on the educated African claimant. The test was whether or not substantial injustice and undue hardship would result to the African if English law was applied. Notwithstanding such exceptions, it may thus be seen that British courts could and did exert enormous influence on the content of customary law, shaping it based on their own ideas and legal concepts.

Since the Supreme Court Ordinance required the Court to apply customary law in those cases before it involving one or more indigenous parties, it was incumbent on the Court to determine what customary law rules applied to each case. Normally, the

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22 Cole v Cole [1898] 2 Nigeria Law Reports 15, a Nigerian precedent followed in Gold Coast courts as it discussed common issues of traditional law found in both countries.


24 Swanz v Bondoh [1891] Redwar’s Comments 197 held that a mortgage in English form with a power of sale conclusively established intent to be bound exclusively by English law and not the customary law of pledges, but where the document was ambiguous, not under seal and not conforming to English form, it was neither an English mortgage nor an equitable mortgage and customary law applied, Bosson v Attonie [1897] Redwar’s Comments 199. Macan v Addaquay [1892] Redwar’s Comments 139 holds that whenever English forms of contract or conveyances are used, English law had to be applied; Quartey v Akoa [1893] Redwar’s Comments 138 (express contract), Adoo v Bannerman [1898] Redwar’s Comments 139 (implied agreement) holds that when contract expressly or impliedly provides that English law is exclusively to be applied; but see Longdon v Sagoe [1898] Fanti Law Reports 97, a mere book entry kept by a seller of goods is in itself insufficient to establish an intent by the parties, both natives, to be bound by English law with respect to the sales transaction, so that the statute of limitations is not applicable; and Fischer v Swanikiar [1883] Redwar’s Comments 137 holding that the English statute of limitations, being a statute of general application in effect in 1874 was received as Gold Coast law under the Supreme Court Ordinance and is applicable to an action by a European against a native on a debt without necessity to prove intention.


-204-
determination of what the law is, is a function of judicial knowledge and experience with, in the Anglo-American tradition, a resort to precedent.\footnote{Marbury v. Madison, 5 U.S. 37 (1803) (Marshall, C. J.)} However, foreign law is not considered to be such as is within the cognizance of a judge. Thus, the Judicial Committee of the Privy Council, the highest judicial authority for cases arising from the Empire, held that customary law was foreign law and its content was a matter of fact to be proved by evidence as would foreign law of any nature. Accordingly, as is the case with appellate review of any determination of fact by a court from which the appeal is taken, the finding of the court as to what the customary law was should not be disturbed on appeal except in cases of clear error.\footnote{Ometa v Numa, [1928], 11 Nigerian Law Reports 18 (Privy Council). Crabbe argues that the requirement of proof of customary law as foreign law was created to assist English judges who had no knowledge of customary law or local mores and had difficulty understanding them and points out Sarbah's argument that requirement for such proof violated Section 92 of the Supreme Court Ordinance that provided for reference to local referees to determine the applicable customary law. Crabbe, 59, 60. Francis Crowther, Secretary of Native Affairs, told the West African Lands Committee in 1912 that oral evidence of native custom was unreliable, that there was very little collected knowledge of native custom, that the testimony of some so-called experts was biased and that custom was often created post facto. BNA CO 879/117/1047.}

Chief Justice Griffith had said that determination of the existence, nature and applicability of customary law in any particular case was a very serious task requiring more than a mere preponderance of the evidence.\footnote{Yerenchi v. Akufo, [1904] Renner's Reports 362 (Div. Ct.).} This holding required the judge to consider what amounted to “expert” evidence from traditional authorities such as chiefs and linguists and to accept only that which he believed to be clear and convincing.\footnote{Kojo Kwakyi Anti, The Legal Institutions of the Gold Coast, University of Leeds, 1957,57-59 ; see also Casely Hayford, Gold Coast Native Institutions, 68-70. See also A. B. Kasunmu, “Introduction,” in Conference on the Integration of Customary and Modern Legal Systems in Africa, compiled by Antony N. Allott, New York: African Publishing Corp., 1971, x.} However and most importantly, a court was not obliged to accept any opinion proffered to him but could determine for himself what the custom was, thus creating a custom on
his own.31 Given this high level of discretion in determining the content of customary law and frequently conflicting opinions as to what the custom was in any particular situation, it is not surprising that the British courts frequently made mistakes and just as frequently created customs that, after multiple repetitions were judicially noticed, that is became something no longer necessary to prove.

In this manner, British judges created “traditional” law not only for a particular ethnic group but for the entire country and that did not really exist or existed in forms different from those the court found to be established. Courts frequently misunderstood the oral testimony of a particular custom and misapplied it. Too, because there were so few texts upon which the Courts relied, principally Sarbah’s, courts extended the customary law of one group, e.g. the Fantis, to all groups notwithstanding the likelihood of differing customs, and an incorrect decision as to custom was perpetuated by the doctrine of stare decisis. Gocking argues that the success of Sarbah’s Fanti National Constitution influenced British judges to view all customary law as Fanti customary law not only in Fanti coastal towns but in the Akan towns of the interior where, in fact, custom differed from place to place. This was so because most of the cases collected by Sarbah, Redwar, Renner and Casely Hayford involved Fanti custom.32

31 Godwin Jones v Ward [1895] Fanti Customary Law 143, held that the court was not bound by the opinions of expert witnesses as to customary law but may choose the rule to be applied based on its appeal to him as “consistent with equity and good conscience”; see also Ashon v Barno, [1891] Fanti Customary Laws 153; Richard Rathbone, “A Murder in Colonial Gold Coast: Law and Politics in the 1940s,” Journal of African History, 30 (1989): 445-461,450.

Repugnancy

The manner in which the Supreme Court Ordinance was drawn clearly demonstrated that English law would be the supreme law of the land vis à vis customary law. Such supremacy was maintained not only by the requirement of proof but also by the repugnancy rules so that customary law was enforced only when it had been approved by British courts enforcing British norms of fairness, equity and natural justice. As we have noted, the repugnancy doctrine held that customary rules that contravened equity, fairness and natural law, as the British understood those terms, were unenforceable. The British, Asante contends, saw the allowance of the enforcement of native law as a “sort of dispensation within the larger framework of English law, and often official contempt for ‘native’ law was hardly veiled.33

The repugnancy doctrine permitted British courts to shape customary law by applying European concepts of public policy, morality and probity to indigenous ideas and thus bend them to British norms.34 Perhaps because the practice was so widespread and fundamental to the lives of the indigenous peoples of the Gold Coast, polygamy was never deemed to be repugnant to British ideas of fairness, equity and morality.35 Thus, the colonial power reserved to itself the right to determine which local practices would be considered to be repugnant.36 T. O. Elias, an African legal scholar

33 S. K. B. Asante, “Over a Hundred Years of a National Legal System in Ghana: A Review and Critique,” 86.
36 The French also imposed a repugnancy doctrine. By Article 75 of a Decree of 11.10.03, customary law was made applicable in disputes between indigens of French West Africa provided that such law was not “contraire au principe de la civilisation Française.” Michel Alliot, “The Role of Justice in (continued...)
of the post-colonial era, argues that through the repugnancy doctrine, the British pushed customary law toward “an ordered and rational pattern of social control, shorn of their superstitions, and harsh elements.”37 While one can agree that the repugnancy doctrine was essential to social control, that control was British rather than indigenous and gave the colonial power a tool to reformulate customary law along lines considered by the British to be useful for economic development.

Thus, British judges had wide discretion to decide which parts of customary law to incorporate into a colonial common law and found practices to be repugnant if they were contrary to what the judges determined to be “principles elementary to English justice,” principles deemed to be so self-evident that no explanation was needed.38 The standard was said to be objective not subjective, i.e. the Judge’s conscience was not be determinative, but the decision had to be related to an external yardstick of morality. In some cases the rules were so basic to fairness, e.g. the disinterestedness of the judge and giving all parties a fair hearing, that every court, no matter the

30 (...continued)
the Application of the Law,” in University of Ife Institute of African Studies, Integration of Customary and Modern Legal Systems in Africa, New York: African Publishing Corporation, 1971, 74-83,76. Opoku sees the French use of a repugnancy doctrine as a method to eliminate traditional law from cases where it might otherwise apply. Kwame Opoku,”Traditional Law Under French Colonial Rule,” Verfassung und Recht in Übersee/Law and Politics in Africa, Asia and Latin America, Vol. 7, No.2 (1974): 139-153., 152. In at least four communities of French West Africa, the Senegalese towns of Dakar, Rufisque, Gorée and Saint Louis, indigenous Africans, known as “originaires,” were considered from as early as 1848 to have at least some attributes of French citizenship, including the right to vote and sue and be sued in French courts, and thus not subject in their legal disputes to the French repugnancy doctrine unless they chose to keep their family and personal affairs under the jurisdiction of the Islamic courts. A 1916 statute confirmed the full citizenship of these “originaires”. However, the French did not extend citizenship to the other peoples of their Empire until after World War II. Frederick Cooper, Citizenship Between Empire and Nation, Princeton: Princeton University Press, 2014, 6, 16-17.


38 Ibid., 124. Sheleff argues that in addition to equity, morality and good conscience, the judges took into consideration compatibility with public policy. He says that the repugnancy doctrine was an essential and integral part of the “legal framework of British control.” Leon Sheleff, The Future of Tradition, Customary Law, Common Law and Legal Pluralism, London: Frank Cass Publishers, 122, 132.
formative culture, had to observe them. But, not all determinations of repugnancy depended on equity, justice and morality. Ocran points out that often the British based their determination of repugnancy on their consideration of what was “most appalling, ridiculous or simply unhelpful to the inculcation of Christian ideals.” Some examples, Ocran gives, would be suicide where the deceased’s body was exhumed, tried and decapitated.

Some British courts incorporated concepts found in English law but not in customary law by considering customary conduct contrary to such concepts in terms of repugnancy. Thus the English doctrine of prescription was not to be found in customary law (see Chapter XII, infra.). Nevertheless, the British courts ruled that permitting the ouster of one in long possession of land openly asserting rights known to the owner to be adverse to the owner’s title and spending to improve the land or to defend rights to it would be repugnant to equity. Other customs deemed to be repugnant included: rendering a judgment by a Native Tribunal when a member of the Tribunal had not heard all of the evidence, customs based on slavery, e.g. the chief’s succeeding to a retainer’s property on the latter’s death, imprisonment by native

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40  Ocran, 470, 472-473.
41  At least one District Commissioner, in Nigeria, characterized the repugnancy doctrine as “not only unhelpful but insufferably patronizing.” M. C. Atkinson, An African Life: Tales of a Colonial Officer, London: Radcliffe Press, 1992, 29. His was, as is seen herein, a distinctly minority view.
42  Bokitsi Concessions Case [1903] Renner’s Reports 298. Bokitsi was followed in Nkoom v. Etsiaku, F. Ct. ‘22 [Full Court 1922] 1, 5 (Smyly, C. J.) . See also Ado v. Wusu, [1938] 4 WACA 96, 99 holding that strict native law will not be “invoked where the effect is, in equity, unjust,” relying on the dictum of Morgan, P. J. In Bokitsi’s Case.
custom, e.g. being held in log,\textsuperscript{44} making a child of a slave a part of his or her father’s family for purposes of succession is repugnant and unenforceable because it would perpetuate prohibited slavery. Finally, Chief Justice Deane, sitting as a Divisional Judge held that customary law requiring that the successor by heirship to a deceased relative be personally responsible for all of the decedent’s debts was repugnant to the extent that the heir was sought to be held liable for debts in excess of the assets left to him.\textsuperscript{45}

**District Commissioners**

The role played by the District and Provincial Commissioners in the administration of justice on the Gold Coast was complex and one of the most controversial, for they were both executive and judicial officers and were subject to control by both executive superiors as well as the Chief Justice. Until 1894, neither District nor Provincial Commissioners had any legislative authority to exercise judicial functions save for that section of the Supreme Court Ordinance giving the Chief Justice power to appoint commissioners for “taking affidavits and declarations and receiving production of documents, or for taking the examination of witnesses on interrogatories or otherwise which may be necessary to be taken in respect of any proceedings in the Court”\textsuperscript{46} Despite this lack of statutory authority, the various District Commissioners sat as judges in small civil and criminal matters in their Districts and

\textsuperscript{44} Appaw v Smith, [1924] Div. Ct. ’21-’25, 140,
\textsuperscript{46} Supreme Court Ordinance No. 4 of 1876, §33.
were supervised therein by the Chief Justice who sought approval of the Colonial Office for his request for specified law books for use by the District Commissioners.47

In this section, I discuss the legal authority of the District Commissioners as magistrates from the 1882 Ordinance and their civil and criminal jurisdiction. We have seen that at least until 1900 not all or even most of the District Commissioners had legal qualifications and I discuss some of the problems arising from that lack and the attempts by the Chief Justices to provide direction to the District Commissioners through issuance of instructions for their guidance.48 It directed each Commissioner to form a Court, makes him a commissioner of the Supreme Court, subjects him to the Rules of the Supreme Court and the orders of the Divisional Court of the Province where his District is located. The statute directed appeals from his court to the Divisional Court. He was required to report to the Chief Justice as to each case he decided at such intervals as the Chief Justice might direct. The revised statute conferred upon him authority to issue writs of Habeas Corpus and to appoint guardians and decide custody cases as well as to enter injunctions in order to protect property in suit or to prevent breaches of contract or tort. He now had jurisdiction to decide disputes as to land arising from property upon which execution had been

47 BNA CO 96/145, No 589, 12.20.1882. In 1878, Chief Justice Chalmers issued Circular Instructions to all Commissioners. Whenever the District Commissioner was in doubt as to the proper course to take, he should delay action and seek instructions from higher authority. Appendix to Instructions to District Commissioners 1911, University of Manchester Main Library, Special Collections, Foreign and Commonwealth Office Pamphlets, 6.1.78. Most if not all of the District Commissioners were assisted by an indigenous Head Clerk, who as the wife of one District Commissioner saw it, was “responsible for all of the office and Court work of the District” under her husband, and “acted as linguist.” Laura Boyle, Diary of a Colonial Officer’s Wife, Oxford: Alden Press, 1968, 18. Although the diary was not published until well after the independence of Ghana, it covers the period 1916-1917. Ibid., Preface.

48 From 1900 to 1935, however, ninety-five percent of the 152 persons who served as District Commissioners in the Gold Coast Colony had legal qualifications albeit with little expertise. Cornelius Bushoven III, National Law and National Courts in the Political System of the Gold Coast and Ghana, Ph. D. Dissertation, Duke University 1971, 9 n.2, 11.
levied. His criminal jurisdiction extended to all misdemeanors and he was authorized to accept criminal informations and bind defendants for trial at an Assize. From that point on, District Commissioners were raised in stature as members of the Judiciary.\textsuperscript{49} In 1916, after several drafts reviewed and revised by the Chief Justice, the Ordinance was amended to provide that the monthly returns of cases heard by the District Commissioners would be made to the Divisional Judge with authority over his district rather than to the Chief Justice. These judges would have full revisory powers that they could exercise on their own initiative without waiting for a monthly report “as the deem fit,” unless the defendant has applied to the District Commissioner to state a case or an appeal is pending.\textsuperscript{50}

Soon after enactment of the 1883 Ordinance, the Governor also began to receive complaints about what he decried as the many instances of illegal proceedings and illegal decisions being made in the District Commissioners' Courts in criminal matters and said that something had to be done to counteract them. Thus he asked the Chief Justice to draft an Ordinance requiring monthly returns of cases to be made to the Chief Justice that would act as an automatic appeal of all criminal convictions from those Courts and authorized the Chief Justice summarily to reverse or amend any judgment he determined to be contrary to law and to authorize him to grant bail pending his review. The Colonial Office approved and asked for lists of all convictions reversed or amended by the Chief Justice.\textsuperscript{51}

\textsuperscript{49} GNA ADM 4/1/18, 10.20.1894.
\textsuperscript{50} District Commissioners Amendment Ordinance No. 8 of 1916, BNA CO 96/569, GNA ADM 1/7/30, 1.25.1916.
\textsuperscript{51} BNA CO 96/159, No. 456, 9.30.1884. The amending Ordinance was passed as No. 7 of 1884.
Almost from the moment that he assumed office as Chief Justice, Griffith began writing letters to District Commissioners in response to their monthly reports on criminal cases. He would tell them in the form of a Socratic dialog what he thought about the way they handled their cases. He also minuted the Colonial Secretary suggesting that increasing the District Commissioners’ criminal jurisdiction would save Divisional Courts at least a week’s work annually and would not impose additional work on the District Commissioners as most new cases could be dealt with summarily. However, he said, no time savings for the Divisional Courts would result from increasing civil jurisdiction as there would likely be many more appeals from the District Commissioners civil judgments and they would soon be overburdened.

Because of the lack of legal preparation by so many of the District Commissioners, in 1893, Chief Justice Hutchinson convinced the Governor that the District Commissioners should be given detailed instructions as to how they should conduct their magisterial duties. The document, Instructions To District Commissioners, defined the District Commissioner as a Commissioner of the Supreme Court who was to facilitate the administration of justice with limited civil and criminal jurisdiction. He was subject to the direction of the Chief Justice and/or the Puisne Judge in his Province insofar as his Magisterial duties are concerned and to the direction of the Governor as to his other duties. The Instructions addressed the problem of the District Commissioner’s dual capacity and the necessity to “constantly

52 GNA SCT 2/1/4, 133; see also letters at 267, 386, 440 AND 454.
54 Joseph T. Hutchinson, ed., Instructions to District Commissioners, BNA CO 96/233, No. 135, 5.10.1893.
to be on his guard to put aside all preconceptions derived from mere rumour or suspicion. This was especially important in cases where had in his capacity as an executive officer received instructions from the Executive at headquarters.” In such circumstances, he should consider transferring the case to another Court.

The District Commissioner was firmly instructed that he had to, as would a Puisne Judge, keep a faithful record of all admissible and relevant oral evidence he received. He was warned not to issue criminal summonses except when he believed that there was evidence that a crime had been committed and that the person summoned had committed it and that the grounds for arrest had to be clearly stated and had to give real notice of the acts charged. The accused had to be promptly brought before him and the summons or warrant and the charge had to be read and clearly explained to the accused. He was not to hold any hearing outside the presence of the accused.55

In civil cases the District Commissioner was required to determine if the request for a summons had some basis or was merely vexatious. He was directed not to grant a judgment on default without taking evidence on the claim. He was advised that judgments might be enforced by attachment and sale of property, arrest and imprisonment or both as of right but that the District Commissioner might release a judgment debtor if the debtor showed that he had disclosed all his property and had no ability to pay and such inability was not due to his own misconduct.56

55 Ibid., Enclosure: Instructions To District Commissioners, ¶¶1-22. See also Francis Crowther, Notes for the Guidance of District Commissioners, Gold Coast Colony, Accra: Government Printers, 1916, 7, 31, 45.
56 Ibid., ¶¶29-37.
The *Instructions* required the District Commissioners, in accordance with the 1884 Supreme Court Amendment Ordinance, to make monthly returns to the Chief Justice as to all cases he heard, both civil and criminal, with a verbatim statement of the charge or claim and the decision he’d made. The Instructions pointed out that no judgment of a Native Tribunal not subject to the Native Jurisdiction Ordinance on the same claims was binding on him (*i.e.*, such judgment had no *res judicata* effect and the case should be retried *de novo*), but that he was obliged to apply native customary law to all claims before him involving natives provided such law was not repugnant to natural justice. Despite some Supreme Court cases that could be read to the contrary, the District Commissioners were told that there were no prescriptive rights in land nor any statute of limitations on claims under customary law. Finally, the *Instructions* said that there was no Statute of Frauds (requirement of a writing) on claims involving illiterate natives.\(^57\)

A second edition of the *Instructions* edited by former Chief Justice Hutchinson and the then Chief Justice Griffith was issued in 1899 that made a number of changes. While the Introduction to the 1893 version defined a District Commissioner as a “Commissioner of the Supreme Court”, the 1899 version specified that he had two “distinct official characters” as a magistrate and an executive official.” The 1899 version reinforces the injunction to note evidence carefully by pointing out that many reversals were occasioned by a failure to specify evidence supporting the decision.\(^58\)

\(^57\) *Ibid.*, ¶¶42-44.

\(^58\) W. Brandford, Griffith, Jr., ed., *Instructions to District Commissioners*, 1899 edition, University of Manchester Main Library, Special Collections, Foreign and Commonwealth Office Pamphlets, ¶¶1-8.

-215-
Paragraph 18 of the 1899 version enjoins the District Commissioner to make sure administrative officials who allege violations of ordinances do not hand in charges prepared “in a slovenly and insufficient manner.” In this and subsequent paragraphs, he was told not merely to note evidence passively received but to question and follow up “clues and hints,” as David Chalmers had earlier directed, to be able to sift the evidence proffered by uneducated witnesses for the relevant material, eliminating hearsay and the witness’ inferences from matters not in evidence and drawing out evidence from the witness’ own observations that he may have omitted to state.59

In the 1899 revision, there is a more extensive discussion of the procedures involved with imprisonment for debt. Since most of the District Commissioners’ civil jurisdiction related to appeals from Native Tribunals, the later version of the Instructions deals with the status of native courts not subject to the Native Jurisdiction Ordinance (see Chapter VII, infra.) and the manner in which their judgments could be enforced with particular attention to customary forms of punishment and detention and the inability of native courts to order sale of a defendant’s property so that the native court was reduced to enforcement primarily by “the force of public opinion.” Griffith’s revision encouraged the District Commissioners to read and study Sarbah’s book on Fanti law and custom as it “will well repay any Commissioner."60

Griffith took greater note of the problems of proving native custom where it is not admitted as, he wrote, it was often very indefinite: “In such cases the indefiniteness of native law affords so-called experts large scope for generalizing from single

59 Ibid., ¶¶8, 19, 21.
60 Ibid., ¶¶34, 42-47, 50.
instances and for laying down as native law doctrines which are sometimes absurd, often in themselves inconsistent and always narrow.”61 This statement demonstrates Griffith’s hostility to native custom and law.

In early 1911, Herbert Bryan, then Acting Governor, sent Secretary of State Harcourt a dispatch concerning a new edition of the Instructions To District Commissioners that had been started in 1909 by Chief Justice Griffith but never completed. Bryan told his superiors in London that he had asked Griffith to revise them in light of the recently enacted Native Jurisdiction Ordinance of 1910. Griffith had promised to complete the revision and send it to the Governor before he left the Gold Coast for the last time, having retired as Chief Justice, on March third.62

Completed that month but not finally approved until October, the latest revision was more than twice as long as the 1899 edition, was much more detailed and included several appendices and pages of forms. The title page indicated that it had been prepared by Griffith but had “since been issued subject to certain modifications with the approval of Chief Justice Sir P. Crampton Smyly.”63 Some of the changed and additional material discussed the common native practice of someone appearing as the party, giving the party’s name and testifying on the basis of what the party told him

61 Ibid., ¶¶53-57. Both versions pointed out the absence of any period of limitation in native law, although Griffith declined to express approval of the decisions of the Supreme Court enforcing this negative rule, characterizing them as “rightly or wrongly” decided and goes beyond Hutchinson to say that “the older the cause of action, the stronger would be the evidence required in support” of sustaining it.

62 GNA ADM 1/2/76, No. 102, 3.7.19.

63 W. Brandford Griffith, Jr. and Philip Crampton Smyly, Instructions to District Commissioners, 3d. Ed., Accra: Government Printers, 1911, University of Manchester Main Library Main Library, Special Collections, Foreign and Commonwealth Office Pamphlets, ¶¶4, 6, 8, 11. This third edition discussed in detail the differences between English and customary oaths for purposes of enforcing the law against perjury, noting that an oath taken by a native according to his religious beliefs, i.e. on his fetish, was deemed to be binding and violation of which could be punished for perjury. Paragraph 58 cautioned against summarily punishing perceived perjury without “a very clear case.” “The fullest allowance must be made for possible misunderstanding through inaccurate interpretation.” Ibid., ¶58.
to say, so that the District Commissioner had to determine at the outset if the witness was acting on behalf of a party per customary law, which was “not accordance with our law” and had to be told that he could only testify as to that which he knew first hand. Another new paragraph directed the District Commissioner to determine whether or not to permit attorneys to appear for parties in civil cases (they could appear in criminal cases as of right) and referred him to Schedule I of the Supreme Court Ordinance which said that ordinarily no attorneys should be permitted where the parties are illiterate unless a special reason compelled otherwise. In this revision, the Instructions reminded the District Commissioners that no sentence of flogging could be carried out without the prior approval of the Chief Justice and no juvenile should be imprisoned as well as whipped. They were reminded not to hear cases of threats, insults or abuses directed at themselves: “This direction may seem elementary but a long experience has proved that it is necessary.”

As to appeals from summary convictions, the District Commissioner was to note the grounds asserted for as the basis for leave to appeal carefully. Unless asserted questions of law were apparently frivolous, he should agree to state a case, that is to set out the legal question presented, and to state all relevant facts, his reasons for his decision on the legal question and any special circumstances the Court should consider.

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64 Ibid., ¶¶13, 20, 30, 47
65 Ibid., ¶¶51, 55.
Paragraph 67 specified that linguists, the spokesmen for the chiefs, generally were allowed to testify as to past events connected to the stool.66 “Tradition and history get mixed up in evidence of this sort and there is much room for the imagination and for invention, but nevertheless this evidence fills in lacunae which could not otherwise be filled and in a certain class of land cases it often furnishes a clue to the truth.”67 Paragraphs 77-88 discussed Native Tribunals and customary law. They pointed out that the Native Jurisdiction Ordinance of 1910 radically changed prior law and divested British Courts of many cases with which they had previously dealt, recognized the jurisdiction of all native courts not merely those proclaimed to be under the earlier Native Jurisdiction Ordinance of 1883, made it mandatory to stop hearing cases cognizable by native tribunals and refer them to those tribunals unless special circumstances were shown and required the District Commissioners to ask themselves if a case was one “cognizable” by a native court. Paragraphs 89-91 urged the District Commissioners to be sympathetic and understanding of the differences between the native and European mind sets. Natives would not blame Commissioners for their decisions if they were convinced that they genuinely tried to get at the truth and were absolutely impartial: “Whenever a new Commissioner comes to any district natives are all prepared to give him a welcome. They recognize his superiority and expect from him a strong sense of justice, great patience in listening to them, strict impartiality,

66 The term “stool” is shorthand for a chiefdom. The chief sat on a wooden stool that played an important role in indigenous religion and customary law.
67 Instructions to District Commissioners, ¶67.
dignity and self control.” On this note of self congratulation and smugness, the Instructions closed.

The following paragraphs describe in greater detail the jurisdiction of the District Commissioners as it changed from time to time as well as the relations between the District Commissioners and the judges who supervised their magisterial work. I describe the appointment of Police Magistrates and the continued perceived need for more District Commissioners to deal with increasing minor litigation that fell outside the jurisdiction of the native tribunals.

This extended discussion of the Instructions demonstrates, I contend, the importance of the District Commissioners to the administration of justice in the Gold Coast at the end of the nineteenth century and into the twentieth century and the efforts of the professional judiciary to enable the District Commissioners to act like lawyers and proper judges even when they lacked professional training and credentials.

At various times, the jurisdiction of some or all District Commissioners was changed in some or all cases. Thus that of the District Commissioner of Akwapim was increased without limit in undefended debt cases where the amount was liquidated. Moreover the Governor requested the opinion of the Acting Chief Justice on raising the jurisdictional limit on all debt cases where the District Commissioner was a Barrister or Solicitor. The point of all this was that the Supreme Court judges liked very much having the assistance of District Commissioners in discharging their judicial duties,

68 Ibid., ¶¶77-91.
69 GNA ADM 1/7/33, 12.14.1918.
provided that the judges could rely on them to perform in a lawyerly manner. For example, from time to time Chief Justice Griffith had occasion to write with approval of the work of many of the District Commissioners whom he supervised, calling them “hard working and steady.”

One effort to deal with the need for more judges of summary courts involved the passage of a Police Magistrates Ordinance. At the end of 1915, the Governor referred a draft such ordinance to Chief Justice Smyly for review and comment. The draft proposed to give the Governor power to appoint and define the geographical jurisdiction of Police Magistrates who would constitute a Court that would be part of the Supreme Court of which the Magistrate would also be a Commissioner. He would, of course have criminal jurisdiction to deal with lesser offenses punishable by imprisonment for up to one year and/or a fine of up to £100, what we in the United States would call misdemeanors, as well as civil jurisdiction of personal actions, i.e. contract, tort landlord-tenant rent and eviction cases, but would specifically deny him jurisdiction to deal with appeals from Native Tribunals such as were within the jurisdiction of District Commissioners.

Adding Police Magistrates would not be enough. The performance of judicial duties by District Commissioners was still absolutely vital to the well being of the Colony. Indeed, in early 1919, toward the end of his term as Governor, Sir Hugh Clifford wrote to Chief Justice Smyly asking his opinion as to the necessity to keep the District Commissioners independent of the Executive. He said that the development of

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70 W. Brandford Griffith, Jr. to Governor Matthew Nathan, 3.9.1901, Oxford University Rhodes House, MS Nathan 307, 32.
71 GNA ADM 1/7/30, 12.13.15.
the Colony generated such an amount of litigation that the District Commissioners could not keep up with their judicial work as well as their executive work. He could appoint Police Magistrates in the towns to reduce some of the District Commissioners’ burdens and who would be independent of the Executive, but, he told Smyly, the Commissioner of the Western Province had earlier objected on the ostensible grounds that the District Commissioners’ lack of independence was a good thing as they knew the people and the Districts and that sometimes political knowledge was necessary to them making good judgments.  

Clifford pointed out that in Ceylon, the Executive and the Judiciary were interchangeable without any problems and the Provincial Commissioner insisted that the natives had no trouble with an Executive as a judge and neither man knew of any complaints that any judgment was politically motivated. Moreover, if there were more District Commissioners they could do political work in their down time whereas Police Magistrates could not. Indeed, many matters dealt with by District Commissioners as judges involved politics. Thus, a District Commissioner, one Ramsey, reported that he had to consider the political effect of any decision he made as to a “patently illegal” destoolment of an Ohene in his district where the Ohene [a second tier chief] was suing in his Court for assault: “My sympathy is very much with the Ohene who has been badly insulted and knocked about,” and since the parties rejected his proposal for a settlement “there is no other course, if the Ohene’s prestige is to be kept up, but to have the culprits dealt with in the District

72 In some instances they were not only not independent of the executive but acted as policeman, prosecutor and judge in the same case. Natasha Gray points out that under the amended District Commissioners’ Ordinance of 1897, they were empowered to issue warrants to search for evidence of fetishism or witchcraft, arrest persons they accused of witchcraft and judge them as well. Natasha Gray, “Independent Spirits: The Politics of Policing Anti-Witchcraft Movements in Colonial Ghana, 1908-1927,” Journal of Religion in Africa, Vol. 35, Fasc. 2 (May, 2005): 139-158, 146.

73 GNA ADM 1/7/33, 2.11.1919, encloses letter from the Commissioner Western Province 8.21.1918. As to pressure on inferior court judges elsewhere in the Empire to convict defendants, see Gilmour, The Ruling Caste: Imperial Lives in the Victorian Raj, 126.
Commissioner’s Court,” and the Ohene’s prestige was an important concern for the colonial government who relied on him to carry out Government orders and policies.74

The Governor wrote to the Secretary of State, Lord Milner, later in 1919 telling him that court work in the three principal towns of the Colony had increased so much that additional assistance was urgent. The District Commissioners, he said were obliged to spend so much time in court that they couldn’t tour their districts. He reported that the Chief Justice, the Provincial Commissioners, the Attorney General and the Solicitor General had conferred and recommended more District Commissioners in preference to an additional Police Magistrate. These proposed additions to the “minor judiciary” should have legal training and should be independent of the executive – how that could be he did not say. He believed that such post or posts should be made available to local barristers forthwith -- it would be a “wise policy.” His estimates provided for more District Commissioners as well as for an additional Police Magistrate, he said.

While recommending the appointment of an African, he also suggested that Europeans should also be appointed in order to train them for higher judicial positions. He noted that the recently appointed native Police Magistrate, Woolhouse Bannerman, was doing well and that he wanted to appoint one other native Magistrate, two European District Commissioners and six Assistant District Commissioners -- presumably also European although he is silent on this point. The Colonial Office

74 Quarterly Report, 6.30.29, Oxford University, Rhodes House, Mss Afr 5.650.
noted Clifford’s request for a native Magistrate but was otherwise silent. However none were appointed at that time and for a number of years later.\footnote{BNA CO 96/605, No. 949, 11.17.1919.}

The personal testimony of some District Commissioners indicates that almost all of their time was allocated to their judicial duties, although that would not seem to tell the whole story, as we know that they were required to deal with numerous political and administrative issues. Nevertheless, District Commissioner W. H. Beeton noted in his diary, in an entry that was typical of many others, that he had spent almost the entire week in court hearing cases such as one involving the “ownership of a wife,” and a large number of cases, “half sanitary and half police.”\footnote{Oxford University, Rhodes House, Mss Afr 5.1608[1], 6.1.1927, 6.11.1927.} Similarly, A. J. Loveridge told an interviewer that most of his work as an Assistant District Commissioner during his first tour of duty was judicial and that he spent at least three days each week in court. Both Beeton and Loveridge said that it was vital to get control over the Native Tribunals and that among their most important duties was to review decisions of the Native Tribunals and to quash unjust convictions.\footnote{A. H. M. Kirk-Greene, Interview of A. J. Loveridge and W. H. Beeton, Oxford University Rhodes House, Mss Afr. 5 1596.}

This comment on the duty to review decisions leads us naturally to a discussion of judicial review of lower court decisions generally. All judicial systems in Europe and North America provided for courts to review the decisions of lower tribunals as a corrective of factual and legal error. The judicial system of Great Britain and its Empire was no different. An appellate court of last resort for litigants from the courts of the entire Empire was the Judicial Committee of the Privy Council. Established by the
Judicial Committee Act, 3 & 4 Will. IV, c. 41 1833, it had jurisdiction over all appeals to the prerogative exercised by the Sovereign in Council. Its jurisdiction was extended by 7 & 8 Vict. c. 69 1844 to appeals from any court, but the Judicial Committee by long practice only heard appeals from the highest court of a colony. The 1844 statute conferred upon the report of the Judicial Committee the status of a judgment. Its purpose was not to supplant the courts below as to their findings of fact in the cases before it but to consider only the most important questions of law, the answers to which might be applied to cases in all of the imperial dependencies and, most importantly, to induce “the inhabitants to resort to the Courts for the settlement of their disputes rather than to the possibly more familiar means of personal violence. For this purpose it is essential that the people should be brought to feel the greatest respect not only for the impartiality and independence of the tribunals, but for the honesty and fairness of those who practice before them.” Thus its members saw themselves as educating all imperial subjects as to the benefits of British justice.

Appeals In the Gold Coast and West Africa Generally: A West African Court of Appeal

In the course of this section, I discuss the manner in which appeals were handled in the Gold Coast and the extended debate over eight years as to the formation and the jurisdiction of a multi-colony court of appeal. This debate, which sometimes became testy as the Chief Justice of Sierra Leone, who had served as a Puisne Judge in the Gold Coast, pursued his own agenda for the jurisdiction of such a

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court and the rules that would govern its operation. I note that at times it required the intervention of the Secretary of State for the Colonies to move the creation of the court to fruition.

During the early days of British colonialism, in 1856, the British established a Court of Appeal for all cases arising from its settlements in West Africa. However that Court was suppressed in 1874 at the time of the creation of the Gold Coast Colony. In 1902, an East African Court of Appeal was created for the protectorates of Kenya, Uganda and Malawi, the jurisdiction of which was later extended to Tanganyika, Zanzibar and Somaliland. But no comparable trans-colonial court existed in West Africa until 1930.

From 1876 until 1930, the Full Court of the Supreme Court constituted the highest appellate court in the Colony and the Protectorates. Pursuant to Section 7 of the Supreme Court Ordinance, it consisted of at two or more of the Judges of the Supreme Court, but one of which had to be the Chief Justice who had a casting vote in the event of an even division. It was required to sit at least four times annually so long as appeals were pending. It had jurisdiction over all final judgments of a Divisional Court and over interlocutory judgments and orders where the judge making the judgment or order gave his leave to appeal in matters worth £50 or more. One may readily see that questions of conflict arose on appeals from judgments of the Chief

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82 Supreme Court Ordinance No. 4 of 1876, §34.
Justice sitting as a Divisional Judge since he was required to sit as a member of the Full Court, but these questions do not seemed to have been raised until 1920.

In November of that year, Gilbert K. T. Purcell, formerly a Gold Coast Puisne Judge and at that time Chief Justice of Sierra Leone, wrote to the Colonial Office recommending the establishment of a supercolonial court of appeal for all the West African dependencies. Purcell alleged that the public had lost confidence in the existing appellate courts where the Chief Justice sat in review of his own decisions, as was the case in all of Sierra Leone, Nigeria and the Gold Coast, and suggested a West African Court of Appeals sitting twice each year in Freetown, Accra and Lagos. All British West African Judges would be members. Purcell readily admitted that such a court would dislocate the work of the local courts and probably would be impracticable but given the resolutions of the National Congress of British West Africa with respect to its dissatisfaction with the Appellate Courts where judges sit on their own cases, it would be better to have a court with outside judges. Purcell argued in favor of criminal appeals in accordance with the 1909 English Criminal Appeals Act that, if his suggestion was accepted, would produce more than enough appeals to keep such a Court busy. He pointed out the fact that in several places, criminal trials were without defense counsel so that a court for criminal appeals would be even more necessary.

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84 GNA ADM 1/7/35, letter from Governor Guggisberg to Chief Justice Smyly enclosing dispatch from the Secretary of State and letter 11.20 from Purcell.

85 BNA CO 96/611, No. 289, 4.9.1920. Governor reports with respect to a request for information about the National Congress of British West Africa and its inaugural meeting. He said that it represented a fair proportion of the Gold Coast educated classes but that he could not say whom in Nigeria, Sierra Leone or the Gambia it represented. He noted some opposition to the group from the ARPS and that few chiefs appear to have supported it. J. E. Casely Hayford was the prime mover, he said, and that the speeches at the first conference were loyal and moderate in tone, that no sense of acute grievance was detected and that he thought that the main objective was more representation and positions in the higher administration. He said that one session was devoted entirely to judicial reform with the main emphasis on the desire for an inter-colony appellate court.
Indeed, Purcell went on, as important as doing justice was the necessity for people to see and feel that justice was being done. Lord Milner responded that if there was a general desire for such a court, there should be a conference among the Chief Justices and the Attorneys General to prepare a scheme for his approval.

In early 1921, Purcell sent the Colonial Office and the Governors of the West African colonies a draft Order-in-Council establishing a West African Court of Appeals (“WACA”) and rules governing it operation. He said that he preferred a court with full time outside judges doing only appellate work but acknowledged that the expense of such a court made this impracticable. His draft permitted criminal appeals only on questions of law which allowed for no additional appeals beyond those then allowed by the various colonial ordinances. Winston Churchill, Milner's successor, rejected the idea of a WACA at that time because of the “considerable expense” that would be imposed on the colonies, an expense that they could not then afford. As to the problem of the Chief Justices sitting in review of their own decisions, Churchill suggested that the Supreme Court Ordinances of the four colonies be amended to eliminate the requirement that the Chief Justices sit on the Full Courts at all times and to add the Circuit Judges of Ashanti and the Northern Territories as Puisne Judges for appeal purposes.

Pressure from Africans for creation of a WACA continued as T. Hutton Mills argued at the 1923 meeting of the National Congress of British West Africa that the

86 Ibid.
87 Ibid., 3.17.1921.
alleged lack of money should not prevent enactment of WACA legislation as four colonies could and should pool their resources to come up with the necessary funds to fund this vital reform. The press took up the call with the Gold Coast Independent joining the National Congress of British West Africa in calling for a WACA with independent judges from England whose sole duty would be to hear appeals. However, beyond expressing a need for a WACA, the voice of the African in the debates concerning the form and jurisdiction of such a court was not heard.

In May 1924, representatives of Nigeria, the Gambia, Sierra Leone and the Gold Coast conferred in the Colonial Office to discuss formation of a WACA, but, according to Colonial Office officials, the conference did not bring such a court “appreciably nearer” to fruition because neither Nigeria nor the Gold Coast wished to support it financially, preferring that any money available for the judiciary be spent on additional Puisne Judges for their colonies. However, Chief Justice Smyly told Governor Guggisberg that he “wholeheartedly” supported a WACA for civil matters, in response to which the Secretary of State, James Henry Thomas directed Smyly and his counterparts in Sierra Leone and the Gambia, along with the Attorneys General of those dependencies to confer and propose a scheme for a WACA and a manner of sharing the costs. He told them to proceed without Nigeria which demonstrated no desire to participate. Each colony would have to decide for itself if the WACA was to have criminal jurisdiction over cases from that colony.

90 W. C. Eckow Daniels, English law in West Africa: the Limits of its Application, University of London, 1962, 121.
92 GNA ADM 12/5/100, 8.25.1924.
The conference met in Accra for six days during the last week of October and the first week of November, 1924 and produced a majority and a minority report. The former, consisting of all the participants from the three colonies save Puisne Judges Dalton and Michelin from the Gold Coast, said that it was not financially feasible to constitute a court of three independent appellate judges, recommend a court consisting of all the judges of the four colonies, even those of Nigeria, with an independent President who would do only appellate and administrative work and which would replace the Full Courts of the participating colonies. No judge would sit on an appeal from his own decision below. The WACA would sit twice yearly in each of Accra and Freetown. The two dissenters accepted the entirety of the majority report except, they asserted, that there should not be a separate independent President, but that the presiding officer should be the Chief Justice of the Gold Coast until such time as Nigeria joined the Court because such officers had the knowledge of local customary law that an independent judge would not have. They went on to recommend appointment of a sixth Puisne Judge for the Gold Coast to ease the burden on the Chief Justice enabling him to devote more time to the WACA. Governor Guggisberg advised London that he supported the minority report because it would result in less expense – “a matter of some importance” – and because it would enable the formation of a WACA sooner.93

Nothing happened to forward the project of a WACA for almost two years. Reporting to the Parliamentary Undersecretary of State, William Ormsby-Gore, in November 1926, Governor Guggisberg said that correspondence as to a WACA began

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93 GNA ADM 12/3/42, 11.21.1924.
as early as 1914. He described the recommendation of the majority of the attendees at the conference among judges, attorneys-general and solicitors-general from the Gold Coast, Sierra Leone and the Gambia at Accra in October 1924 that a WACA similar to that in the East African Protectorates, consisting of all judges and acting judges, be created with an independent President with only appellate duties with headquarters at Accra, and that would replace the Full Courts of the colonies. Each colony would be responsible for a specified portion of the cost according to size. He described Michelin’s and Dalton’s dissent from the majority report as to a separate WACA President since the Gold Coast Chief Justice could do it and that Sierra Leone was holding out for an independent President. Guggisberg noted that the Colonial Office had yet to comment on this issue but that it had told the Governors that each colony could decide for itself what cases would be appealable to the WACA. Finally, Guggisberg told Ormsby-Gore that in 1921 the Gold Coast Attorney General had said that criminal appellate jurisdiction of any WACA should be no greater than that of the Gold Coast Full Court, *i.e.* criminal appeals on questions of law only.\(^9^4\)

Shortly thereafter, the Governor of Sierra Leone complained to Secretary of State Leo Amery about the lack of progress toward formation of a WACA and the rejection by the Gold Coast Government of his Chief Justice’s recommendations. Flood noted on the dispatch his disdain for Sierra Leone’s appeal that the Secretary of State should force the Gold Coast and Gambia and also Nigeria to bail out the “relatively unimportant Colony of Sierra Leone.” Flood thought that the Sierra Leone

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\(^{94}\) BNA CO 96/663, 11.17.1926. A minute on that dispatch noted the proposals of the ARPS for judicial reform that included a WACA, a new Gold Coast Court of Criminal Appeals, extension of jury trial to all criminal cases and abolition of trial by assessors.
Chief Justice was responsible for the agitation, was weak and was being manipulated by the local Bar. Risley, the Colonial Office legal advisor, disagreed saying that, on the contrary, Purcell was often accused of being too strong and that Sierra Leone needed immediate relief in the form of judges from the other colonies to enable it to form an appellate court for pending cases. Nigeria had six Puisne Judges and could afford to lend one to Sierra Leone even if the Gold Coast couldn’t, so that a WACA would be unnecessary. Sir Samuel Wilson, the Permanent Undersecretary, minuted that the Secretary of State was reluctant to coerce other colonies at the behest of Sierra Leone, but he’d ask Nigeria if it would accept either of the 1924 proposals and if it said yes, he’d approach the Gold Coast and the Gambia which likely would go along.95

Nigeria’s Governor advised his colleagues that he had adopted his Chief Justice’s view that a WACA would offer no benefit to Nigeria since appeals couldn’t be heard speedily by outside judges coming to Lagos given the schedule of the judges of the four colonies.96 Nevertheless, the Colonial Office decided to move the scheme forward without Nigeria and directed the Governors of the three remaining colonies to get together and resolve their differences.97 Now, however, John Aitken, the Gambia judge, expressed his opposition to a WACA without Nigeria, saying that it was unnecessary since Sierra Leone and Gambia appeals could be heard in Freetown if Nigeria lent the necessary judges as it had agreed to do and the Gold Coast could handle its own appeals.98

95 BNA CO 554/73/8, 12.21.1926.
98 Ibid., 8.15.1927.
Ignoring Aitken’s opposition, the Colonial Office proposed a scheme along the lines of the 1924 majority report with a permanent President based in Accra to arrange sittings and to preside over all sittings of the WACA and to consult with the Chief Justices as to rules. The seemingly endless colloquy continued when Gold Coast Governor Alexander Ransford Slater, said that Chief Justice Smyly now opposed a WACA because Nigeria would not come in, the Gold Coast would have most of the burden and the Gold Coast would not be able to share the prestige of an appellate court that encompassed all of West Africa. Risley noted in the margin, “Rubbish.” Slater preferred an additional Puisne Judge who could do both Divisional and appellate work as to which he was being pressed by the unofficial members of his Legislative Council, in which case the Gold Coast could help out Sierra Leone as Nigeria would. He said that his Attorney General was also backing away from the idea of a WACA in favor of an additional Puisne Judge who could go to Sierra Leone from time to time if needed. Moreover, the Attorney General reported to Slater, Smyly had inquired of the leaders of the Bar as to what they wanted and was told that they wanted an additional Puisne Judge in preference to a WACA without Nigeria. The Governor enclosed extracts from the minutes of the Legislative Council recording a speech by Casely Hayford, then an Unofficial Member, complaining about the Gold Coast being a training ground for judges seeking promotion. Casely Hayford argued that Judges needed to stay for longer periods in the Colony because the law and customs were not easy to learn quickly. Slater, somewhat reluctantly said that he had to endorse the

100 GNA ADM 12/3/46, 9.25.1927.
views of his Attorney General and Chief Justice and pressed for another Puisne Judge, one who was vitally needed in view of leaves coming up for three judges.  

101 A Colonial Office official, D. C. J. McSweeny, characterized the Gold Coast’s reasoning as “selfish” and said that lending judges to Sierra Leone ad hoc would not cure its problems in the long run. 

102 A. J. D. Dawes expressed the hope that Slater would “convert” his advisors to a WACA scheme but acknowledged that Slater and Smyly seem to have “retired” from the idea of a WACA. J. A. Calder, an Assistant Undersecretary of State, opined that since nobody but Sierra Leone seemed to want it, the ideal of a WACA should be dropped, while Risley argued that if the Gold Coast were to be coerced to take part, Nigeria should be as well. Moreover, arguing with some passion in favor of the multi-colony court, he said that if a Court of Appeal for all of British West Africa were to be created, “it would inspire the natives of all those territories with an even added confidence in the administration of ‘British Justice’ which they all recognize as being the bedrock of peace, order and good government in West Africa.” While Ormsby-Gore said that he wanted to revisit the question of coercing the recalcitrant colonies, as he personally believed that the Gold Coast and Nigeria should be in.  

103 McSweeny was skeptical about the need for a sixth Puisne Judge and discounted the endorsement of the local Bar as self serving in that they believed it would lead to more litigation and work opportunities. Calder agreed that the case for a sixth judge was “hardly made out,” but recommended that the Secretary of State

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101 *Ibid.*, BNA CO 554/73/8, 11.11.1927,  

102 The record is barren of any evidence that the Colonial Office considered the obvious alternative of appointing more judges for the Sierra Leone Court to enable it to handle its apparently pressing business.  

approve putting a sixth judge in the estimates. Risley agreed, although Gilbert Grindle, another Assistant Undersecretary, thought it unnecessary as Magistrates could act as Puisne Judges, he wouldn’t oppose Risley.

The *Gold Coast Independent* responded to complaints that if outside judges were brought in to deal with local appeals they would not know local law and custom by saying that neither did the Privy Council when dealing with appeals from the Gold Coast. The paper encouraged the Government to pursue creation of a West African Court of Appeal as soon as possible, citing the support for such a court from many (albeit unnamed) local judges.104

At last, in February 1928, Ormsby-Gore decided that a WACA of the three colonies should be created with Sierra Leone to pay for the appellate judge, Nigerian judges would sit on the court even if it heard no Nigerian appeals and there would be no independent President. The three Governors were to consult and decide where the new appellate judge should be based, what if any other work he should do and what local legislation was necessary to get things going. They should prepare a proposed Order in Council to carry out the scheme.105 Through the summer of 1928, the Governors of the three colonies, the Attorneys General and the judges went back and forth, drafting and redrafting the Order-in-Council establishing the WACA and debating

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104 *Gold Coast Independent*, 2.24.1928, 126.

105 *Ibid.*, Confidential dispatch to West African Governors, 2.22.1928. He also told Slater that he would allow the Gold Coast to have a sixth Puisne Judge, perhaps as a consolation prize for forcing it into the WACA. In March he told Slater that after years of ineffectual debate he felt he had to intervene. *Ibid.*, 3.3.1928. This decision was in accord with editorial opinion. The *Gold Coast Leader* praised the judges for attempting to get a Court of Criminal Appeals established despite the obstacle of Nigeria’s refusal to join and urged that the Court go ahead without Nigeria. *Gold Coast Leader*, Cape Coast, 11.12.1927, 6.
whether it should have jurisdiction over criminal appeals.\textsuperscript{106} Having at last lost patience, in November, the Secretary of State took charge and told the three Governors that the Order-in-Council would be revised in the Colonial Office, passed through the Privy Council and sent to them.\textsuperscript{107} Because Sierra Leone insisted on the WACA having jurisdiction over criminal appeals and the Gold Coast did not, he had decided that the Order-in-Council would provide for jurisdiction over such appeals where local law so provided. Rules were to be made by the President of the Court, that is the Chief Justice of the Gold Coast, and one other judge in consultation with the Chief Justice of Sierra Leone and the Judge of the Gambia.\textsuperscript{108} In April 1929, the Secretary of State directed the Governors to pass all necessary legislation and agree on the Rules of Operation so that the Court could commence operation on June 1, 1929.\textsuperscript{109} Through the spring and summer of 1929, Governor Slater having told the Secretary of State that the June 1 deadline could not be met, fourteen substantive communications respecting proposed rules passed among Smyly, Purcell and Aitken, with the latter two judges usually carping about Smyly’s drafts.\textsuperscript{110} In order to resolve

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\item GNA ADM12/5/100. See particularly Acting Gold Coast Governor Thomas to Smyly, 7.9.1928 and enclosures, Thomas to Smyly 8.21.1928 and enclosures, Thomas to the Acting Governor of the Gambia, 9.5.1928. One of the main sticking points was Smyly’s insistence on a quorum of two judges to hear cases in order, he said, to make it easier to hear cases on short notice, and to make rules. GNA ADM 15/120, 3.27.1928. The Sierra Leone Attorney General objected, and Flood agreed, that the quorum for hearing an appeal should not be two and a panel should not have an equal number of judges. BNA CO 554/79/4, Sierra Leone Dispatch 4.9.1928. Ultimately they conceded the point.
\item \textit{Ibid.}, 11.20.28. The Privy Council issued the Order-in-Council on December 1, 1928. It provided for yet another Puisne Judge, to be paid for by the Gold Coast, to sit in Accra and to be available as a Gold Coast Puisne Judge when he was not doing appellate work. The President would have no casting vote so that an equally divided court would result in affirming the decision below. As a means of limiting frivolous appeals, the Court was authorized to increase sentences in criminal cases. BNA CO 554/79/4.
\item \textit{Ibid.}
\item \textit{Ibid.}, Secretary of State to West African Governors, 4.1.1929.
\item GNA ADM 12/3/50.
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the outstanding issues, the new Gold Coast Chief Justice G. C. Deane, would meet his Sierra Leone opposite number in Freetown en route to taking up his post. Puisne Judge R. E. Hall and the Attorney General, Sidney Abrahams, were sent to assist him. By mid-November, the Rules had finally been agreed to and an effective date for operations of the Court of January 1, 1930 was set. But, as was usual with West African legislation, technical glitches were discovered and a revised date of March 1, 1930 was set.\(^{111}\)

The issue of the jurisdiction to be given the WACA over criminal appeals from the Gold Coast engendered numerous and varied opinions from the judges and law officers. Some favored free appeals and some appeals only on questions of law. Judge Sawrey Cookson insisted that free appeals be granted to defendants not only in the Colony but in Ashanti and the Northern Territories as well in order to “Let us remove this blot on our escutcheon as typified by the recent Knowles case” [where a defendant in Ashanti had been condemned to death for murder without trial by jury, without a right to counsel and only a limited appeal]. Attorney General Abrahams argued that a free appeal, that is one on the facts, the law and the sentence should be allowed.\(^{112}\) The Governor advised the Secretary of State that after much thought and consideration of the views of his Attorney General and the judges, he agreed that the

\(^{111}\) BNA CO 554/80/5, Telegram, 11.22.1929; Confidential (B), 11.27.1929; 12.12.1929; GNA ADM 15/66, 11.15.1929; GNA ADM 12/3/66, Confidential, 11.27.1929.

\(^{112}\) GNA ADM 12/5/100, Enclosure No. 1 TO Letter from Governor SLATER TO Chief Justice Smyly, 1.26.1929.
WACA should have jurisdiction of criminal appeals from the Gold Coast pursuant to the English Criminal Appeal Act.\(^{113}\)

In late May 1932, the Secretary of State advised the Governor of Nigeria that the WACA was working very well and was giving a great deal of satisfaction and that it was now time for Nigeria to adhere to the Court. He informed the Governor that until Chief Justice Deane left that he would remain the President of the Court after which the Nigerian Chief Justice would assume that position and until then, Rules would be made by the two Chief Justices together.\(^{114}\) The Gold Coast wanted the WACA quorum to remain at two judges with the consent of the parties because of a financially induced reduction in personnel. The Attorney General had his doubts as to the value of a two judge bench but deferred to Chief Justice Deane's desires in the matter.\(^{115}\) The Governor wished to wait until the reforms recommended by Bushe (see below) were implemented, but since the necessary legislation to implement those reforms would not be ready for a year or more, he urged that the Order-in-Council to bring Nigeria into the WACA go forward immediately. This was done and Nigeria adhered to the Court as of April 1, 1934.\(^{116}\)

The press continued to lobby for free appeals in criminal cases and independent judges for the WACA, repeating its concern that judges will not reverse

\(^{113}\) BNA CO 554/80/4, 3.30.1929. Slater agreed that in view of these opinions, that he characterized as “unanswerable.” his prior view that criminal appeals from Ashanti and the Northern Territories should be limited to capital cases and as to other cases only when he approved was untenable. He acknowledged that no administrative officer should exercise discretion as to someone’s right to appeal. GNA ADM 12/3/49, 4.3.1929.

\(^{114}\) GNA ADM 12/1/80, Confidential, 5.31.1932.

\(^{115}\) BNA CO 544/94/1, Deane to Governor, 10.25.1933, Enclosure No. 1 to Confidential (A) 11.11.1933; Attorney General to Governor, 9.13.1933, Enclosure No. 2 to Confidential (A), 11.11.1933;

\(^{116}\) BNA CO 544/95/6, telegram, 4.3.1934.
the decisions of their colleagues, although experience showed that concern to be without basis.\textsuperscript{117} Despite public opinion, Britain continued to resist the idea of both independent judges and free appeals in criminal cases, although WACA’s jurisdiction was extended in 1935 to include interlocutory appeals by leave of the court below in civil cases and appeals on questions of fact and punishment by leave of the court below in criminal cases.\textsuperscript{118} Then, in 1938 a crack appeared in the wall of opposition when Donald Kingdon, the Chief Justice of Nigeria, said that the time had come for appointment of a full time WACA President and probably full time WACA judges as well.\textsuperscript{119} The new Gold Coast Chief Justice, Philip Petrides, expressed his agreement, at least in part, but, asserting that most criminal appeals were frivolous, argued that they should be heard speedily by judges in the colony from which they came and should not await appointment of a President. The Colonial Office seemed receptive to Kingdon’s suggestion, asking the two Chief Justices to report exactly what their proposal would cost, what savings, if any, would result and what fees it would generate.\textsuperscript{120} In response, Kingdon told the Secretary of State that he believed that an Independent President should be the highest paid judge in the Colonial Legal Service so as to attract the most able candidates but conceded that even that estimated sum he submitted to the Colonial Office would likely not convince the best English barristers to offer themselves as potential appellate judges. The Gold Coast Governor, Arnold W. Hodson, doubted that the appointment of an independent WACA President would

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\textsuperscript{117} \textit{Gold Coast Independent}, 6.1.1935, 516, 518.
\textsuperscript{118} WACA Amendment Ordinance No. 1 OF 1935, BNA CO 97/11, 4.27.1935.
\textsuperscript{119} BNA CO 554/13/18, Confidential, 6.28.38.
\textsuperscript{120} BNA CO 554/13/18, Confidential, 11.7.1938.
\end{footnotesize}
save much of the time of the Gold Coast and Nigerian Chief Justices as to appellate work.\textsuperscript{121} By the time the Secretary of State responded, the war had commenced and he was able to use that fact as an excuse to put off further consideration of proposals for independent WACA judges for the time being.\textsuperscript{122}

Wartime conditions notwithstanding, Gold Coast officials, such as Attorney General, Henry W. B. Blackall, continued to consider the value of having independent appellate judges. The time was coming when they would be appointed by the Sovereign through the Colonial Office without consultation with the colonial Governors.\textsuperscript{123} In March 1943, Gold Coast Governor Alan Burns told H. H. Duncan, Assistant Legal Adviser at the Colonial Office, that since the Gold Coast Chief Justice, Philip Petrides, would retire toward the end of 1943, it was time to consider the role of the Chief Justice in WACA. The performance of the Chief Justice’s role in the Gold Coast (the “efficient administration of the Supreme Curt and the Magistrates’ staff”) was negatively affected by his frequent absence at WACA sessions. Burns urged that consideration should be given to appointment of three independent appellate judges the cost of which could be partially offset by the reduction in the Gold Coast and Nigeria of one Puisne Judge each although he couldn’t really say if the Gold Coast could afford to lose a Puisne Judge. He knew, he wrote, that the judges would oppose such a reduction, but he believed it could be afforded since some of the Puisne Judges didn’t do a full days work.\textsuperscript{124} The Colonial Office replied that all four Chief Judges

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  \item \textsuperscript{121} BNA CO 554/119/1, Confidential (A), 5.25.1939.
  \item \textsuperscript{122} \textit{Ibid.}, Confidential, 10.17.1939.
  \item \textsuperscript{123} Oxford University, Rhodes House, Blackall Mss, Brit Emp 5.447, 174.
  \item \textsuperscript{124} BNA CO 554/127/10, 3.23.1943.
\end{itemize}
would have to make such a request before the Secretary of State could consider it and asked if there would be sufficient work to occupy three independent judges full time. In any event, consideration would have to await the end of the war.\textsuperscript{125}

Unwilling to give up their efforts to obtain an independent court, the Governor of Nigeria proposed a court of an independent President and one other judge who would do only appellate work and sit together with the Chief Justice of the colony in which the court sat. Burns joined in saying that he and other Governors agreed that two independent judges should be appointed and that the Chief Justice of the colony where the WACA was sitting would make the third judge for the panel. The two judges would be based in Accra and go on leave only in the summer when the Court would not be in session. Current judges would handle emergency applications while the Appellate Judges were on leave and would remain members of WACA.\textsuperscript{126} Still reluctant to commit itself, the Colonial Office asked each Governor to provide the opinions of their Chief Justices and information on the work of WACA since 1935, \textit{i.e.} the number of cases, the time spent hearing, traveling and deciding the cases and the opinion of the Chief Justices of the Gold Coast and Nigeria as to whether or not they could afford to lose a Puisne Judge.\textsuperscript{127}

Ironically, after all the lobbying for an independent court by Gold Coast Governors and Judges, it was the Gold Coast Chief Justice, Philip Harrigan, who raised the latest obstacle to achieving that objective. The Colonial Office’s O. G. R. Williams reported on January 22, 1944 that he’d spoken to Harrigan the prior day and

\textsuperscript{125} \textit{Ibid.} 5.5.1943.
\textsuperscript{126} \textit{Ibid.} 5.25.1943; GNA ADM 12/3/97, 6.5.1943.
\textsuperscript{127} \textit{Ibid.}, No. 207, 8.24.1943.
that Harrigan said he opposed an independent appellate bench, because such judges would be “out of touch with the peculiar conditions of the various West African Colonies.” Harrigan said that the Governors rather than the judges were promoting the idea so they could keep their Chief Justices home. His proposal to deal with the Chief Justices’ workload was to appoint more Puisne Judges. Burns rebutted Harrigan’s assertions with a memorandum from the Gambia’s Judge Johnson saying that two judges were good but three would be better, and a letter from one of his own Puisne Judges, Alfred Doorly, saying that the decisions of the WACA would have added weight if it were composed of independent judges and suggesting that the WACA judges should live and work in England and only come to West Africa two or three times a year to hear arguments. Burns pointedly added that Harrigan was so occupied with WACA and administrative work that he had little time to sit as a Divisional judge. Former Attorney General Abrahams advised the Colonial Office that Doorly’s suggestion was utterly impractical and the cost of employing eminent barristers was beyond anyone’s means. However he rejected Harrigan criticism that knowledge of local conditions was necessary as demonstrated by the decisions of the Privy Council judges who had no knowledge of local conditions. Harrigan responded to Duncan saying that the absence of the Chief Justice from the colony from time to time was not such an inconvenience as to “justify this far reaching innovation.” Nor would Independent judges expedite the work of the WACA particularly. Moreover, the WACA as proposed would be “an academic body of lawyers removed entirely from the

128 BNA CO 554/134/9, 1.22.1944.
130 Ibid., Minute, 3.20.1944.
conditions existing in the colonies concerned” and would be too technical.\textsuperscript{131} In May 1944, Burns and Harrigan sat down with Colonial Office officials, during which meeting it was decided to postpone decision on independent judges until Harrigan had some more experience in West Africa and the war was over.\textsuperscript{132} Thus after years of debate, as with so many other initiatives for changes and reform in the administration of justice, nothing was done and the WACA continued to be a court consisting of the judges of its member colonies.

**Judicial Reform in the 1930's**

At the start of the 1930's, it appeared to many in the Colonial Office as well as in the Gold Coast administration that the colonial judiciary was neither as efficient nor effective as was desired. While concern focused on the operation of the traditional courts, the Colonial Office deemed that the manner in which the British courts administered justice, particularly criminal justice justified a close inspection of the courts. Thus it was decided to send the Colonial Office legal advisor, Grattan Bushe, to visit each of the West African dependencies and to report on the manner in which the British courts administered justice. As to the Gold Coast, Bushe’s extensive report led to a Courts Ordinance in 1935 that replaced the Supreme Court Ordinance of 1876 and, among other things, extended the jurisdiction of the Gold Coast Supreme Court to Ashanti and the Northern Territories and created the position of District Magistrates as judges of summary jurisdiction who would be subject to the supervision of the Chief Justice alone. It extended the right to counsel in criminal cases to Ashanti and the

\begin{footnotes}
\item[131] Ibid., Memorandum, 4.13.1944.
\item[132] Ibid., Minute, 5.24.1944.
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Northern Territories. The 1935 Ordinance worked well and remained in force until the creation of an independent Ghanaian state.

The quality of justice in West Africa in 1930 was being questioned by those members of the public that read the Gold Coast press. A leading article in the August 4th issue of *West Africa* complained of certain judicial decisions and asked if men of the right caliber were being attracted to legal posts in the Gold Coast. It asserted that the salaries were too low for a Chief Justice in the Gold Coast. The article went on to say that jury trial should be a right in all cases and asked if WACA excluded judges from sitting on appeals from cases in which they were involved below -- a question that need not have been asked if the journalist responsible for the article had read the WACA Order-in-Council which was readily available to him. Upon reading the article, E. W. Flood, a Colonial Office Assistant Secretary, minuted that the Colonial Office got the best men for what it could afford to pay and whose judgments were seldom reversed.\(^{133}\) In late September 1930, Alexander Fiddian minuted that he had been told by E. W. Flood, another Assistant Secretary, that “he had been thinking for some time that everything was not right with the administration of the law in West Africa.” Fiddian discussed the matter with Grattan Bushe, the departmental Legal Advisor who suggested that he, Bushe, go to the four West African colonies to become acquainted at first hand with legal conditions and problems; it would also be good for legal and judicial morale for him to visit. The Deputy Undersecretary of State, Charles Jeffries, agreed with the proposal and suggested that Bushe go to Africa in 1931.\(^{134}\)

\(^{133}\) BNA CO 544/84/4, Flood minute, 8.24.1930.
\(^{134}\) BNA CO 544/85/4, Fiddian minute, 9.27.1930, Bushe minute, 10.28.1930.
In anticipation of Bushe’s visit, a leading article in the *Gold Coast Independent* argued that there was a need for radical reform in the administration of justice: “The administration of justice by the State is an essential and permanent element of civilization and a device which admits of no makeshifts or temporary substitutes.” The Government had to assure the legal system against “fatal conservatism,” the leader continued. The judiciary had to be severed from the Executive, that is, Provincial and District Commissioners should not exercise judicial functions, a “cause of much perversion of justice.” It was necessary to free judicial administration “from every conceivable suspicion.” More Magistrates, especially African Magistrates, should be appointed, WACA should have independent judges as it was wrong for appellate judges to sit on appeals from their own decisions and their colleagues were unlikely to reverse or even to criticize the decision of one of their own.

As noted above, this last contention was demonstrably false. Nevertheless, the leader laid out serious proposals for a thoroughgoing reform of the legal system.

Bushe spent four weeks in the Gold Coast during the period December 1931 to March 1932, meeting and talking with the Governor, judges, District and Provincial Commissioners, the Administration’s law officers and local barristers, among others. His report attacked the exclusion of attorneys from courts in Ashanti based on unsupported beliefs that they fomented litigation, a belief that certainly did not apply to criminal cases, and found that charges of misconduct by members of the Bar were substantially exaggerated. He said that he believed that his recommendations

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135 *Gold Coast Independent*, 1. 23.1932, 98.

136 It may be noted here that in India, District Officers combined the duties of police, prosecutor and judge in criminal matters along with their administrative duties without apparent objection although one commentator thought it not to be “a very satisfactory system.” Gilmour, *The Ruling Caste*, 124.
concerning the allowance of counsel in criminal cases in Ashanti and the Northern Territories would be supported by the Gold Coast Government, but he agreed that attorneys might be excluded from Native Tribunals until appeals from such Tribunals reached the Supreme Court and/or WACA.\(^\text{137}\)

Bushe reported that judges and barristers told him that appeals to Provincial Commissioners in land cases were “unnecessary and undesirable," that Provincial Commissioners made too many mistakes, some elementary, were apt to decide cases on the basis of knowledge obtained outside the record, and, as was the case with District Commissioners, were often interested in their political capacity in the outcome of cases. Provincial Commissioners defended their conduct by saying that only they could decipher often unintelligible records sent up from Native Tribunals. Bushe acknowledged that most decisions of the Provincial Commissioners were not appealed and most of those appealed were affirmed by the Supreme Court. Thus, despite his recommendation to deprive District Commissioners of judicial jurisdiction and the complaints of the Bench and Bar, he recommended that no change be made in the jurisdiction of the Provincial Commissioners.\(^\text{138}\)

Bushe said that he believed the monetary jurisdiction of the Magistrates Courts was too high and deprived the Supreme Court of cases it should have had. Appeals to the Supreme Court, he went on, should be on all grounds not just on questions of law, because that stating a case for review by the Supreme Court was too difficult for most District Commissioners. More effort, Bushe urged, should be made to create WACA

\(^\text{137}\) BNA CO 554/90/13, Report 3.24.1932.

\(^\text{138}\) \textit{Ibid.}
panels with judges from colonies other than the one from which the appeal comes so that the parties might be given more of a sense of a disinterested tribunal.\textsuperscript{139}

With respect to jury trials, Bushe concluded that expansion of the right to jury trial would be of doubtful value because there were too few literate natives and most of them were Fantis and would not be suitable for trying cases involving other ethnicities. Accordingly, he recommended against extension of jury trials to Ashanti.\textsuperscript{140}

Finally, Bushe discussed the desirability of extending the jurisdiction of the Supreme Court to Ashanti and the Northern Territories and of consolidating it with the Circuit Courts of those dependencies. Ashanti and the Northern Territories were then being administered, \textit{viz à vis} the Gold Coast, as foreign territories. Criminal defendants found in those places who were sought by the Gold Coast had to be extradited under the Fugitive Offenders Ordinance; the writs of the Supreme Court did not run there and the Gold Coast Attorney General had no control over prosecutions there. He deemed these conditions to be unacceptable. Thus, he recommended that the jurisdiction of the Supreme Court be extended to Ashanti and the Northern Territories and that the Chief Commissioners’ courts should be abolished since they were run by administrators who had an interest in too many cases as political officers, who were too often without legal training, who committed too many elementary

\textsuperscript{139} \textit{Ibid.}

\textsuperscript{140} \textit{Ibid.} As late as 1943 African journalists raised the question of the availability of speedy and public jury trials and the right to counsel paid for by the State in all four of the British West African dependencies as well as “corrective not vindictive” punishment by fine or incarceration but not both. West African Press Delegation to Great Britain, 13. The Delegation emphasized the necessity for separation of the executive and administrative branches and functions and that Africans should be appointed to judicial positions in equal numbers of Europeans. \textit{Ibid.}, 13.
mistakes and too many of whose decisions were based on knowledge acquired outside the record.\textsuperscript{141}

Writing to the Colonial Secretary about Bushe’s recommendations as to Magistrates’ monetary jurisdiction some months after reviewing Bushe’s Report, the Secretary for Native Affairs said that Bushe recommended appointment of a small committee to “evolve a practicable scheme.”\textsuperscript{142} The Committee in turn recommended that each Police Magistrate should dispose of 4,000 criminal cases per year together with a small number of civil cases, some of the Police Districts should be enlarged with Police Magistrates to sit from time to time in all the large towns of the District, but that they would have to make do with the current number of Magistrates because there was no money for more people.\textsuperscript{143}

Responding to a question as to whether District Commissioners should have concurrent jurisdiction with Police Magistrates in places where the latter sat, the Secretary of Native Affairs quoted Bushe’s Report, that “It is slightly ridiculous and quite unnecessary” for Police Magistrates and District Commissioners to be part of the Supreme Court. Bushe had recommended that a new Courts Ordinance should have two parts, one dealing with the Supreme Court and one dealing with courts of summary jurisdiction for Magistrates. District Commissioners, Bushe recommended,

\textsuperscript{141} \textit{Ibid.} Nevertheless, Bushe acknowledged, as he had in the matter of Provincial Commissioners’ judicial jurisdiction, statistics showed that the Chief Commissioner did a good job as only 43 of 129 cases appealed during the years for which he had data were reversed. On July 8, 1932 the Secretary of State, Sir Philip Cunliffe-Lister, approved Bushe’s recommendation that counsel be permitted to appear in the courts of Ashanti except in land cases where the parties were natives. GNA ADM 12/3/57, Confidential to the Secretary of State, 10.18.1932.

\textsuperscript{142} GNA ADM 15/72, 8.31.32. The Governor named such a committee Chaired by Chief Justice Deane, with the Acting Colonial Secretary, Thomas, the Acting Attorney General, James De Hart, the Acting Secretary for Native Affairs, Skene and the Accra Police Magistrate as members.

\textsuperscript{143} \textit{Ibid.}, 10.24.1932.
should not have any jurisdiction *ex officio* but if necessary, a District Commissioner could be appointed an Acting Magistrate. Chief Justice Deane said that until a Courts Bill passed, the District Commissioner’s jurisdiction should not change, but when a Bill was drafted, the Governor should be authorized to create Justices of the Peace and to appoint District Commissioners as Justices of the Peace so that they could issue search and arrest warrants, set bail and try petty cases. Police Magistrates could look to such District Commissioners for assistance if necessary. The Chief Justice argued that his scheme would facilitate administration of justice and not allow the prestige of the District Commissioners to suffer as it might if they were stripped of all jurisdiction.\textsuperscript{144} Attorney General Abrahams said that he was not willing to see the District Commissioners deprived of all jurisdiction or endanger their authority or influence but would like to see their judicial role as secondary to that of the Police Magistrates and would suspend their jurisdiction in places where Police Magistrates sat.\textsuperscript{145}

The Governor told the Colonial Office that he was not happy with Bushe’s recommendation as to reducing the Magistrates’ civil jurisdiction. He argued that the monetary amount was raised to its then limit in 1930 in order to reduce the workload of the Divisional Court because, before his retirement, Smyly had been concerned that WACA would produce so many criminal appeals as to keep Puisne Judges from dealing with civil work, but, the Governor said, the feared explosion of criminal appeals never occurred. Now, Slater said, the Chief Justice and the Attorney General agreed with Bushe’s recommended reduction. He, however, could not concur because, he

\textsuperscript{144} *Ibid.*, 11.4.1932.

\textsuperscript{145} *Ibid.*, 11.15.1932.
contended, the present level of monetary jurisdiction yielded faster, cheaper and more convenient results. Moreover, since the monetary jurisdiction of the Magistrates’ courts was raised only a few years ago, it should not now be reduced. If Puisne Judges were not fully occupied, perhaps their number could be reduced. The consensus of Colonial Office opinion was, with one exception, that the Governor’s arguments were “conclusive.” Bushe noted his disagreement but said that he wouldn’t push the matter against the Governor’s wishes.146

In October 1933, the Attorney General delivered to the Governor a draft of a Courts Bill that would essentially replace the Supreme Court Ordinance. Among other things, it would consolidate the courts of Ashanti and the Northern Territory into the Supreme Court, extend the jurisdiction of that Court throughout the Gold Coast and make the Circuit Judges of Ashanti and the Northern Territories Puisne Judges. At the behest of the Chief Justice, it would make the Puisne Judges of the three other British West African dependencies Puisne Judges of the Supreme Court. It created a separate inferior court to be called the Magistrate’s Court for judges of limited, summary jurisdiction whose judges would be known as Magistrates, rather than Police Magistrates, and who would have both limited civil and criminal jurisdiction. The District Commissioners would have the authority of Magistrates as well and have jurisdiction in addition to that of the Magistrates to try interpleader cases arising from attachments issued by Native Tribunals in land cases. It amended the Legal Practitioners Ordinance to provide attorneys accused of disciplinary violations a hearing by the Gold Coast judges. Lastly, it would create a Rules Committee of

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146 BNA CO 96/708/9, Confidential, 1.12.1933.

-250-
Judges and private attorneys to made civil rules that would become effective unless the Legislative Council vetoes them.\textsuperscript{147} As may be seen, all recommendations that District Commissioners be relieved of their judicial authority and duties were rejected.

After multiple revisions, the Courts Bill was read for the first time in the Legislative Council in March 1935, the first proposed legislative enactment for the entire Gold Coast after an Order-in-Council of January 1, 1935 consolidated the three entities occupying the territory of the Gold Coast into one Colony and requiring only one ordinance for the entirety of the expanded Colony. The Attorney General, who presented the Bill to the Legislative Council, stated its objectives and purposes: to expand the jurisdiction of the Supreme Court to Ashanti and the Northern Territories.\textsuperscript{148} As before, the Court would have no jurisdiction over cases within the jurisdiction of the Native Tribunals under the Native Administration Ordinance except as might be specified in that statute. There would continue to be no jurisdiction over land cases heard in the Native Tribunals and appealable to the Provincial Commissioners. Magistrates’ Courts were no longer part of the Supreme Court but were separately constituted. He pronounced it to be Government policy that the administration of justice was to be confided, as far as the financial condition of the Colony would allow, to credentialed attorneys. He admitted that the Administration had not always carried out that policy completely however, but promised to do so to the fullest extent possible: “It is hoped that the judicial work of the country will as far as is possible be performed by the District Magistrates thereby giving effect to the policy of divesting the judiciary

\textsuperscript{147} GNA ADM 15/74, 10.25.1933.  
\textsuperscript{148} GNA ADM 6/119, 234 -236.
from the Executive.” But the statement went on to say that would not happen immediately because there was little money to hire professional magistrates. He said that when District Commissioners had to sit as judges they would do so only upon a special order of the Governor.149

The Supreme Court would be the forum for appeals from the Magistrates’ Courts in civil actions as of right where the amount in issue was more than £5 and of interlocutory orders upon leave of the Magistrate. The jurisdiction of the Magistrates’ Courts in civil matters would be up to £300 and included personal cases, rent cases, guardianships of minors, injunctions and interpleader with respect to property upon which execution had been levied of a value up to £300. Where District Commissioners sat as magistrates, their jurisdiction was limited to £100 and their interpleader jurisdiction was similarly limited. Magistrates would have criminal jurisdiction where the fine was up to £100 or one year in prison and/or flogging under the criminal code. Similarly, where a District Commissioner sat as a magistrate, his criminal jurisdiction was limited to a fine of up to £50 or prison for six months. In most other respects the Bill reenacted the provisions of the Supreme Court Ordinance except that there would be no jurisdiction as to election or destoolment disputes of chiefs, claims as to stool property or political or constitutional relations among chiefs. The Court might refer questions of native law and custom to a Native Tribunal or rely on expert testimony. It could accept or reject the judgment of the Native Tribunal as to

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149 GNA ADM 14/2/21, 3.20.25, Legislative minutes, 29 -30; BNA CO 97/11, 4.27.1935. Because of the lack of money to employ Magistrates, District Commissioners continued to exercise judicial jurisdiction for most of the period concluding in 1944. Bushoven III, 19.
which there would be no appeal or otherwise treat it as justice might require as if it were the report of a referee.\textsuperscript{150}

After the second reading, the Unofficial Member from Cape Coast, Mr. Korsah, moved in the Committee of the Whole to amend the Bill to reduce the monetary limit on the Magistrates’ civil jurisdiction from £300 to £200 because the magistrates were overworked and the judges were not busy. After some discussion an amount of £150 was agreed and the amendment passed. The Bill was passed in essentially this form on April 27, 1935 as The Courts Ordinance No. 7 of 1935.\textsuperscript{151} The British Courts were thereafter governed according to the strictures of this Ordinance until 1944 when it was amended to reflect the changes then being made to the native tribunals under the Native Courts Ordinance of that year.\textsuperscript{152}

The Courts Ordinance added prestige to the Magistrates, now known as District Magistrates, and a Circular Notice from Chief Justice Deane reinforced their prestige in the eyes of the public by reminding them and all the other judges of a statement he had made in Judicial Circular No. 1 of 1931 that Magistrates had power to fine instead of imprisoning those they convicted and urging them to exercise that power freely when the “offense is not of an aggravated nature and the offender is a young person or a first offender.” Further, Deane said, in the proper case extensive use should be made of the power to grant the offender time to pay the fine or to pay it in installments if necessary. However, one of the African Magistrates, Archie G. Hutton-Mills

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cautioned his colleagues that such power should only be used cautiously as it encouraged defendants to disappear and gave them incentives to commit crime (!).  

The 1935 reforms established the jurisdiction and personnel of the Supreme Court up to the date of independence. The number of judges varied according to financial and national security considerations during World War II, but from 1935 on, the focus of the British administration of justice was on the indigenous courts.

**Imprisonment for Debt**

Another aspect of the judicial reforms of the 1930's involved imprisonment for debt. The issue of the propriety of imprisonment to compel payment of a debt and the terms under which that remedy (or penalty as others would call it) had roiled the courts of the Gold Coast for many years. As early as 1874 the Colonial Office was seeking a report on the law of imprisonment for debt applicable in the settlements if the Gold Coast from Chief Magistrate Marshall and the Queen’s Advocate, David Chalmers. The former reported that the law operated in a cruel way, the debtor can’t pay the debt while he is imprisoned, interest accumulates and the amount paid by the creditor for his maintenance is added to the debt, so that the debtor would be unlikely ever to be able to pay and could only look forward to an indeterminate time in prison. Marshall said that since there were no ordinances governing imprisonment for debt in the Gold Coast, English common law applied, but English statutes had abolished imprisonment for debt – a marginal note on the dispatch at this point made in the Colonial Office says: “Not so . . . the statute only applies to the U.K.” – Marshall suggested enactment of an Ordinance. Chalmers said that the Debtors Act of 1869 did not apply to the Gold

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153 GNA CSO 4/1/280, Memo by Chief Justice Deane 8.11.19.

-254-
Coast but that a local ordinance abolishing imprisonment for debt would only encourage fraud and the debtor's property that might be available to pay the debt was not always known or ascertainable, so that imprisonment was the only form of enforcement that worked. Chalmers added that the Judicial Assessor, like a native chief, could make any order he felt appropriate to enforce payment and could thus ameliorate the harshest aspects of imprisonment for debt.154 Almost one year later, the Secretary of State, Lord Carnarvon, in the course of a dispatch setting out his design for a Supreme Court Ordinance, opined that the law related to imprisonment for debt should be modified because “The supposed interests of traders must yield to the requirements of humanity.”155 Nothing was done at that time either to codify the law nor to ameliorate its negative effects.

In 1918 the Governor asked the Attorney General to look into the necessity for and the conditions of imprisonment for debt. The Attorney General reported that it was indeed necessary and that the conditions under which it was imposed and was carried out were fair. Shortly after assuming office as Chief Justice, George Deane proposed elimination of this form of enforcement of judgments. The Governor sent him Session Paper VII of 1918-19 that contained the Attorney General’s discussion of imprisonment for debt and the opinions of various people showing “an overwhelming majority in favor of maintaining the existing law.” Governor Slater asked Deane whether, in light of this material, he still thought imprisonment for debt should be abolished. He reminded Deane that India, Hong Kong, Zanzabar, Kenya and Uganda

155 GNA 1/1/39, No. 15, 4.16.1875.
still permitted it. Deane’s reply, if any, is not in the record, but we do have a
memorandum of a conversation between Attorney General Abrahams and the Colonial
Secretary concerning the former’s discussion with Deane in which, Abrahams says, he
convinced Deane that the remedy of body execution, or imprisonment for debt, was
permitted by the Supreme Court Ordinance, albeit, Abrahams says he admitted, such
a remedy was considered in England to be “a relic of barbarism.” However, under the
very different conditions prevailing in the Gold Coast it might be necessary. Indeed, he
went on, he told Deane that he believed that conditions had not changed much from
1918-1921 when the overwhelming weight of opinion was in favor of retaining the
remedy. He noted that he had recommended to the Chief Justice that the latter
prepare an up to date Civil Procedure Ordinance that would give the judges some
discretion in ordering arrest of debtors and that Deane had seemed to agree to such a
proposal. Abrahams recommended against abolition of imprisonment for debt or
enactment of bankruptcy legislation the effect of which would have been to harm
creditors, primarily European creditors, by annulling all or most of their claims, a
recommendation that he knew Deane strongly opposed. He advised the Governor to
seek the Judges’ opinions as to giving them discretion not to order imprisonment when
specified conditions existed. Since they had the power to make rules under the
Supreme Court Ordinance, they should take the initiative to make the desired changes.
However, he continued, whatever the Judges decided would have to be imposed on

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156 GNA ADM 12/5/100, Letter dated 2.30.1929 from Governor Slater to Chief Justice Deane.
157 GNA ADM 15/64, Memorandum, 12.27.1929.
the customary tribunals as well.\textsuperscript{158} In July 1930, Deane reported to Slater that as he had been asked to do, he had discussed with each of the Puisne Judges the issue of relaxing the current rules on imprisonment for debt and that only Judge Michelin had recommended giving the Judges discretion not to order arrest in a case where reasonable cause had been shown. Accordingly, Deane reluctantly acknowledged that his position lacked support and he recommended retention of the \textit{status quo}.\textsuperscript{159}

There matters rested until April 1933 when the Colonial Secretary asked the Attorney General to comment on the existing legislation relating to imprisonment for debt and a proposal to appoint a committee to investigate and make recommendations.\textsuperscript{160} The Attorney General responded that he “very strongly” opposed such a committee as a waste of time; it was done in 1918-19 and things had not changed so much since then. He also opposed bankruptcy legislation for reasons he had previously expressed. However, he said, Nigeria was enacting bankruptcy legislation and the Gold Coast Government should watch and note how it operated. Abrahams explained that the Judges were split on their views as to whether or not the issuance of the writ was a ministerial act or whether they had the authority to exercise their discretion. He said that former Chief Justice McLeod, writing in \textit{Eiloart v Brew},

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\item \textsuperscript{158} \textit{Ibid.}, Memorandum, Abrahams to Slater, 3.27.1930.
\item \textsuperscript{159} GNA ADM 15/67, Letter, Deane to Governor 7.9.1930. For hundreds of years, traditional loans had been collateralized in various fashions. One such fashion was by pawning, that is by providing to the lender the services of the debtor or one of his relatives for the time the loan remained unpaid. Just after the creation of the Colony, the British made efforts to eliminate pawning. The chiefs expressed concern as to the collectibility of debts without pawns as security. The Colonial Office saw pawning as just another form of slavery that was illegal under the Gold Coast Criminal Code and should be positively prosecuted and directed District Commissioners not to assist in the recovery of escaped pawns or to recognize them as proper security for debts. GNA ADM 1/2/19, No. 40, 12.27.1874; GNA ADM 11/1/1866, Confidential, 2.3.1894. Austin, “Human Pawnin in Asante 1865-1950: Coercion, Gender and Cocoa,” 137-138
\item \textsuperscript{160} GNA ADM 15/73, Colonial Secretary to Attorney General, 4.10.1933.
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FCL 261, as well as Puisne Judge Porter, said that the Judges had discretion, while Deane and former Puisne Judge King Farlow Nettleton, Michelin and Cookson said that issuance of the writ was simply an obligatory ministerial act. Deane wanted to eliminate imprisonment for debt entirely, Abrahams went on, while he favored a rule permitting a judge to exercise discretion not to order arrest of honest debtors who showed an inability to pay and no misconduct.161

In August 1933, the Chief Commissioner of Ashanti agreed to the Chief Justice’s proposal to permit the judges discretion when an application for an arrest warrant was made and allowing District Commissioners to deny a warrant to a Judgment Creditor in a case in a customary court if the judgment debtor satisfactorily showed that he could not pay.162 Governor Shenton Thomas agreed as long as the native authorities understood the purpose of the change in policy. Abrahams concurred, particularly, he said, in view of the recent dispatch from Cunliffe-Lister noting how many people were being imprisoned for debt in the Gold Coast. The necessary rule change could be quickly accomplished by the Chief Justice and one Puisne Judge with the approval of the Legislative Council. Then, at some point, not necessarily right away, the Native Administration Ordinance would have to be amended to apply the changed policy to the Native Tribunals.163

The Supreme Court Rules were amended in April 1934. They eliminated the unrestricted right of a Judgment Creditor to have his Debtor imprisoned on execution

161 Ibid., 7.25.1933.
162 GNA ADM 15/74, 8.3.1933.
163 Ibid., 8.4.33. Returns for 1930 showed 251 persons (100 in the Eastern Province, 84 in the Central Province and 67 in the Western Province) imprisoned for an average duration of 5 1/2 weeks. GNA ADM 11/1/1974.
and to “Ensure that no man is subjected to imprisonment by reason of poverty or misfortune.” If however, the Judgment Creditor proved that the debtor had sufficient means and was deliberately evading payment or attempting to defraud his creditor by a transfer of property, or that he has contracted the debt by fraud or recklessly without a reasonable expectation of being able to discharge it, imprisonment could be ordered.\(^{164}\) Cunliffe-Lister suggested amending the Rule to require the consent of a detained Judgment Debtor to sale of his goods to satisfy the debt, except those goods that were perishable, as to which consent would not be required. Sale would take place only after one month’s confinement on fifteen days notice.\(^{165}\)

Press response to the Rule change was positive, but confused. *The Times of West Africa* said that the Government had abolished imprisonment for debt, an obviously incorrect observation, but only in the British courts. It claimed that the Native Tribunals “continue to harass” debtors, and that British action creates a wedge between the chiefs and the people. The Attorney General, it went on, should recommend extension of the Supreme Court Rule to the Native Tribunals: “The Government is gradually destroying public confidence by such invidious discrimination between white and black in this matter of justice.” One cannot help but conclude that this attack on the Government at a time when it was doing or was about to do exactly what *The Times of West Africa* sought to have done was motivated by ignorance or anti-Government malice.\(^{166}\)

\(^{164}\) GNA ADM 1/2/207, No. 364, 8.1.1934.
\(^{165}\) GNA ADM 15/75, 9.4.1934.
\(^{166}\) GNA CSO 4/1/169, No. 119A, 4.11.1935.
It is somewhat artificial to divide judicial jurisdiction as exercised on the Gold Coast between British and Native (as that term has been almost universally used to described the indigenous courts), for in the end all jurisdiction was British. Indeed, the customary authorities only exercised such jurisdiction as the colonial power allowed them to do. Similarly, as we shall see, all courts were British courts and the extent that each exercised more or less different subject matter jurisdiction, that is the types of cases which the courts heard, reflected policy decisions of the colonial power. British jurisdiction would supercede that of Native Tribunals because, in the words of a Senior Colonial Office official, Assistant Undersecretary Edward Wingfield, “the Kings’ [i.e., the Chiefs’] courts are so dilatory and corrupt and they enforce their judgments by detention in such horrible dungeons and sometimes even by torture that their abolition is clearly desirable in itself. Besides, they cannot be trusted to carry out the Emancipation Ordinance.”\(^{167}\) Former Chief Justice Griffith argued that natives with bad cases took them to the Native Tribunals, but those seeking “justice” came to the British courts. For Griffith, maintenance of “effete and impractical” Native Tribunals was a “careless resuscitation” of ancient problems.\(^{168}\) We now turn to a discussion of those Tribunals and their relationship to the colonial administration and the British courts.

\(^{167}\) BNA CO 96/113, No. 13, 9.27.1874, Minute, 1.12.1875.

\(^{168}\) Griffith, Jr., *The Far Horizon*, 166.
CHAPTER VII – NATIVE JURISDICTION – 1878 TO 1910: FIRST EFFORTS TO REGULATE NATIVE TRIBUNALS

Perhaps the most significant aspect of British administration of justice on the Gold Coast, as well as in many others of the British African dependencies, was the relationship between the colonial administration and the customary authorities as to the operation of the indigenous courts, known during this period as Native Tribunals. Martin Chanock has written that this aspect of colonialism was one of interaction in which Africans played an important role, participating “within the forms of colonial institutions” and expressing themselves in the language of the colonizers.¹ He argues that the indigenous authorities took advantage of Britain’s desire to rule through them to control access to land and assert their control over women while seeking to stave off loss of authority.² Cotran and Rubin point out that the British created dual court systems in each of their African colonies. In some they merely continued existing traditional courts while in others they created them. The contend that there were no or only tenuous links between the two systems and that customary courts and the law they applied were almost completely isolated, but, as we shall see, that was not the case in the Gold Coast.³ Roger Gocking has characterized the British recognition of the role of Native Tribunals as grudging but necessary as the British courts had insufficient manpower to handle all litigation and were unwilling to deal with indigenous

¹ Martin Chanock, Law, Custom and Social Order, Cambridge: Cambridge University Press, 1985, x.
² Ibid., 7, 23. Britain’s more intense involvement in the indigenous court system of its other African territories than in those of the Gold Coast may be explained by the necessity to enforce collection of direct taxes, which taxes did not exist in the Gold Coast. Ibid., 172.
offenses such as witchcraft and fetishes. And although, he argues, they never came up to what British judges and administrators considered the highest standard of British justice, they did accustom people to utilize the courts to resolve disputes in a manner more and more akin to British legal usage. In this respect, Gocking has the right side of the argument as the evidence shows a steady increase in the number of cases brought in all the courts, British as well as traditional. Indeed, concerns for the litigiousness of the Gold Coasters were frequently heard from Colonial Office as well as local British officials.

Mahmood Mamdani notes that justice was “bipolar” in all African colonies with native courts for native disputes and European courts to resolve non-native disputes, a situation that did not exactly fit the case of the Gold Coast however. He argues that the British, in particular, privileged traditional law and custom but more often that tradition or custom that was the one with the “least historical depth so that “monarchical, authoritarian and patriarchal notion of the customary . . . most accurately mirrored colonial practices.” It was, he says, an ideological construct. We shall hear echos of this argument in the criticisms of traditional courts both by Gold Coast colonial authorities as well as the educated elite in that colony.

Consistent with the concepts of indirect rule, the British in India promoted a local customary court, the panchayat, that would enforce customary law without reference to

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5 Ibid., 113.
6 Mamdani, 109.
7 Ibid., 22.
Hindu law. Originally seen as an arbitral forum, the panchayat was available only to those litigants who came to it voluntarily and it had no enforcement powers. As a result, litigants overwhelmingly chose to ignore the panchayats in favor of other tribunals so that it metamorphosed into an administrative body. In French West Africa, efforts were also made to have disputes among the indigenous population be adjudicated pursuant to customary law, often that law being Muslim law, albeit in courts in which a French official presided. Indeed, as Salacuse points out, the French were compelled to respect indigenous law and institutions as their concepts in most areas “conflicted fundamentally” with those of the people they governed and imposition of French civil law “would have had disastrous results.” As in the Gold Coast, customary courts applied customary or Islamic law to disputes between indigenous peoples.

I discuss here several themes that characterized the relationship between colonial officials and indigenous courts that continued to do so during the entire course of the period under study. First among these is the desire of the British to use the

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9 Ibid., 7.


12 Salacuse, 42.

13 Conklin, 90. However, also as in the Gold Coast, the French courts were to apply customary law to disputes between indigenes involving family or inheritance law. *Ibid.*
traditional authorities as agents of their rule, supporting their prestige while, often
ccontradictorily, seeking to control them. As late as 1949, a Committee appointed to
study constitutional reform noted that the administration of justice by such traditional
authorities had been one of the “causes of friction” between and distrust by members
of the community. From 1865 to 1880, the British in the Gold Coast, with the full
accord of Colonial Office officials, tended to allow native chiefs to exercise jurisdiction
without control except for that resulting from appeals.

A second theme, related to the first, deals with the widespread perception that
the indigenous court officials exploited the population by means of excessive fees and
fines and made decisions based on political considerations unrelated to the merits of
the dispute. In the years just before formation of the Gold Coast Colony in 1874, the
officials of what would become the new dependency had increasingly expressed
concern about the unregulated conduct of the customary authorities in the Colony and
particular in the Protectorates of the interior. Writing some years later, the long serving
Chief Justice of the Gold Coast, W. Brandford Griffith, Jr., said of the customary
courts: “There is ample contemporary testimony to show the condition of the native
courts; the fees were enormous; bribery was rampant, and judgment went to the highs
bidder; costs and damages fell so heavily on unsuccessful parties that whole families
were pawned in payments; panyarrin was the recognized mode of enforcing
judgment, and this led not only to many persons being sold into slavery, but to tribal

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14 Coussey, J. H., Chair, Report to His Excellency the Governor by the Committee on Constitutional Reform, London: His Majesty’s Stationery Office, 1949, 32, ¶220.
15 R. Addo-Fening, “The Native Jurisdiction Ordinance, Indirect Rule and The Subject's Well-
dissension.”

Continuing, he said that people deserted the native tribunals for the British magistrates because the latter were so “measurably superior.” At the time, maintenance of an indigenous system of courts was a matter of necessity because, as Antony Allott argues, the British were unable or unwilling to provide a sufficient number of judges to handle all the cases sought to be litigated and permitting a continuation of the existing system, no matter how corrupt it seemed to be was consistent with their expressed desire to “promote tranquility” and was more likely to promote acceptance

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16 BNA CO 96/723/3, W. Brandford Griffith, Jr., “A Note on the History of the British Courts in the Gold Coast Colony, With a Brief Account of the Changes in the Constitution of the Colony,” 10. Initially the British courts declined to treat pawnning as slavery, but charged those taking pawns with kidnapping, a lesser offense. Trevor R. Getz, “A ‘Somewhat Firm Policy,’: The Role of the Gold Coast Judiciary in Implementing Slave Emancipation, 1874-1900,” Ghana Studies, Vol. 2 (1999), 103. Pawning was a means by which an individual bound himself or a relative to serve a creditor until the obligation was satisfied. Suzanne Miers, *Slavery in the Twentieth Century: The Evolution of a Global Problem*, Walnut Creek, CA: Alta Mira Press, 2003, 35. Panyarning was a form of temporary that all too often became permanent. W. O. Blake, *The History of Slavery and the Slave Trade, Ancient and Modern*, New York: Haskell House Publishers, 1969 [1861], 112. Britain had outlawed the Atlantic slave trade in 1807 and via the Slave Trade Abolition Acts of 1842 1843 (6 & 7 Vict. C. 98) had made slave trading by British subjects illegal everywhere in the Empire. However, it was not until the creation of the Gold Coast Colony in 1874 that prohibition came to be applied to the Africans of the Gold Coast who, to that point, had been considered to be foreigners. Initial proposals for gradual emancipation were rejected by Governor Strahan as being impossible to administer and by the Colonial Office for fear of British public opinion. Getz, Trevor R., *Slavery and Reform in West Africa*, Athens, OH: Ohio University Press, 2004, 100-101. Accordingly, Lord Carnarvon directed that an emancipation ordinance be passed that applied to the Colony as well as to the Protectorates. The Gold Coast Anti-Slavery Ordinance (No. 1 of 1874) was the first passed by the Legislative Council of the new colony. It was followed by an ordinance to emancipate all slaves on the territory of the Colony. Emancipation of Persons Holden in Slavery, No. 2 of 1874. These enactments criminalized slave dealing and defined slaves as including pawns. Dumett and Johnson argue that pawnning came to be seen as a substitute for slavery and a means of adding dependents to the households of the wealthy. Raymond Dumett and Marion Johnson, “Britain and the Suppression of Slavery in the Gold Coast, Ashanti and the Northern Territories,” run.edu.ng/media/3427514823303.pdf, 71-116, 94. Although pawnning was prohibited by the Criminal Code, the prohibition was rarely if ever enforced until almost the eve of World War II. *Ibid.* Emancipation was slow as the only courts of the Colony dealing with emancipation cases were located in Accra and Cape Coast, a fact that Getz asserts was a greater hindrance to emancipation than ignorance of the Ordinance or its provisions by the slave population was. Getz, *Slavery and Reform in West Africa*, 105. During the period that Getz studied, most punishments for slave dealing initially imposed amounted to fines and short prison sentences. After amendment of the Criminal Code in 1892, sentences of five to seven years were imposed in the most egregious cases. *Ibid.*, 176-177.

of British rule. In this chapter, I described the dissatisfaction of the colonial authorities with the Native Tribunals, the manner in which the colonial power began to exert more control over Native Tribunals and the problems arising from British desire to insure that justice was done in these indigenous courts while maintaining the stature of the chiefs who were considered to be agents of the colonial administration. I show how very often these two objectives conflicted and discuss the mostly failed efforts of the British to reconcile them through legislation. I discuss the first effort to regulate native jurisdiction in 1878, the 1883 Native Jurisdiction Ordinance and the repeated failed attempts to amend that statute until passage of the 1910 Native Jurisdiction Amendment Ordinance that greatly increased the jurisdiction of the Native Tribunals at the expense of that of the Supreme Court, but which did little to eliminate corruption or to reconcile the people to the chiefs’ administration of justice. The colonial power seemed unable to find the fine line between assuring fair judicial treatment to the people and sustaining the authority of its chosen agents.

Owusu has pointed out that the relationship of the Chief, or Ohene, to his subjects was that of the head of the family. He ruled them as a father then ruled his wife and children. One of his most important functions was to see to administration of justice through his Tribunal. The Native Tribunals generally consisted of a Chief or King presiding over a number of traditional councillors who collectively decided the

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19 Despite continuous expressions of dissatisfaction by people with administration of justice in the Native Tribunals, the number of cases decided therein did not diminish appreciably, primarily because the Native Jurisdiction Ordinance as amended in 1910 and its successor, the Native Administration Ordinance of 1927 gave the people no other alternative in almost all instances.

20 Owusu, 37.
cases brought before them. In some societies, such as the Borotse of modern Zambia, Namibia and Angola, the chief neither presided not participated in making a decision but whatever verdict resulted was presented to him for confirmation.\(^{21}\) In many societies, such as the Tswana of modern Botswana, as well as the Akan of the Gold Coast, the tribunals had varying jurisdiction, ranging from only the most minor matters in village courts to plenary in the chief’s court. Appeals could be had to higher chiefs’ tribunals where cases were heard de novo.\(^{22}\) Conciliation was the primary objective of the customary courts and, indeed, before a case could be brought in a Tswana court, the plaintiff had to certify that the parties had attempted to settle their dispute.\(^{23}\) In the Akan courts of the Gold Coast as well, the chiefs and councillors made every effort to reconcile the parties before rendering a decision.\(^{24}\) Since custom, affiliated with religion, played a critical role in administering justice in the Native Tribunals, oaths were central.\(^{25}\) In pre-colonial Africa continuing until almost the end of the colonial period, cases were usually commenced by the swearing of an oath, more about which is discussed below.\(^{26}\)

While repeatedly according the traditional courts the role of intermediary between the British rulers and the peoples of the Gold Coast, the colonial administration attempted to control the operation of those traditional tribunals as


\(^{23}\) *Ibid.*, 47.


\(^{25}\) Indeed, according to Owusu, it was a religious duty to follow custom. Owusu, 53.

closely as it could through the oversight of the District Commissioners who were authorized to review and, later, revise the decisions of the traditional authorities. As the first level appellate authority from decisions of the Tribunals in most cases, the District Commissioners played a key role in the administration of justice, but were not as intrusive as their colleagues in other colonies. In Northern Rhodesia, for example, the District Commissioner played a much more involved role in the dispensation of indigenous justice. One such District Commissioner, Kenneth Bradley, notes that he sat with the chiefs during their deliberations and often suggested an appropriate verdict. Moreover, he frequently heard appeals from the decision of local courts informally in his office with only the appellant and the chief rendering the decision appealed from being present.27 That the District Commissioners, more often than not, failed to overcome the failings of the native system of justice bedeviled the colonial authorities throughout the period under study.

**Regulating Native Jurisdiction By Legislation**

It will be seen that from the outset, the British viewed the chiefs, even of those of the nominally sovereign states of the Protectorates, with disdain and as little more than their agents who would follow orders as to the conduct of their courts as well as in all other respects or suffer for their failure to do as they were told. David P. Chalmers, who prior to creation of the Colony and during its first days was then acting as Chief Magistrate and Judicial Assessor and who subsequently became the Colony’s first Chief Justice, laid out a plan that, with a number of alterations, remained the program for the role of indigenous courts in administering justice throughout the period under study.

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study: permit customary courts to exist with whatever jurisdiction the British would
allow them to have to be under close supervision of the colonial Government and that
would carry out the colonial plan for administering the Colony. What Lord Lugard later
called “indirect rule” was, at least as far as the Gold Coast was concerned, little more
than a recognition that the imperial government would not pay for the number of
officials that would be required to rule the colonized peoples directly, something of
which Chalmers quickly recognized.

Chalmers criticized the existing system of Native Tribunals saying that the
problems of corruption and excessive fees were soluble only by “utilizing, regulating
and controlling” chiefs’ power by allowing the chiefs plenary civil jurisdiction subject to
appeals to British courts and specifically limiting fees, setting out rules of conduct,
having the Government pay native judges a stipend and appointing Court Clerks for
the Tribunals.  

Chalmers said that if there were a sufficient number of British magistrates
working with the local chiefs, that would be the best means “for bringing the population
under the influence of the Government as a civilizing power, so far as the department
of justice is concerned.” Since that would not be really possible because of cost and
the unavailability of trained personnel, the best way of administering justice would be
“by utilizing, regulating, and controlling the power of the hereditary chiefs of the
country,” for, if left to themselves, Native Tribunals would not improve. Government
could and should recognize and support the power of those chiefs who were

28 BNA CO 96/94. 4.16.1872 and 5.9.1872 sent to the Colonial Office on 10.29.1872. He followed
these up with a letter to the Governor in June 1872, “Suggestions on the Administration of Justice to the
Natives of the Protectorate.” Sarbah, Fanti National Constitution, 209, Chalmers to Governor, 6.6.1872.

29 Ibid., ¶3.
“intelligent, humane and well affected towards the Government,” who would be responsible for his lesser chiefs and would carry out Government decrees and directives and those of the British courts. His court would be recognized as a tribunal of first instance with civil and minor criminal jurisdiction subject to appeal to the British courts; “he would be required to abstain from all excessive exactions and charges, and to conform his conduct generally to the instructions which should be given to him from time to time.” He would be, in effect, an English magistrate and should receive a government stipend conditioned on his good behavior and compliance with the instructions he receives. The Government should appoint educated clerks and registrars where the chief was illiterate. As to those chiefs who did not meet these conditions, Chalmers could only recommend that for the time being they be left to their own devices, allowing them to continue but not formally recognizing their authority and providing redress for injustices through the British courts.30

Chalmers recommended against confining British jurisdiction to that of a court of appeal and requiring all cases in the first instance to be heard by Native Tribunals, except in the coastal towns where Native Tribunals were under the direct observation of the English authorities. British courts, he urged, should be open to anyone who sought their intervention and should handle all cases except those of such a nature as would be better decided in a native court: “if natives both want a native court so be it but if either party wants a British Court it should then be held to be exclusively in our cognizance, and dealt with as such without exception unless it should appeal that it is of such a nature as may properly be decided in one of the recognized native courts

. . . ” Otherwise the prestige of the British Courts, and also of the Government, would “seriously suffer” and their influence in reducing crime and “the darker forms of cruel native customs” would abate.31 Only courts that had been approved by the Government should be allowed to hear cases since appellate jurisdiction was insufficient where bad chiefs might use physical force to prevent an appeal from being taken.32

While proposing to increase control over them, Acting Governor Freeling told the Colonial Office that the chiefs were complaining that because of British control, people wouldn’t obey them and that they could not carry out Government orders without help from the constabulary. In a tone almost of desperation, Freeling went on to say that Government had to work through the chiefs as it was “impossible except at enormous cost in money and probably lives to have a sufficient number of resident commissioners in the interior districts of the protectorate to carry our laws; besides this would tend still more to teach the people to lean only upon Government.”33 Nevertheless, he sent the Chalmers’ proposals to be set forth in an ordinance to Lord Carnarvon, the Secretary of State, with which the latter expressed his agreement with the caveat that they had to be very simply stated and approved by him before being issued.34

Herbert, the Permanent Undersecretary, and Robert H. Meade, Assistant Undersecretary of State, agreed that Chalmers’ suggestion of an ordinance was a

31 Ibid., ¶15.  
32 Ibid., ¶¶14-16.  
33 GNA ADM 1/2/21, No. 79, 3.16.1877.  
34 GNA ADM 1/1/44, No. 519, 9.29.1877.
good one and better than a mere notice as to the limits of native authority as it would carry much more weight. Moreover, as Charles Lees, then acting as Governor said, an Ordinance would make native jurisdiction rest on British authority rather than innate right and would make native chiefs less formidable opponents to British government.\textsuperscript{35}

An Ordinance embodying Chalmers' proposals was introduced into the Legislative Council and passed through all three stages on one day by a Council consisting only of the Acting Governor, Lees, the Acting Colonial Secretary and the Chief Justice, Chalmers. The Ordinance which recognized the authority of only those chiefs proclaimed by the Governor to be subject to its provisions and authorized the holding of Native Tribunals only by such chiefs was sent to the Secretary of State, Lord Carnarvon, for the Sovereign's approval with the Acting Governor's caveat that it would apply only where and when he proclaimed it to be in force and that he would await Sovereign approval before doing so.\textsuperscript{36}

Eighteen months after passage of the Native Jurisdiction Ordinance of 1878, it had yet to be placed into effect. Governor Ussher explained to Michael Hicks-Beach, the Secretary of State, that the Ordinance was motivated in part by need to replace the power the chiefs had lost when slavery was abolished and in part in order to educate

\textsuperscript{35} BNA CO 96/123, Minute on No. 44, 2.24.1878.

\textsuperscript{36} GNA ADM 1/14/3, Legislative Council Minutes 6.24.1878; GNA ADM1/2/22, No.133, 7.3.1878. Even before this legislation that would legitimize chiefly rule as agents of the British, Chalmers took steps to assure that the British judges would treat the chiefs with proper respect. On June 1, 1878, he issued a Circular Letter to all judges, magistrates and District Commissioners directing that no summons was to be issued to a chief except by a special messenger who would explain the claim fully to the chief and collect any monies the chief admitted owing. If the chief disputed the claim, his Linguist was to appear on his behalf along with any witnesses the chief wished to have heard, but the chief himself would not be required to appear unless he wished to do so or his presence was deemed by the Court, upon clear evidence having been shown, to be vital, in which event such necessity should be fully explained to him and his appearance scheduled at his convenience with his costs paid in advance. If both parties were chiefs, the case should not be heard by a District Commissioner without a full report being made and prior approval being received. GNA SC 6/45, J. M. Sarbah Papers, 42.
them and to raise their status while relieving the British courts of the cost of a considerable burden of work. However, he said, he did not believe that the Native Jurisdiction Ordinance could be put into effect at that time because the interior chiefs were unable to understand it. As simple as were the workings of the Ordinance, they “would be utterly beyond the power of the Native Chiefs if left to interpret it” with only a brief visit from a Commissioner or with the help of a semi-literate bush magistrate.

Ussher was quite pessimistic about the Native Tribunals that were operating without the authority that the Ordinance would have conferred, because the chiefs rendered corrupt decisions that British Courts had to reverse on appeal and oppressed their subjects: “Their courts are as venal, their decisions as unjust and they themselves as superstitious and ignorant as they were twenty, or for that matter, one hundred years ago.” He should be required to exercise his jurisdiction under the constant or frequent care and direction of competent officers, and such officers must be appointed.” “It cannot fail to be remarked that next to nothing has been done to ensure to the poor and helpless inhabitants of the interior, the comparatively just and upright rule and the effective protection of the law, which is accorded to the natives of the coast.” Until the situation in the interior improved by sending in officers to teach “ordinary principles of law and justice” and to educate the chiefs as to the same, no system of native jurisdiction could succeed and direct taxation (in which the Secretary

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37 GNA ADM 1/2/23, No. 22, 1.21.1880, 240.
38 Ibid., 244.
39 Ibid., 246. The Governor proposed appointment of additional District Commissioners who would visit the chiefs frequently, “explaining to them the working of the Native Jurisdiction Ordinance; seeing that justice is administered as far as may be without corruption; that the court fees and fines are duly collected and properly accounted for . . . and, in fact, supervising in a general way, the affairs of the provinces in which they may be appointed.” Ibid., 247.
of State was primarily interested and which, Ussher agreed, was the only source from which to pay stipends to the chiefs) could be possible. Here then was the essential contradiction in British policy: indigenous authorities could not be trusted to administer justice according to British ideas without close supervision from British officials but there were an insufficient number of such officials. At the same time, the British needed to work through these same corrupt chiefs to rule the country. Historians such as Sara Berry have noted these essential contradictions in British colonialism as exemplified here in the administration of justice. My study reinforces Berry’s argument and supports her conclusions that property and other rights were continually contested and changed over the course of the seventy year period considered here.

Indeed the shortage of manpower to oversee the operations of the traditional courts was recognized by the Colonial Office from the earliest days of the Gold Coast Colony, but despite such recognition, the British were unable, or unwilling to spend the money, to resolve them. As we shall see, when chiefs complained that close supervision of their operations were undermining their prestige and their ability to control the population, the inclination of the colonial government was to ease such control all the while complaining that the chiefs did not render justice to their people fairly and efficiently.

Some days later, Ussher again wrote to the Colonial Office, suggesting that no Native Tribunal should be permitted within a reasonable distance of the seat of a

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British court. Until he heard from the Secretary of State as to this suggestion, he would limit Native Tribunals to one per town requiring as many chiefs as wished to participate to sit together. He would require each Tribunal to make weekly returns of the number of cases heard, the amount and disposition of all fees and fines collected and the nature of all other punishments imposed. He told London that he intended these measures to be temporary only, “since eventually native courts can be suppressed, in my opinion, where District Commissioners and higher British Courts exist.” In these circumstances, he thought that the Ordinance should not be enforced as the chiefs could not be trusted. 41 The Secretary of State replied said that without a direct tax it was unlikely that the Government would be able to afford implementation of the Governor’s suggestions. He recommended implementing the Ordinance in a few districts where the effects could be monitored by District Commissioners. The Secretary of State agreed that eventually the Native Tribunals would have to be abolished where British courts sat, but “such change must, however, be carefully and gradually made, and the worst cases should be disposed of first.” 42

Ussher took the Secretary of State’s suggestion and eliminated the Native Tribunals in Accra and Cape Coast and told his superior that he intended to move speedily against those in Elmina and Lagos (for which latter he was still responsible). The Governor complained that there were still too many instances of human sacrifice, slavery and lawlessness, and that the local chiefs were unable to stamp out slavery, an example of the “unfitness for the present of natives to cope with a judicial system

41 GNA ADM 1/2/23, No. 24, 1.25.1880, 247, 266.
42 GNA ADM 1/1/49, No. 535, 3.31.1880.
requiring the example of honesty and judgment.” The native courts performed better, he went on, when they knew that the parties had the option to appeal to British courts or to resort to British courts in the first instance. Ussher said that judges coming to the Gold Coast “hold sinister opinions as to the general fair dealing of the Native Chiefs, and they were correct to hold such opinions.” He disagreed, he said, with Chalmers that the chiefs were reasonable and cited several examples of chiefly atrocities. Implementation of the Ordinance, he concluded, would negate efficient and civilized rule and he could not do it then with the means at his disposal.

Herbert thought that Ussher went too far in interfering with native jurisdiction and, probably much to Ussher’s surprise, the Colonial Office said that it disapproved his proposals to oversee and regulate native authority. The Government was “not prepared to assume the responsibility of so great an interference in the habits and customs of the natives as would be involved in placing them under the direct Government of the Crown.” The policy of the Government, the Colonial Office dispatch continued, was to govern the interior through the chiefs and exercise only “a general control and supervision over their acts.” Thus it was necessary to support native jurisdiction except in coastal towns with only such supervision as was necessary to check abuses such as “cruel and barbarous punishments.” Where a “sufficient English court is established,” native jurisdiction could be curtailed. Then came the real reason for the Government’s position: deference to local mores was a justification for

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43 Ibid., 84.
44 GNA ADM 11/2/24, No. 151, 5.11.1880, 85, 87.
British unwillingness to bear the expense of direct rule. The Colonial Office was not prepared to appoint the number of District Commissioners and judges necessary to implement the policy Governor Ussher proposed, but would assure that the District Commissioners who were appointed would have legal training so as to enable the Governor to relieve Constabulary Officers of judicial functions. Thus the administration of justice according to the professed principles of English law gave way to financial considerations and the need to support indigenous agents.

The 1883 Native Jurisdiction Ordinance

By August 1882, after four years of backing and filling about whether and how native jurisdiction should be dealt with, the then Governor, Samuel Rowe, told the Colonial Office that he thought “it is quite time that some close arrangement should be made for the support of the authority of the native chiefs in any action which they may rightly take.” The Secretary of State agreed and a new Native Jurisdiction Ordinance Bill was prepared. The necessity for doing something to legitimize the Native Tribunals resulted from a Full Court decision, Amocoo v Ducker, that held that judgments of such indigenous courts were akin to arbitration awards and were neither final nor binding unless both parties accepted the judgment and agreed to be bound.

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46 BNA CO 96/131, 7.15.1880. Hector Macleod, a Puisne Judge and then Chief Justice, wrote, in 1889, that at a time when natives had the option to bring their disputes to the British courts, it was necessary to maintain a system of native courts as the British lacked the resources necessary to provide justice only through British Courts and without Native Tribunals, it would have been impossible to administer justice. Hector Mcleod, “Administration of Justice on the Gold Coast,” The Juridical Review, Vol. I (1889): 272-286, 273.

47 GNA ADM 5/2/80, letter from Rowe to Secretary of State, 8.31.1882, quoted in the 1951 Korsah Report on Native Jurisdiction.

48 [1883] 2 F. L. R. 35.
The Bill that became law as the Native Jurisdiction Ordinance No. 5 of 1883 applied only to those states that were the subject of a proclamation by the Governor-in-Council to be under its terms. In those states, the chiefs and councillors authorized to do so by customary law could hold Native Tribunals with a small civil jurisdiction over personal actions, over land cases of any value and succession cases where the value of the property in the matter was no more than £25. The Native Tribunal could hear criminal cases involving customary offenses and common law crimes as specified in the Schedule attached to the Ordinance such as petty assaults, slander, seduction, wilfully disobeying a chief or violating a chief’s oath or insulting a chief. The Tribunal could impose punishment as provided in the Criminal Code or by customary law so long as they were not repugnant nor oppressive and the fines were not excessive. Even this jurisdiction could be restricted by order of the Governor-in-Council. Attorneys were expressly prohibited from appearing before any Native Tribunal and in any British Court to which a case might be transferred except with the consent of the Court, a provision that raised loud opposition then and for many years going forward. British control was thought to be strengthened by a provision that the Governor, the Queen’s Advocate or a District Commissioner, on his own initiative or at the request of a defendant, could intervene in any case in a Native Tribunal and direct that it be heard in a higher Native Tribunal or a British Court. Further, appeals from Native Tribunals to British Courts were subject to administrative control in that applications for leave to appeal were to be decided by the Secretary for Native Affairs. In land cases applications for leave to appeal went to the District Commissioner and, with his leave
that could not be denied without the approval of the Queen’s Advocate, from him to the Divisional Judge. 49

When he sent the newly enacted Ordinance to the Colonial Office for Royal Consent, Governor Rowe explained to Lord Derby, the Secretary of State, that he would proclaim coverage of only those Native Tribunals where there was no Divisional Judge or District Commissioner at or near where the Tribunal sat and that it was not now nor for some time to come intended to bring tribunals under the Ordinance where there were District Commissioners or a Divisional judge sitting. 50 Thus, he implied that he would tolerate Native Tribunals only so long as it would take to enable a British judge or District Commissioner to assert British jurisdiction over the indigenous state.

Even before passage of the Ordinance, the Governor and the Colonial Secretary began seeking information as to which states should be placed under the Ordinance. 51 The District Commissioners were sent into the bush in their districts to collect such information as to when the local Tribunals were established, the names and positions of the members of the court, “from whence does the Court derive its native jurisdiction and to what extent does it exercise it in civil and criminal matters irrespective of the Ordinance of 1883,” do the people accept court decisions as final or can they and do they appeal to another or higher Tribunal, are there any written records made, by what process are parties brought before the Tribunal, must the

49 GNA ADM 4/1/7.
50 GNA ADM 1/2/28, No. 37, 1.30.1883.
51 GNA 1/9/2, letter to District Commissioner of Salt Pond,1.20.1883; letter to District Commissioner of Tarquah, 2.6.1883. As we shall see below, Government conducted several surveys seeking the same kinds of information over the next sixty seven years and never seemed to formulate any effective policies based on the information collected.
parties be present and be heard or does the Tribunal decide in their absence, on what basis are costs calculated and who decides how they are distributed among the members of the court, how are judgments enforced and how many actions, on average, are brought each week, by Europeans, and by natives. Whenever a state was proclaimed to be under the Ordinance, the Chief was told that the Governor expected him to enforce criminal law and keep the peace. No concern for fair administration of civil law was expressed."

An emerging African elite of ministers, prosperous merchants and lawyers, of both mixed race and purely African, living primarily in the larger coast communities, educated in English schools and adopting, at least in part, a life style akin to that of the colonial rules, seeing themselves as a class separate from the people of the interior. They often felt as negatively about the chiefs as did many British officials. At the end of 1883, responding to a petition from one J. R. Maxwell, apparently an educated coastal African, for the Secretary of State to disallow the Native Jurisdiction Ordinance, because, as he said, the chiefs are “illiterate and uncivilized” with no will of their own. In his response, Governor Rowe indicated his indifference to the corruption of the chiefs when he said that he was concerned not with chiefs’

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52 GNA ADM 1/9/3, 4.19.1883.

53 GNA 1/9/3, 7. 4.6.18; The Assistant Colonial Secretary also notified the District Commissioner that two chiefs had been proclaimed to be under the Ordinance. Ibid., 4.9.83. The Chiefs of the Eastern Province selected to be placed under the Ordinance were told by the Secretary for Native Affairs that “in the Administration of Justice in your Division you must act in strict accordance with its provisions and rules which explain fully the powers that you have under them.” They were required to send the Secretariat the names of each councillor entitled by native law to be part of his court and the names of his Linguist, Sword Bearer and each other official, specifying the office each held. GNA ADM 1/9/2, 8.29.1883.

54 The Governor had reported opposition by members of the Gold Coast Bar as exalting “uneducated and savage” chiefs. BNA CO 96/153. Such opposition extended to his own Queen’s Advocate, W. B. Griffith, Jr., on similar grounds. BNA CO 96/181.
knowledge of law but “their general habit of ruling, their appreciation of the responsibilities attached to their position as chiefs, their recognition by their people in this position and the general consensus of opinion among the tribe or district which they rule that they are persons who are fittest to rule.” He wanted agents who would be accepted by the people. The purpose of the Ordinance, he reminded his readers, was to sanction by law the exercise of traditional powers. The people would be protected by their right to seek leave to appeal to a British court and by the authority of the Governor-in-Council to suspend a chief and/or his court in any District for a good reason. It bears repeating that the Government had to administer through the chiefs because it was unwilling to pay for a staff necessary to do otherwise: “It is most desirable to make use of and regulate their influence and authority until such time as it may perhaps be possible to replace it by something better adapted to meet the needs of the community as civilization progresses.”

In the years after enactment of the Native Jurisdiction Ordinance of 1883, the question arose as to the status of Native Tribunal judgments issued after the effectiveness of the Ordinance. Previously, the Court had ruled, as noted above, that such judgments were not binding on a British Court having only the effect of an arbitration award. Now, in Oppen v. Ackinie, Macleod, C. J., Smalman Smith and Francis Smith, PJ's, the Court overruled prior decisions as to §§11-12 of the Supreme Court Ordinance and held that jurisdiction of Native Tribunals based on native customary law continued and was “coextensive” and “concurrent” in cases between

55 GNA ADM 1/2/35, No. 420, 12.4.83, 412.
56 Ibid., 416.
57 [1887] F. C. L. 207-212, Full Court.
native parties with that of the Supreme Court. But despite this decision, Griffith, Jr. opined that Native Tribunal judgments were binding on British courts only to the extent that such Tribunals were subject to the Native Jurisdiction Ordinance of 1883 and that Tribunals not under the Ordinance had no legal standing and held court and imprisoned defendants “at their peril.”58 He “strongly” recommended that the Government adopt a course that “would gradually lead to the extinction of native prisons in consequence and of the Native Courts.”59 This recommendation reflected Griffith, Jr.’s lack of respect for the traditional authorities and his conviction that their decisions were based “as much on fetish as on facts,” and that as civilization, as he saw it, advanced in the Gold Coast, the chiefs would lose power and the British would rule through District Commissioners.60

In January 1892, Chief Justice Hutchinson, reporting on his recent tour of the Colony, said that the chiefs complained to him that Government was taking their power away and that they had no means to enforce their judgments and orders because of restrictions on the length of sentences in prison. They claimed to be losing the respect and obedience of their people and fewer cases were being brought to their courts resulting in a loss of prestige and revenue. They particularly resented not being able to put defendants and recalcitrants in log without the written consent of the Government and the cost of keeping an expensive clerk to comply with Government paperwork requirements.61 They treated petty crime as a tort against a person rather

58 GNA SCT 14/2/3, 10.3.1887. In 1891, the Governor told the Colonial Secretary that he “intimated that he could not recognize judicial power in the chiefs except under the Native Jurisdiction Ordinance,” and that the District Commissioners refused to recognize judgments of Native Tribunals not subject to the Ordinance. GNA ADM 11/1/195, 11.23.1891.

59 GNA ADM 11/1/477, 161.

60 GNA ADM 11/1/191, 12.3.1887; Ibid. 3.12.1887.

61 Ibid., ¶3.
than against public order and required the perpetrator to pay damages to the victim rather than by imprisoning the wrongdoer.\textsuperscript{62} Hutchinson explained that land cases, of which there were a great many, generally were not between individuals but between or among families or stools of villages or subdivisions.\textsuperscript{63} He cautioned against undermining the prestige and power of the chiefs because the distance between where most litigants and witnesses lived made it “impossible for many years to come” for British courts to dispense Justice in every part of the Colony. Thus, “a very large proportion of grievances must remain without any legal remedy unless at the hands of a Native Court.” This was particularly true in disputes in land which were very numerous and which, because they generally involved questions of boundaries, a British judge could not decide satisfactorily without going to the spot and seeing the land.\textsuperscript{64} Hutchinson was not convinced that the chiefs and Tribunal councillors were corrupt despite the widespread general belief that they were, but acknowledged that the Tribunals were often influenced by personal relations and were more expensive than British courts.\textsuperscript{65}

Amending the 1883 Native Jurisdiction Ordinance

Despite Chief Justice Hutchinson’s conclusion that not all of the chiefs were corrupt, many British officials expressed intense dissatisfaction with the Native Tribunals. One District Commissioner complained that the Native Tribunals in his District were engaged in “gross perversions of justice” by extorting “almost incredible sums of money from litigants.” The Governor explained to the Secretary of State that

\textsuperscript{62} Ibid., ¶6.
\textsuperscript{63} Ibid., ¶8.
\textsuperscript{64} Ibid., ¶13.
\textsuperscript{65} Ibid., ¶14
the exactions of the Native Tribunals had led to pawning, a "system which is the growth of centuries brought about by the doctrine of vicarious punishment" in which the pawn was effective enslaved to a creditor pending payment of the debt incurred.⁶⁶ Pawns, most often females, he continued, were often abandoned by their debtor-relatives who moved on to create new ties. He urged that only the extension of the Native Jurisdiction Ordinance to the entire Colony, careful supervision by the "Judicial Department" and publication of a fixed schedule of fees and fines could "cure the evil" of pawning and even then it would take time.⁶⁷ Although panyaring, a form of slavery by which a creditor could seize the debtor or anyone associated with the debtor and sell that person to satisfy the debt,⁶⁸ was outlawed by Ordinance, pawning, a less extreme form of slavery by which the pawn turned him- or herself over to the creditor voluntarily continued, as the colonial government acknowledged, until well into the twentieth century, the courts often seeing the pawning of women as just another form of marriage.⁶⁹ Indeed, despite a mandate from the Colonial Office to prosecute pawning under the Criminal Code, the colonial government turned its eyes from its obligation, arguing that it should be allowed to "wither as economic and legal changes made alternate forms of borrowing available." In 1907 the Colonial Office directed the Gold Coast Government to inform District Commissioners that they were not to assist

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⁶⁶ GNA ADM 11/1/1866, Governor's Dispatch to the Secretary of State, 2.3.1894.
⁶⁷ Ibid.
⁶⁹ Grier, Beverly, "Pawns, Porters and Petty Traders: Women in the Transition to Cash Crop Agriculture in Colonial Ghana," in Pawnship in Africa: Debt Bondage in Historical Perspective, edited by Toyin Falola and Paul E. Lovejoy, Boulder, CO: Westview Press, Inc. 1994. Austin points out that Pawns not only secured debts but marital fidelity, i. e. the wife was pawned to the husband and if proved to be unfaithful, her family had to pay the husband an agreed sum. Moreover, a creditor was permitted to use an unmarried female pawn sexually and/or marry her off and keep the bride price. Austin, "Human Pawning in Asante 1865-1950: Coercion, Gender and Cocoa," 126.
in the recovery of escaped pawns and the courts of Ashanti not to recognize pawns as
security for debts.\textsuperscript{70}

Based on his findings as set forth above during his tour of the Colony, Chief
Justice Hutchinson wanted to amend or replace the 1883 Ordinance, an Act with which
he decided he was dissatisfied and for the improvement of which he needed more
information about the operations of the Tribunals. A Traveling Commissioner, Hull,
suggested the appointment of a Commission to explore the issue, a suggestion that
Hutchinson adopted and promoted.\textsuperscript{71}

Thus it was the initiative of the government, rather than any outcry from the
 populace, that led to the Hutchinson Commission that was appointed on August 1,
1894. Its Report, transmitted to the Colonial Office on January 12, 1895,\textsuperscript{72} summarized
the evidence taken about the structure and jurisdiction of various courts, mainly those
of Head Chiefs and Kings, describing the composition of Native Tribunals, the plenary
jurisdiction of those tribunals, although fear of British displeasure lead most of the
tribunals to send all criminal cases, not merely murder or other major felony cases, to
the British courts. Jurisdiction of subordinate courts was only defined by custom and
was impossible to define accurately. The Report described the manner in which
decisions were rendered by the councillors who were members of the Court, some with
and some without the participation of the presiding Chief and the requirements for the

\textsuperscript{70} \texttextit{Ibid.}, Austin, 137-138.
\textsuperscript{71} Mensah Brown, 395.
\textsuperscript{72} GNA ADM 6/20, 1.12.1895, 27 \textit{et seq.} The Commission, consisting of Chief Justice J. T.
Hutchinson, Puisne Judge T. C. Rayner, the Solicitor General, Arthur Sharood, and two members of the
Legislative Council, J. H. Cheetam and J. Vander Puye, who, with minor exceptions, unanimously agreed
on the Report. Mansah Brown argues that since no chiefs testified to the Commission, the report was
merely an “expression of opinion based upon an analogy with the existing practices in the English courts
of law.” Mensah Brown, 68.
parties to produce sureties for costs. The Commission reported that the fees and fines collected were divided among the Chief and the other members of the Tribunal and that fees were charged at every stage of the case.

The Commission discussed the absence of any applicable statute of limitations and the manner of enforcement of judgments, most often by arrest of the debtor and/or his surety until the debt was paid, but, more recently, more and more by execution against and sale of a judgment debtor’s property. The Report confirmed the statement Hutchinson made earlier about the absence of specific allegations of wrongdoing or corruption by Tribunal members and that the Commission had received no evidence of extortion or corruption, although J. M. Sarbah testified that people were afraid to complain lest they “be boycotted and ruined, but that there was a widespread belief that exorbitant fees were charged and people were wrongfully imprisoned.

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73 In December 1904, W. Brandford. Griffith, Jr., described the means of initiating a case in the Native Tribunals by means of an oath, placing a palm leaf on land (in a trespass case) or applying to the Omanhene for a summons. When the defendant arrived, the drums called the councillors to form the Court. The plaintiff and his witnesses are heard and cross examined by the defendant and the members of the Court, then the defendant and his witnesses are heard and cross examined. The Omanhene sums up the evidence and, generally, the councillors deliberate out of the presence of the Omanhene unless the councillors are evenly divided in which case the Omanhene joins them in deliberations. Memorandum from W. Brandford Griffith, Jr to Society for Comparative Legislation, Gold Coast Local Committee, Oxford University Rhodes House MSS Afr. 5 356, Harper 1904. Owusu notes that Christian opposition to many indigenous religious practices have resulted in a loss of respect for native gods and a consequent severe diminution in the use of oaths to commence litigation. Owusu, 99.

74 Ibid., ¶¶1-8. Fees included a service fee, witness fee, decision fee payable by the prevailing party; linguist fee and a view fee in land cases. The names of the various oaths recalled disasters or other painful events in the history of the community, e.g. the Wakudu (Wednesday) oath recalls a Wednesday when the King was defeated and killed in battle. The oaths bore different names in different chieftdoms and there were different oaths for the Paramount Chiefs and the lesser chiefs. A. Clark, "On the Judicial Oaths Used in the Gold Coast," The Journal of the Anthropological Institute of Great Britain and Ireland, Vol. 29, No. 3/4 (1899): 310-312, 310. See also Charles W. Welman, The Native States of the Gold Coast: History and Constitution, London: Dawsons of Pall Mall, 1969 [1925, 1930], 44-46.

75 Ibid., ¶9-11.

76 Ibid., ¶¶13, 15. Sarbah indignantly accused the Commission, despite the “meagerness” of the evidence and denials by the chiefs, of finding that fees charges by native tribunals were “extortionate” and persons were wrongfully imprisoned solely because of alleged insults to chiefs’ dignity. John Mensah Sarbah, Fanti Law Report, 2nd Edition, London: William Clowes & Sons, Ltd., 1904, Appendix, 180-181.

-286-
The Commission recommended that a new Ordinance be enacted that would apply to all Tribunals without exception and without distinction between those in the interior and those in towns where British judges might sit. All judgments should be rendered only unanimously by the members of the Tribunal and the Chief or King should not be permitted to refuse to accept the decision or to overrule it. A scale of fees should be fixed at the average amount given in evidence before the Commission. No family property should be permitted to be sold to satisfy an individual debt and vice versa. Finally in order to keep their costs down, the Tribunals should not be required to keep written records, although this last recommendation may just as well been made because then the British Courts would be required to hear the case de novo on appeal, something many, if not most, natives would prefer.

On June 1, 1895, Hutchinson introduced a Native Jurisdiction Bill into the Legislative Council based on the Commission’s recommendations. This Bill was withdrawn on April 10, 1896 with the promise that a new bill was to be introduced and published for general information, but such legislation never surfaced.

Governor Maxwell, who succeeded Griffith, Sr. in mid-1895 told the Colonial Office that Hutchinson’s draft appeared to him to be insufficient. In his view, the Bill dealt too much with the Tribunals and insufficiently with the “powers, duties and responsibilities of Native Chiefs.” Thus, he decided to withdraw the Bill, which was

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77 Ibid., ¶¶16-33.
78 GNA ADM 14/1/6, 14/1/7, 446.
79 The Attorney General, W. N. M. Geary, adversely commented on the now withdrawn Bill because it lacked any provision requiring ratification, either prior or subsequent, by the Governor as a condition to a Chief holding court. Geary desired to insert a provision requiring such ratification, rendering illegal any court not having been ratified and subjecting its chief to criminal penalties for pretending to be a public officer. BNA CO 96/697/4, Enclosure 1 in Confidential 10.13.1931, ¶8.
done in August.\(^8^0\) Now he was sending the Secretary of State a new Bill, the aim of which was to improve the position of the chiefs while making them more responsible to Government “for the proper performance of the functions assigned to them.”\(^8^1\)

The new proposed Bill classified all chiefs as Omanhene (Principal Chief), Ohene (Divisional Chief) and Safu or Odikro (Village Chief), of which there were twenty six Omanhene. The Attorney General urged that all native courts should be within the Ordinance and, thus, subject to the Government’s approval. He would have those not receiving such approval be penalized if they tried to exercise jurisdiction. His draft provided, among many other things unrelated to the Native Tribunals, that the Governor-in-Council could determine the fees to be charged by the Native Tribunals and who was to get them. A Native Tribunal’s criminal judgment would not be binding on the Supreme Court which might retry the case. It would require that all decisions by Native Tribunals had to be unanimous among all persons customarily empowered to be part of the Tribunal; that perjury before a Native Tribunal was to be punished in the Supreme Court not the Tribunal; that enforcement of Tribunal judgments could be by seizure of property as well as by imprisonment, that the Governor could suspend any Tribunal for good cause; that appeals from Divisional Chief to Head Chief and from any court would lie to the District Commissioner if the case were in the latter’s jurisdiction and otherwise to the Divisional Court; and that the Supreme Court could

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\(^8^0\) Interestingly, the Korsah Commission Report stated that the Bill was withdrawn primarily because of the opposition of Chief Justice Griffith. K. A. Korsah (Chairman), *Report of the Commission on Native Courts, Accra: Government Printing Department, 1951*, 5, ¶ 16.

\(^8^1\) GNA ADM 1/2/49, No. 131, 4.15.1896, 671.
transfer cases to and from a Native Tribunal on the application of any party or on its own motion.\textsuperscript{82}

The time to enact new legislation to regulate the Native Tribunals was simply not propitious. The Land Bills of 1895 and 1897 engendered such opposition that, as Mensah Brown argues, the Government feared pressing any legislative initiatives that would intensify anti-Government feeling.\textsuperscript{83} The combination of these two proposed Ordinances was seen as a broad attack on the customary authorities by “systematically subverting the judicial authority of the chiefs, interfering with ability to enforce obedience to their judgments by limiting the forms and extent of punishments. As Addo-Fening has said, it “ultimately marked the beginning of the collapse of central authority” of the chiefs in the traditional state.\textsuperscript{84}

Following the end of the last Ashanti War, Britain annexed Ashanti and, at the same time, issued an Order-in-Council annexing the Gold Coast Protectorates and incorporating them into the Gold Coast Colony that now included all of the country south of the Pra River, the border of Ashanti. The issue rose almost immediately as to the impact of the Order-in-Council on the status of those Native Tribunals in the Protectorates that had been proclaimed to be under the Native Jurisdiction Ordinance of 1883. In 1903 the case of \textit{Dantsi v Appiah}\textsuperscript{85} raised the issue before the Full Court as to whether Native Tribunals continued to exercise jurisdiction following annexation or was their jurisdiction vested in the Supreme Court by the Order-in-Council. Chief

\textsuperscript{82} BNA CO 96/272, No. 131, 4 .15.96., Enclosures: Attorney General’s Memoranda dated 2.27.1896 and 4.2.1896. It also would repeal the 1883 Ordinance as well as the 1887 Native Prisons Ordinance. GNA ADM 6/21, 262.

\textsuperscript{83} Mensah Brown, 403.

\textsuperscript{84} Addo-Fening, “The Native Jurisdiction Ordinance, Indirect Rule and The Subject's Well-Being: The Abuakwa Experience ,1899 -1912,” 117.

Justice Griffith and Francis Smith, P. J., concurring, held that jurisdiction of colony and protectorates was bound together by the Supreme Court Ordinance of 1876. The Legislative Council, they held, was empowered to legislate for the Protectorates as well as the Colony. The 1895 Law Revision Ordinance defined the Colony to include the Protectorates, so that whenever an ordinance specified the Colony, it was deemed to be effective in the Protectorates as well. This would apply to the Native Jurisdiction Ordinance of 1883 as well as all the other Ordinances. Native Tribunals continued to be dealt with by Government and the Supreme Court in the same manner as they always had been both before and after the 1901 Order-in-Council. Indeed, seven Native Tribunals were proclaimed by the Governor to be subject to the Native Jurisdiction Ordinance of 1883 after the effective date of the 1901 Order-in-Council.86 Thus, Griffith concluded, the Native Tribunals continued to exercise the same jurisdiction as they had since 1883.87 Unfortunately Griffith could not convince two of his colleagues, Stanley Morgan and G. K. T. Purcell, who dissented and said that the Native Tribunals had been ousted of jurisdiction and their judgments were merely arbitration awards and the Tribunals were without any inherent means to enforce them in the same manner as were those of Tribunals held by Arthur B. Pennington, P. J. In Gambra v Num, to have no legal existence. Since the Court was divided, no definitive rule could be laid down at that time.88 In an effort to provide some kind of ruling for the guidance of the Colonial Administration, the Law Officers expressed their opinion that

86 Governor Nathan reported that in early 1904 there were twenty Native Tribunals under the Native Jurisdiction Ordinance of 1883, thirteen had been added between 1898 and 1903 BNA CO 96/420, Confidential, 3.6.1904.


88 Ibid. The Colonial Office encouraged the Governor to resolve the problem by enacting a new Native Jurisdiction Ordinance that would apply to all Native Tribunals, but that result would have to await the summer of 1910.
the Order-in-Council annexing the Protectorates extinguished the jurisdiction of the Native Tribunals and that the 1883 Native Jurisdiction Ordinance was only of "doubtful" applicability in the former protectorates.  

Two years later, Chief Justice Griffith, sitting alone as a Divisional Judge ruled that Native Tribunals were not abolished by the 1901 Order-in-Council. He did not refer to the Colonial Office Law Officers opinion to the contrary as he did not consider the courts to be bound by such opinion. He held that the decision of a Native Tribunal in an action between parties who voluntarily appeared before the Tribunal was binding on a Divisional Court. Thus the judgment of such a tribunal was not merely an arbitration award but the judgment of a court. Griffith then asked whether tribunals not under the 1883 Native Jurisdiction Ordinance survived the 1901 Order-in-Council that annexed the Protectorates to the Colony. He concluded that native tribunals only existed because the Crown, the source of all justice, expressly or implicitly recognized and permitted them to exist. The Native Jurisdiction Ordinance of 1883 was an expression of such recognition and the Order-in-Council of 1901 was an example of implicit recognition. The terms of the 1901 Order-in-Council retrospectively validated and legalized prior legislation that had included the Protected Territories and thus acknowledged the Native Tribunals in such territories, even those not under the 1883 Native Jurisdiction Ordinance. Accordingly, he determined, the decisions of the Native Tribunals were res judicata and binding on the Divisional Courts.  

BNA CO 96/423, 7.27.1905.  
Mutchi v. Annah et al, Mutchi v. Kudu [1907] Divisional Court, Redwar’s Reports 211  

The Attorney General, seemingly particularly annoyed that Griffith, who was known to be no friend of Native Tribunals, had ignored a Law Officers’ opinion, criticized Griffith's judgment in the Legislative Council and asserted that if given the opportunity, the Privy Council would reverse. GNA ADM 14/1/9, Minute by Attorney General, 9.2.1907. The opportunity to appeal was never taken and Griffith’s judgment (continued...)

-291-
Griffith continued to argue inconsistently as to the existence of Native Tribunals following the 1901 Order-in-Council annexing the Protectorates and forming the Gold Coast Colony. The Order-in-Council established the Crown as the sole source of justice and thereby eliminated any pre-existing jurisdiction. Griffith expanded on the argument that the Order-in-Council did away with jurisdiction of Native Tribunals, leaving them only as fora for voluntary arbitration with no power to compel attendance or to enforce their decisions. These de facto Tribunals could only be made de jure by an Ordinance conferring and limiting jurisdiction and specifying that all native jurisdiction derived from the Crown. He argued that the view of Justice Pennington in Dantsi that only Parliament could create courts in the Gold Coast was wrong in that the Legislative Council, acting under the authority of the Colonial Laws Validity Act of 1865 could and properly did create both native and British courts. The Supreme Court Ordinance took care of the British Courts and, he confusingly asserts, a Native Jurisdiction Ordinance was necessary to deal with the Native Tribunals. But if the Supreme Court Ordinance remained valid after the Order-in-Council why did the Native Jurisdiction Ordinance not also remain valid and was that not exactly what he argued in Dantsi and again in Mutchi?

The confusing and inconsistent judgments of the Supreme Court as to the continued viability of Native Tribunals clearly required legislative resolution. The Secretary of State, Alfred Lyttelton, agreed. He said that he was tired of what he considered to be lawyers picking the wings off flies and directed that the matter be resolved by an Ordinance. He said that when the Protectorates became British by

92(...continued)
endured until made irrelevant by the Native Jurisdiction Amendment Ordinance of 1910.
93 BNA CO 96/421, Confidential (B), 12.31.1904, Enclosure 1.
annexation, Native Tribunals had “either to become a British Court deriving its authority from the Sovereign or else to disappear as a court of justice.” The Sovereign delegated authority to the Legislative Council that by the Supreme Court and Native Jurisdiction Ordinances set up courts so that, in his opinion, every Native Tribunal under the Native Jurisdiction Ordinance prior to the 1901 Order-in-Council existed as a British Court and every Court not under that Ordinance prior to 1901 was no court but at best a private and voluntary arbitration tribunal without power to compel appearances or to enforce its awards. A Native Tribunal could be made a proper court only by bringing it under the Ordinance and, thus, he disagreed with Justice Pennington that only an Act of Parliament could create a court. 94

The continued existence of viable Native Tribunals was only a tepid attraction for those members of the indigenous community educated at Fourah Bay College in Sierra Leone or in England or in missionary schools in the coastal towns. One correspondent to a newspaper commenting on an Open Letter to Kings and Chiefs said that if they would administer justice with “rigid impartiality,” Africans would flock to such Tribunals and not to the British courts, but that he despaired of such a result, citing a case where a party was fined £10.17.6 before he was even allowed to state his case. 95 It was a measure of the desperate need of the colonizers for assistance in rendering justice that the Governor, Matthew Nathan, said that he needed the chiefs to

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94 GNA ADM 12/1/27, Confidential from Secretary of State Lyttelton to Governor Rodger, 7.27.1905.

95 Gold Coast Leader, Cape Coast, 9.20.1902, 4, letter of J. H. Craneson. How Africans such as Mr. Craneson defined justice can only be a matter of speculation as there is no record that I have discovered that can shed light on that question. It could be said however that in the first decade of the twentieth century the English speaking merchants, ministers and lawyers of the coastal towns who flocked to the British courts saw justice was what those British courts rendered.
preside over the Native Tribunals "no matter how unsatisfactory the District Commissioners and the Chief Justice found them in those roles." 96

As had former Chief Justice Hutchinson and former Governor Griffith, Sr., Governor Rodger believed that the powers and duties of the chiefs should be more clearly defined and the jurisdiction of their courts, their fees and fines should be more precisely specified. However, he and his Attorney General disagreed with Griffith Jr.'s view that no Native Tribunal should exist where there was a District Commissioner's court and said that Native Tribunals could coexist with District Commissioner's courts quite easily and be supervised under the Native Jurisdiction Ordinance but, nevertheless, that such Ordinance should be repealed and replaced.

The Chief Justice sent the new Governor, John Rodger, a memorandum, dated March 23, 1904, 97 arguing that Native Tribunals generally were only covered by the Native Jurisdiction Ordinance where there were no District Commissioner's courts, i.e. in the interior, or where the Governor had thought that a Chief was "worthy to be granted special powers," but that such powers had frequently been extended to places even where a District Commissioner sat. Griffith contended that the continued existence of Native Tribunals betrayed the native who wanted to make use of British Courts because they had decided that indigenous courts "were unfit to administer justice." If native courts had been "reduced . . . to impotence," it was the result of indigenous action, he claimed. He strongly objected to "restoring and placing alongside our Supreme Court" courts that had "been tried and found wanting, which the natives themselves have condemned, and which are not shown to have materially

97 BNA CO 96/420, 11.28.1904, Enclosure No. 1.
improved,” and to which we are practically forcing the natives to return.”

Native Tribunals served a useful purpose, he went on, where they were at a distance from British Courts or where the chiefs were more than “ordinarily enlightened” since the British could not always provide justice in the first instance and should be glad to make use of the native courts to “supplement our own courts.” But, he went on, in those courts “partiality was common, where injustice was rampant,” fees are excessive and damages awarded are disproportionate to injuries suffered. Chiefs didn’t want cheap justice for their people, Griffith argued, but revenue from fees and appellate jurisdiction was but “a small corrective” against abuses in the face of social pressure against using “‘white men’s courts.’” If they could be trusted, native courts would be the best tribunals to deal with land cases because the chief and his councillors would know the history of the land and probably the boundaries, but they couldn’t be trusted and native judgments in such cases were so vague and uncertain that it took days for the Supreme Court to determine what the judgment decided and whether the land was the same. If native jurisdiction were expanded, Griffith continued, judgments which were likely to be corrupt and the extent of which would be difficult to determine, would be res judicata, a very bad result. Native tribunals should not be abolished, he concluded, but appeals to British courts should be easier, fees regulated and all judgments in land cases should be required to be particularized and recorded and filed with the Secretary for Native Affairs as a condition to their validity. All execution sales should be recorded stating the price paid.

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98 Ibid., ¶6.
99 Ibid., ¶11.
100 Ibid., Enclosure No. 1, 3.23.04
In a second memorandum dated May 21, 1904, Griffith, speaking of Odikro and other minor chiefs’ courts, said that it “seems hardly wise to permit the existence throughout the Colony of practically irresponsible petty Courts with power to enforce decrees untrammeled by the many restrictions which hedge round the enforcement of judgments of British Courts.” In practice, he said, it was only “the Omanhene’s Court which is deemed to have the full powers conferred by the Ordinance” and that can properly be regulated, although minor courts fulfilled a function as arbitration panels whose decisions “will possess only a moral and social sanction.” He repeated his objection that native courts existed primarily to provide revenue to the chief and not to give speedy justice, and that they were “often partial and corrupt.” Nevertheless, they could be of great good: “They are in fact our future petty sessions Courts and County Councils” and should not be abolished. The British could not make the Tribunals just, but by making appeals easier than at present Government could “mitigate hardship and expose partiality and injustice,” by regulating fees it could “put some check on extortion” and by requiring recording of land judgments within a specified time in order that they be valid, it could reduce the danger of unrecorded tribunal decisions. But so long as the “Court to a native chief connotes revenue, . . . so long will there exist in the native Courts an inherent defect which no legislation can cure.”

Griffith sent Rodger yet another memorandum that year arguing that *viz à vis* British Courts, Native Tribunals were foreign and their judgments were to be recognized only if they could be said to be civilized; since they were not, the Supreme

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Court had no duty to acknowledge their force."\textsuperscript{105} The Governor, writing to the Colonial Office, said that it should give the utmost consideration to W. Brandford Griffith’s views as to the policy to be adopted as to native jurisdiction, “but at the same time, allowance must be made for the ‘unconscious cerebration’ of the President of the Gold Coast Supreme Court, naturally jealous of the prerogatives of that Court, and intolerant of the existence of tribunals such as Native Customary Courts, independent of the Supreme Court and not even subject to its appellate jurisdiction.”\textsuperscript{106} Clearly, Rodger saw the dilemma of trying to make indigenous tribunals responsive to the needs of the people without destroying the prestige of the chiefs upon whom the British relied, but like most colonial officials, he had no effective proposals to resolve the dilemma.\textsuperscript{107}

A few days later, Sarbah and E. J. P. Brown, African unofficial members of the Legislative Council, advised the Governor that a new ordinance should be passed as defects could not be cured by regulations or rules under the existing ordinance. The new law should be “comprehensive, explicit and complete in itself,” declaring the powers and jurisdiction of the native authorities and regulating the exercise thereof, specifying the fees and fines chargeable. It should “facilitate appeals from inferior local courts to that of an Omanhene and from there to a District Court. These council members urged that the Ordinance should apply to the whole country and should permit lawyers to practice in the Omanhin courts so long as they spoke the language of the court and the people and conducted the cases in that language. Finally, each

\textsuperscript{105} \textit{Ibid.}, Enclosure No. 7, 8.3.04. A position entirely inconsistent with the one he took in his opinion in \textit{Mutchi}.

\textsuperscript{106} BNA CO 96/420, Confidential, 11.26.1904.

\textsuperscript{107} The British mercantile and mining communities were largely on the sidelines as to debates concerning native tribunals as their disputes with each other and most often with indigens were heard in the British courts and continued so to be heard throughout the period under study here. Similarly, matters concerning the British imperial wars, against the Ashanti Empire and in South Africa, were not part of the debate as to the efficacy of the traditional courts.
court should have a registrar who would keep detailed records of the cases that would be admissible in the Supreme Court. These proposals, if adopted would go some way to reducing the corruption found in the Native Tribunals, but would gird the chiefs about with rules that would limit their power and prestige.

The Attorney General laid out for the Governor his views on the content of a new Native Jurisdiction Ordinance and his reasons for his proposals, a memorandum that was sent on to the Colonial Office. All Native Tribunals should be explicitly made subject to the Supreme Court with a general right of appeal to the Supreme Court, he suggested. There is no indication in his memorandum that he considered that this suggestion would have the effect of creating one court system with no independence for the native courts. Jurisdiction and fees should be specified and the courts of the lesser chiefs would have civil jurisdiction only. Omanhenes’ courts should be provided with registrars and the means to enforce their judgments. In a very creative suggestion that did not arise again until 1927, he proposed that principles of customary law be recorded so that they could readily be known outside the small circle of councillors and linguists. He believed that as a consequence, business and revenues would increase. He further recommended that those courts that would have criminal jurisdiction would have it defined by Hutchinson’s 1894 draft Bill that limited criminal jurisdiction to crimes punishable by up to three months imprisonment and/or a fine of up to £25, allowed appeals to the District Commissioner’s Court if within the jurisdiction of that court or to

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108 *Ibid.*, Enclosure, Memorandum from the Attorney General, 8.10.1904. In the first decade of the twentieth century, men like Sarbah and Brown who had received British educations in missionary schools as well as in publicly supported institutions such as Fourah Bay College in Sierra Leone before going to England for study at the universities and the Inns of Court, appear to have spoken for all the Africans of the Gold Coast because with extremely rare exceptions such as the story of Abina (see Chapter I), the voices of the chiefs, much less the common people, were not heard. It is not clear whether these educated Africans were in touch with similarly educated people outside the Gold Coast. The record is barren of any such contacts until about 1920 and the creation of the National Congress of British West Africa that was designed, in part, to facilitate such contacts.

-298-
the Divisional Court, and specified fees to be charged. Civil jurisdiction as the
Attorney General foresaw it would seem to be unlimited, even though the committee
reporting on the 1894 Bill had rejected unlimited civil jurisdiction and the then
Governor, Maxwell, had also been opposed. However, unlike Sarbah and Brown, the
Attorney General opined, strictly limiting the chiefs’ powers in civil matters would be
“impolitic:” “The aim of the Government should be to uphold his [the Chief’s] dignity
and make him an effective instrument for maintaining law and order in his own district,
not to lower him in the eyes of his people.” Unlike Griffith, the Attorney General
believed that native courts and District Commissioners’ courts could exist side by side
“in perfect harmony” with distinct duties and jurisdiction, native courts would deal with
native cases, District Commissioners with Europeans, native courts with customary
law, District Commissioners with English law. The District Commissioners, the
Attorney General noted seemingly without a single concern for the problems inherent
in their dual role, were not mere judges but also administrative officers. He viewed
some of Sarbah’s proposals as being “excellent” but he disagreed with probably his
most important one, to permit attorneys to appear in Native Tribunals. In yet another
proposal that would not resurface until the Native Courts Bill of 1944, the Attorney
General recommended that native magistrates for each superior chief should be
appointed who, presumably, would have legal training. Moreover, registrars should be
appointed to keep complete records of proceedings, to summarize in English the
linguists explanation of the reasons for a judgment and record it in a judgment book,
issue writs of execution, account for fees and fines and report all this regularly to the
Government 109 Despite a common theme in the proposals of almost everyone who

109  Ibid., 11.15.1904.
expressed a view, the Colonial Government seemed unable to reach the consensus necessary to produce detailed legislation for another six years.

**Early Versions of the 1910 Native Jurisdiction Amendment Ordinance**

The Native Jurisdiction Amendment Ordinance Bill of 1906 was published and read for the first time on November 6, 1906. After twenty three years during which the Native Tribunals and the Supreme Court exercised concurrent jurisdiction over disputes between natives, the proposed Bill now provided for the exercise of exclusive jurisdiction specified in the Bill by Native Tribunals of Head Chiefs and Chiefs and prohibited exercise of jurisdiction except as specified in the Ordinance, thereby asserting the British view that the chiefs had no inherent rights to hold courts. As in previous bills, the Governor in Council was authorized to extend, curtail or remove any and all jurisdiction otherwise conferred by the proposed bill from any and all the native tribunals in the Colony. It provided for enforcement of judgments by sale of property, arrest, writs of possession, etc., and for appeals first to the court of the head chief and then to the Divisional Court whether judgment was as to personalty or land.\(^{110}\)

In January 1907, the Governor sent the 1906 Bill drafted by the Attorney General and the Chief Justice to the Colonial Office. He said that he had deferred the second reading of the Bill until August at the request of an association of educated coastal Africans, the Aboriginal Rights Protective Society (ARPS)\(^ {111}\) and the Provincial Commissioners so that the Bill could be thoroughly explained to the chiefs. The Bill, he said, was based on the principle of derived, not inherent, jurisdiction. Only those chiefs listed on the schedule to the Bill would be permitted to conduct Tribunals for

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\(^{110}\) CO 99/18, Gazette, 11.22.1906, 2089 et seq.

\(^{111}\) This organization was created in response to two proposed Land Bills alleged by it to amount to theft of indigenous land. See Chapter XII, *infra*.  

-300-
which the Governor would appoint Tribunal registrars. To reduce the possibility of corruption, all fines and fees would be paid to state treasuries, not to the chiefs and councillors who would, instead, receive fixed salaries. Thus far, he reported, the only serious opposition to the Bill that he saw was to those provisions amplifying those sections of the 1883 Ordinance making the chiefs’ jurisdiction derivative and not inherent. Colonial Office minutes from Alexander Fiddian and Charles Strachey noted the provisions of the Bill with approval but said that if Bill were enacted, it would be the de facto end of Native Tribunals.

Contrary to Rodger’s expectation, the immediate public reaction to the 1906 Bill was unfavorable. The ARPS attacked it as violative of customary law. It argued that the Chiefs’ jurisdiction was inherent in his position as chief and not derived from British rule despite British claims for the Sovereign being the font of all justice. Moreover, it contended that judicial functions should be entrusted not just to chiefs but to chiefs and councillors otherwise people would be deprived of democratic rights and the chiefs would be established as tyrants in contravention of customary law. However, press comment was more restrained. In reporting the first reading of the 1906 Bill and the appointment of the Legislative Committee to study it before the second reading, the Gold Coast Leader, praised the Attorney General for the “great pains” he took in drafting the Bill that it saw as a step toward cooperation with Native authorities in the fair and efficient administration of justice.

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112 BNA CO 96/455, Confidential, 1.6.1907.
113 Ibid., Minutes, 2.23.1907.
114 GNA ADM 11/1138.
115 Gold Coast Leader, Cape Coast, 2.3.1907, 2-3.
The members of the Legislative Committee appointed to consider the Bill received criticisms from many sources. Principally, they concerned limits on civil jurisdiction,\textsuperscript{116} the level of fees permissibly to be charged,\textsuperscript{117} that the Bill stripped the chiefs of their inherent rights and should not be passed without their consent, the manner in which fees were to be distributed\textsuperscript{118}

Justice Pennington claimed that many terms in the Bill were too vague to be applied easily.\textsuperscript{119} The Commissioner of the Western Province, Arthur J. Philbrick, also criticized the Bill as being too complicated and that many provisions were impracticable.\textsuperscript{120} Similarly, District Commissioner Arthur Ffoulkes thought the Bill was too elaborate. He suggested that a conference be held with all the chiefs to see if a uniform procedure could be agreed upon that would limit court membership to the Chief and three councillors as assessors in an effort to reduce the costs litigants would have to pay.\textsuperscript{121}

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\textsuperscript{116} \textit{Ibid.}, 1.26.1907, 12. Mate Kole, one of the most powerful chiefs in the Eastern Province, criticized the limit on civil jurisdiction of £25 as being far too low. The country was developing rapidly, he wrote to J. M. Sarbah, a member of the Committee, claims in the courts were larger and more complex, and if limits were too low, people would be driven to the British Courts and, therefore, to lawyers, the last a criticism he must have known would resonate with the British, given their belief that lawyers equated to increased litigation and increased costs to the people. Kole also complained that criminal jurisdiction was too narrow considering that until recently, Native Tribunals had had unlimited jurisdiction. He believed that young offenders and adults, as well, should be flogged rather than be fined or imprisoned since the young ones and many adults could not pay the fine and the people were not “civilised enough to know the degradation of imprisonment.”
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\textsuperscript{117} \textit{Ibid.}, 25. The Omanhene of Comea Asen, Edina and Mankasem each wanted all prescribed Tribunal fees to be raised. In addition, they said that people were now regularly using promissory notes so that claims based on these instruments should be within Native Tribunal jurisdiction and not that of the Supreme Court. Generally the chiefs complained that scheduled fees were too low, that registrars should be named by the chiefs and not the Governor.
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\textsuperscript{118} \textit{Ibid.}, 37. The Ga Manche, the principal chief in Accra, argued that only appeal fees should be paid to the Government Registrar and all other fees should be paid to and divided among the members of the Native Tribunals as they had always been. He also contended that appeals should lie to the Full Court from the Paramount Chiefs’ Courts as they were equal to the Divisional Courts.
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\textsuperscript{119} \textit{Ibid.}, 52.
\textsuperscript{120} \textit{Ibid.}, 55.
\textsuperscript{121} \textit{Ibid.}, 78-79, 11.19.1907.
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Contrary to the views of the chiefs, the Commissioner of the Central Province expressed the view that the Head Chiefs’ courts were unpopular because the fees and costs were too high, particularly where there was a District Commissioner’s Court in the same town and because of the “frequent oppression and injustice of [the Tribunal] administration.” He thought that because the Head Chiefs’ Courts couldn’t exist on the fees set out in the schedule to the Bill since they had too many retainers to support, it would be likely that they would create new fees or take bribes with the connivance of the Registrars so that District Commissioners should be authorized to sit in the Tribunals to prevent corruption until the time came when the Head Chiefs could be put on a salary. From his point of view, the Chiefs were, in any event, already too independent of the District Commissioners, who were the “CEO’s” of the District.122

The Acting Provincial Commissioner of the Central Province, Herbert C. W. Grimshaw, reminded his readers that the Native Tribunals were generally seen as excessively expensive and partial. Government was providing no adequate compensation for the Chiefs’ loss of income due to the lower scheduled fees. It would be better, he wrote, if all fees and fines were paid to the Registrar and the Head Chief were paid a stipend. Grimshaw failed to note that this suggestion left the Councillors who made up the court without any income at all.123

The District Commissioner of Accra commented that the proposed Ordinance should not be applied in Accra where educated people and merchants abounded and had been living away from custom, tradition and the authority of the chiefs for years, and particularly not to the large Muslin population that should not be subject to Native Tribunal jurisdiction because Sharia law was completely different from Ga traditional

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122 Ibid., 59-65.
123 Ibid., 78., 11.25.1907.
Finally E. J. P. Brown sent an extensive Memorial to the Legislative Council urging a requirement of written records to enable appellate courts properly to review Tribunal proceedings as well as reform of appellate procedures to take from the Secretary for Native Affairs, an administrative officer, the authority to pass on whether or not to permit an appeal, a cumbersome and unsatisfactory system that deterred proper appeals by natives who lacked understanding of the procedures.

Some criticisms reflected a realistic appraisal of the Bill, e.g., that it was too complex in its provisions to enable illiterate and semi-literate chiefs to understand and enforce. Others could easily be accommodated, such as permitting the Tribunals to enforce the terms of written notes, previously considered to be solely within British jurisdiction. However, the evidence, albeit primarily anecdotal, demonstrated that most of these criticisms were well grounded, but those issuing them should have known that it would be impossible to draft a bill that would respond to the most important of them. For example, the Colonial Office had several times in the past denied that there was sufficient funding to pay for as many District Commissioners as would be necessary to provide the supervision of the Tribunals required to prevent corruption. In any event, if District Commissioners were to sit in the Tribunals to oversee them, how could the chiefs save their face as traditional leaders, in which event the whole purpose of preserving traditional courts would be defeated. Moreover, fees could not be raised sufficiently to provide a secure income for the chiefs while paying for the Registrars and other staff, for which the Government would not pay, without driving the people away from the Tribunals which would consequently become too expensive for the vast majority of would be litigants.

124 Ibid., 92, 4.21.1908.
125 Metcalfe Documents, 532.
The Committee considered the 1906 Bill for more than a year but was unable to produce a unanimous report. Ultimately, the Governor sent the Colonial Office both a majority and a minority report together with a copy of the 1906 Bill marked to show the latest changes and proposals. He said that everyone on the Committee but the Chief Justice agreed on the universal application of the Ordinance so that the powers of the Tribunals “if abused can always be either restricted or withdrawn.” The majority gave no reasons for their recommendations, so he asked the Official Members (W. C. F. Robertson, Acting Colonial Secretary, Frederic H. Gough Acting Attorney General, and John Maxwell, Acting Secretary of Native Affairs) to state them. The most important opinion, in his view, was that of then Attorney General, A. Willoughby Osborne, who was then in Nigeria.

The Majority Report of three official members and Giles Hunt, a European unofficial member, Brown and Sarbah: stated that while not all members agreed on all the provisions of the Bill, all agreed to sign the report and offer additional amendments on the second reading. Griffith produced a 32 page minority report in which he said he could not agree to universal application of the Ordinance or to Europeans being tried for violating by-laws and that he “profoundly” disagreed with depriving the Supreme Court of jurisdiction of matters within the civil and criminal jurisdiction of Native Tribunals. Griffith argued that if Native Tribunal jurisdiction were to be exclusive, even in small civil and criminal matters, the District Commissioners would lose the bulk of the business they do. Even though most small civil cases involved debt on shop accounts evidenced by shop books, illiterate native judges could not understand them. So, too, promissory notes with guaranties were documents beyond their ken. Under

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126 BNA CO 96/473, 12.8.1908.
the Native Jurisdiction Ordinance of 1883, Griffith contended, natives had the option of bringing their land cases in the Supreme Court or Native Tribunals and almost always chose the Supreme Court. To oust the Supreme Court of jurisdiction in land cases would result in a substantial increase in appeals from Native Tribunals to the District Commissioner then to the Provincial Commissioner and then to the Full Court, thus only increasing cost and delay. Griffith acknowledged that where jurisdiction was concurrent and Native Tribunals sat in proximity to the courts of the District Commissioners, jurisdiction would clash, “But which court should suffer, the native court which has fallen to its present low estate owing to the fact that the natives deserted it to come to our court or the Supreme Court which must in any case remain?”

Griffith moved on to argue in favor of attorneys appearing in all courts, native as well as British. He noted that attorneys might appear in the District Commissioner’s Court and should do so because the District Commissioner is equivalent to a prosecutor, an executive officer, and attorneys provided an important safeguard for defendants summoned before him. They were vital in saving judicial time and organizing facts and evidence. The natives knew the value of counsel and used them in all important land cases. Additionally, attorneys encouraged settlement. Griffith referred to a Provincial Commissioner as having said that the failure of a Head Chief to hear counsel deprived him of “‘an assistance often of great value.’” “Our role,” Griffith said, “in this country has been based upon the justice dispensed by the late Queen’s courts.” Natives coming into British courts contacted Europeans and civilization, Griffith asserted, while Europeans learned about the customs of the natives and their law, resulting in mutual trust. Courts had more educational effect than schools and the
proposed amendment would diminish the “most wholesome communication between natives and Europeans.”

Griffith’s arguments reflect his long held view that British courts administering British law in all but a few cases was critical to the development of the people of the Gold Coast and their integration into the modern world. His contentions differed from those of the administration only in his statements that British judges would become familiar with indigenous custom and find therein a basis for understanding the colonial subjects. One may argue that these views originated in considerations of racial supremacy, but, I argue, they derive equally if not entirely from Griffith’s training in the common law as advocate and judge.

Governor Rodger reported that some of Griffith’s arguments were “very cogent” and perhaps some area around the District Commissioner’s seats should be excluded from the jurisdiction of the appropriate Tribunal, but he had yet to form an opinion. The Governor urged that Tribunal jurisdiction should be limited to natives and exclusive as to subjects of the Chief, and as to all other persons, jurisdiction should be concurrent with that of the British courts. Commenting on Griffith’s opposition to exclusive jurisdiction in land and other cases, Rodger said that without it Tribunal jurisdiction would be a “nullity” and would encourage lawyers to promote litigation in British courts where they could appear.

Griffith, Jr argued that to grant Native Tribunals exclusive jurisdiction was a reversal of the historical spread of British jurisdiction and was contrary to the desires of the native population that would benefit only the chiefs and would lead to a marked deterioration of the quality of justice. He said that one reason the Native Tribunals made poor decisions in land cases was because they did not require surveys or plans.

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127 BNA CO 96/473, .
128 GNA ADM 12/3/15, Confidential, 12.8.1908, 74.
made no definitions of boundaries and created no adequate record for Supreme Court review. Native Tribunals were, he concluded, are and would continue to be instruments of extortion.\textsuperscript{129} Governor Rodger, to the contrary, wanted jurisdiction in cases between natives to be exclusive to the Native Tribunals, because the “persistently hostile attitude of the Supreme Court during the last twenty years . . . has rendered the nominally ‘concurrent’ jurisdiction of all Native Tribunals quite illusory.”\textsuperscript{130}

From the point of view of the chiefs, the Supreme Court “has gradually usurped and monopolized all jurisdiction of every description, original as well as appellate and over tribal as well as non-tribal natives; and that for the last twenty years, it has persistently endeavoured to abrogate or minimize, in every direction, the civil and criminal jurisdiction specifically conferred on certain Native Tribunals by the Native Jurisdiction Ordinance of 1883.”\textsuperscript{131}

The Governor quoted his Attorney General as saying: “‘. . . it is one of the main objects of this Bill to spare Natives the necessity of squandering money in Supreme Court litigation . . .’” Rodger wanted Supreme Court jurisdiction to be appellate only where the parties to the action were natives, but cases involving Head Chiefs should be heard by a District Commissioner or Divisional Judge and those involving lesser chiefs should be transferable to a British Court.\textsuperscript{132}

Ellis, of the Colonial Office, clearly expressed the policy choices available when he minuted that the issue was whether “we are ‘to rule through the chiefs’ and give them exclusive jurisdiction so they can be the instruments of our rule” or as had been

\textsuperscript{129} GNA ADM 11/1138, Minority Report as to 1906 Native Jurisdiction Ordinance Amendment Bill.
\textsuperscript{130} GNA ADM 12/3/15, Confidential, 12.8.1908, 72.
\textsuperscript{131} \textit{Ibid.}, 86.
\textsuperscript{132} \textit{Ibid.}
going on for years, “particularly since the present Chief Justice was appointed,” gradually to eliminate the chiefs’ power and make government European in “personnel and method.” He reminded the readers of his minute that successive Secretaries of State chose the first alternative, but because of delay in amending the Native Jurisdiction Ordinance and “the animosity of the Chief Justice towards the Native Courts,” the tendency has been toward the second alternative. Apparently having heard from the now departed former Attorney General, Alexander W. Osborne, Ellis reported that Osborne thought that native jurisdiction should be concurrent with that of the District Commissioners and that the Supreme Court should be required to transfer cases to Native Tribunals unless there were allegations of bias or partiality. Other minutes noted that W. C. F. Robertson, the Acting Colonial Secretary, said that he signed onto the majority report because the chiefs were losing influence through Government’s failure to help them enforce their judgments. He believed that the Native Tribunals were clearly being used and were popular notwithstanding the Chief Justice’s statements to the contrary. Robertson was convinced that the power of appellate courts was a check on abuses. John Maxwell, the Acting Secretary of Native Affairs, was reported as thinking that the Native Tribunals should be strengthened as a sign of British trust in them but should not have exclusive jurisdiction in land cases. He believed that the chiefs were becoming educated and abuses were diminishing. Once again, opinions varied and fell almost equally on both sides of the issue. It was apparent that they could not readily be reconciled and that no new Native Jurisdiction Ordinance was soon to be enacted.133

133 ibid.
The Governor blamed the attitude of the Supreme Court and the Chief Justice for, the “decay” in Native Tribunals. It was clear that Griffith had enormous influence as to courts legislation, both native and British, for Colonial Office minutes reflect Rodger’s thinking that in view of the Chief Justice’s opposition it might be better to withdraw the 1906 Bill and make necessary changes through issuing regulations, thus getting around Griffith’s opposition. J. S. Risley, a Colonial Office Legal Adviser, opined that this would be all right legally, but it would be better to pass a new Bill albeit one much less elaborate than the then current draft, which could be done if agreement could be reached on basic principles. Risley reported on his interview with Griffith, who was then home on leave. The Chief Justice was uncompromising on the issue of concurrent rather than exclusive jurisdiction for the Native Tribunals, Risley noted. Since the possibility of compromise seemed to be out of the question, Risley said that they had a choice to make. He chose to go with the majority report that, he said, seemed to represent a better way to go forward allowing transfers where bias was likely. He would confine jurisdiction to local Africans giving other West Africans the option either to go to the Supreme Court or a Native Tribunal and that there would be no native tribunal jurisdiction over Europeans.\(^\text{134}\)

Ellis minuted to Cox that he did not see how chiefs could maintain their authority without exclusive jurisdiction. Cox agreed but he also agreed with Risley that the “power of removal is very necessary in the case of native courts.” Ellis sought guidance from Cox as to whether the Bill should go forward or the Governor should issue regulations. Although the Legislative Council would still have to approve Regulations, the debate would be far more limited than if a Bill were before it, so he

\(^\text{134}\) \textit{Ibid.}
recommended going forward with regulations and the Colonial Office directed the Governor to do so unless he has strong reasons to proceed otherwise. The Regulations the Governor was directed to issue would afford the Native Tribunals some “small” exclusive jurisdiction, less than that in the draft 1906 Bill, provide for removal of cases to the District Commissioners’ courts and the Supreme Court “in a proper case” as where, e.g., bias is likely, confining such jurisdiction to “tribal natives” while other West Africans were to be given the choice of proceeding in a Native Tribunal or the Supreme Court and the Tribunals would have no jurisdiction over Europeans. London directed that such regulations should provide for a gradual extension of applicability rather than encompass the entire Colony at the same time. Finally, the Tribunals should be given the “proper means” to record their judgments, especially in land cases, and to enforce them.\footnote{135} In order to clear the way for a completely redrafted Bill, the 1906 Bill as redrafted to reflect the Majority Report recommendations was withdrawn.\footnote{136}

In discussing with the Colonial Office the principles that would underlie a new proposed Native Jurisdiction Ordinance Amendment Bill, Governor Rodger observed that native jurisdiction, once entirely personal, had become both personal and territorial. He quoted the report of the 1895 Committee on Native Jurisdiction to the effect that any Native Jurisdiction ordinance should be universally applied and notes that Chief Justice Hutchinson was not as fearful of the consequences of universality as his successor Sir W. Brandford Griffith, Jr., seemed to be. Rodger suggested a newly drafted Ordinance prepared by the current Attorney General, Arthur Hudson, with

\footnote{135} \textit{Ibid.}, 10.28.1909.\footnote{136} GNA ADM 14/1/7, 441.
some modifications of his own, that was “a more modest, but possibly more practical Bill.”\textsuperscript{137}

Commenting on this dispatch, Ellis minuted that after extensive analysis, he thought that the Hudson draft as modified in accordance with the Governor’s proposals should do the job. Cox approved, agreeing with the Governor, contrary to the Chief Justice’s view in his minority report, that Native Tribunals should be supported and chiefs trained so as to raise the level of their courts. Sir Charles Lucas, an Assistant Undersecretary, and Lord Crewe, the Secretary of State, expressed their agreement and authorized the Governor to proceed with a Bill that defined “native” as the Governor had proposed but they asked the Governor to advise as to what extent the definition would include educated Africans, native officials and others and to advise if he thought it possible to include provisions for recording land cases.\textsuperscript{138} Crewe told the Governor that “some small (emphasis mine) exclusive jurisdiction should be assigned to the Native Courts” that would be less extensive than under the 1883 Ordinance. The powers of the Native Tribunals should be “safeguarded” by authority to remove cases to the District Commissioner’s court or the Supreme Court in cases where, e. g., bias was probable. The Ordinance should not be immediately applied throughout the Colony but gradually introduced.\textsuperscript{139} The “aim of the Government,” Crewe said, “should be to train them [the chiefs] and to raise the level of their courts.” Both good

\textsuperscript{137} BNA CO 96/486, Confidential, 10.19.1909. This dispatch included comments from his Colonial Secretary, Herbert Bryan, and then District Commissioner, later Secretary of Native Affairs, Francis Crowther. Crowther opined that the proposal for exclusive jurisdiction was “precipitous” and was not based on an adequate knowledge of native conditions. He argued that the Native Tribunals lacked “the probity that is necessary to exercise exclusive jurisdiction.” Bryan also strongly opposed exclusive jurisdiction, saying that it meant “a betrayal of British trust to ensure justice.”

\textsuperscript{138} GNA ADM 14/1/7, 441.

\textsuperscript{139} GNA ADM 12/1/31, Confidential, 10.25.1909. The Attorney General responded to the Colonial Office’s Statement of Principles by noting that the proposed Bill enacts each of the Secretary of State’s requirements except for that of a gradual introduction. Hudson persists in proposing that the Bill be applied to the entire Colony at once. GNA ADM 15/117.
policy and necessity require active Native Tribunals so as to avoid “swamping the Supreme Court with petty cases.”

Shortly thereafter, the Governor reported on a meeting with Sarbah, Hunt and Mills, unofficial members of the Legislative Council, and his impression that they favorably received the new proposals. The content of a bill to give greater jurisdiction to traditional tribunals was critical to the colonial administration as it would, it was hoped, enable to traditional authorities, whose prestige had been diminished by increasing resort by litigants to British courts, to regain some of that lost prestige by requiring their subjects to use their courts. At the same time, some of the proposed content would enable the administration to exercise control over those tribunals to protect the people from feared exploitation by rapacious chiefs and their councillors.

The Native Jurisdiction Amendment Ordinance Bill of 1910 was read for the first time in the Legislative Council on May 28, 1910 and published in the Gazette. In his address to the Legislative Council, the Attorney General recapped the effort to regulate Native jurisdiction from 1878 through 1883 and the three bills submitted and withdrawn in the 1890's. He reminded the members of the Council of Chief Justice Hutchinson’s recommendation, repeated subsequently by a number of officials, that a Native Jurisdiction Ordinance should apply throughout the Colony with no distinction between interior and coastal Tribunals and tells the Council that this Bill makes that provision. He also reminded them of Chief Justice Griffith’s 1901 statement that the key to native jurisdiction was the enforceability of judgments and pointed out the provision enacting that principle. He recalled to the Legislature the Government’s 1904 policy statement that “all petty civil and criminal cases between natives should in the first instance be heard and decided by

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140 GNA ADM 12/1/32, Confidential, 1.18.1910.
141 GNA ADM 14/1/7, Confidential, 11.06.1909.
142 BNA CO 99/22, Gazette, 6.11.10, 503.
the Native Courts and that the jurisdiction of these Courts should be supported and their legal orders enforced to the fullest extent,” and noted that such policy was carried into effect by the Bill. He bemoaned the failure of the 1907 Select Committee to achieve unanimity leading to the withdrawal of the 1906 Bill.

Sarbah expressed his hope that prior to submission of the Bill to the Committee of the Whole after its Second Reading, it would be widely circulated and publicly considered. As to specific provisions, Sarbah criticized specific sections, saying that appeals should not lie to District Commissioners who change so frequently and that they should not sit in Tribunals with the Chiefs who should be assisted by educated natives.143

In a scene that most Americans would find extremely bizarre in light of our tradition of separation of powers, Chief Justice Griffith rose, as an Official Member of the Council, to criticize his own Government’s proposal. Saying that he had often been called, “the Member for the Natives,” he promoted a Bill that would be simple in form and attacked the one on the table as being too complicated, among other things. He criticized the provisions dealing with appeals in land cases, saying that they should not go to Provincial Commissioners who were too preoccupied with administrative tasks to deal with them and ninety per cent of whose decisions would be appealed to the Divisional or Full Court in any event. Such appeals should lie from the Head Chief’s Court directly to the Divisional Court.144 At this point the Governor interjected his opinion that the success of the Ordinance in providing inexpensive justice depended in large measure on the Registrars about whom he had “grave doubts,” so the Bill provided that illiterate chiefs should send

143 GNA ADM 14/1/9, 7.1.1910. 440-441.
144 Ibid., 442.
the Linguists to give complete oral reports of all proceedings with respect to land cases to the appropriate District Commissioner.\textsuperscript{145}

On July 4\textsuperscript{th}, over Griffith's objection that there had been insufficient time for the public to consider the Amendment and that in and of itself it made no sense and should have been published with the entirety of the 1883 Ordinance which it amended, the Bill passed its second reading and proceeded to the Committee of the Whole. In Committee, Griffith objected to most of the Bill's provisions and voted against them. He argued that the definition of the term "Native Authorities" was incomprehensible, against mandatory transfer of cases between natives to Native Tribunals because transfers worked a hardship on those who chose British courts and enabled District Commissioners to lighten their workload by dumping otherwise valid cases into Tribunals. To rebut Griffith's opposition to universal application, Governor Rodger pointed out that Griffith had concurred in the recommendation of the Select Committee for universal application.\textsuperscript{146}

Sarbah proposed a number of amendments, particularly to defeat exclusive jurisdiction. He suggested that educated natives compelled to litigate in the Tribunals, might unduly influence the illiterate chiefs and councillors through inadvertent intimidation and so distort justice. His proposed amendment was rejected, supported only by the Chief Justice and T. Hutton Mills, the second African Unofficial Member. He pushed for the right to counsel in cases transferred from the Tribunals to British courts. The Governor countered by warning that a richer party could take advantage of a poorer party and impose economic hardship on him by forcing him to hire counsel. Sarbah responded that attorneys would be very useful to new and inexperienced District Commissioners who were unfamiliar with customary law to have counsel on both sides, particularly in land cases,

\textsuperscript{145} \textit{Ibid.}, 443.

\textsuperscript{146} \textit{Ibid.}, 444.
which, in any event should be appealable directly to the Supreme Court.\textsuperscript{147} The Governor rebutted by saying that the District Commissioners were more familiar with the land in their districts and could decide on the spot while a judge had to take evidence. Moreover, Rodger said, he had doubts that a mere plan without a personal inspection could enable a court to make a correct judgment.\textsuperscript{148} On July 5\textsuperscript{th}, a number of outstanding issues were resolved by agreement, among which were the appellate route for land cases, to the Provincial Commissioner and then to the Full Court. At Griffith’s behest, the Rules made part of the Schedule to the Bill was amended to require the Tribunals to keep written records. Sarbah prepared a list of fees to be put into the Schedule. Finally, on July 27, after Griffith had said, with “regrets, that he had to oppose passage of the Bill because it was too complicated for illiterate chiefs and councillors to deal with and was detrimental to the rights of the colony primarily because it forced unwilling litigants into an undesired forum, the Native Jurisdiction Amendment Ordinance it was enacted as No. 7 of 1910.\textsuperscript{149}

The provisions of this extremely important legislation require more particular attention. Section 2 (ii) redefined “Native” as someone living under customary law; Section 3 applied the Ordinance to every state and division in the Colony and subjected all their “powers and jurisdiction to the provisions of the Ordinance and not otherwise”; Section 13 gave Provincial Commissioners power to intervene in Tribunal proceedings (theretofore such power resided only in the Governor and the Attorney General); Section 15 added a new appeal track: appeals from an indigenous Divisional Tribunal lay to the Head Chief’s Tribunal, then to the District Commissioner’s Court if the amount in issue or criminal fine exceeded specified sums or the criminal sentence exceed seven days in jail; Land appeals

\textsuperscript{147} Ibid., 444-445.
\textsuperscript{148} Ibid., 446.
\textsuperscript{149} Ibid., 449-450.
would lie to the Provincial Commissioners and then to the Full Court; Section 17 precluded any appeal from the District Commissioner's Court in a non land case except upon leave from the District Commissioner or the Divisional Court; Section 24 added a new Section 34 requiring Tribunals and Appellate courts to apply customary law not repugnant; a new Section 25 criminalized imposition of fines and fees in excess of those specified on the Schedules to the Ordinance; and a new Section 36 authorized Tribunals to punish perjury. Rule 18 required literate chiefs to record all proceedings and to preserve the record for the District Commissioner; Rule 19 required illiterate chiefs to send the Linguist along with the parties to the District Commissioner to make a verbal report of the proceedings within seven days; Rule 20 required monthly reports to the District Commissioner either in writing or via the Linguist to be passed on to the Secretary of Native Affairs of all criminal cases where the fine exceeded 10/ or imprisonment was imposed. Schedule A specified the fines for violating a Chief’s Oath and fees for summonses, hearings, Land Viewing, Linguists and Execution.  

The 1910 Ordinance enacted the principle of exclusive Native Tribunal jurisdiction over all actions between indigenous litigants with administrative officials, District and Provincial Commissioners having the primary responsibility for dealing with appeals. In so doing, it achieved the objective of supporting the stature of the customary authorities, but failed to provide for simple and inexpensive justice for indigenous litigants. Indeed, merely laying out the most pertinent terms of the Ordinance gives support to Griffith's criticism that it was too complicated. If the intent was to simplify the procedures and make litigation in the traditional courts cheaper and easier for the indigenous population, it clearly failed. For instance, an appeal from a lower British Court to a higher British Court was on the record  

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150 GNA ADM 4/1/39.
made below and written and/or oral arguments. Under the 1910 Ordinance, an appeal from the lower Tribunal was to a hearing de novo in the Head Chief’s Tribunal and thence to a hearing before the District Commissioner on a record, if the Head Chief were literate, a matter of coincidence, or another hearing de novo upon the report of the Linguist. The District Commissioner’s judgment was appealable to the Provincial Commissioner in land cases and finally to the Full Court or, in personal cases, with the leave of the District Commissioner or the Divisional Court to the Divisional Court and, at last, to the Full Court. It is not at all surprising, even without the burden of attorneys’ fees, that few litigants could afford this tortuous and expensive process. Moreover, the provision outlawing fees in excess of those specified was without teeth and required for enforcement the close supervision of an insufficient number of overworked District Commissioners. The colonial authorities chose to support their indigenous agents in preference to assuring that they would render justice.

Griffith’s opposition to the 1910 Ordinance made him few friends, even among those who agreed with all or some of the positions he took. The Governor was furious. He sent the Colonial Office the minutes of the Council meetings, complaining that "Every stage, almost every clause of the Native Jurisdiction Bill both on the Second Reading and in Committee was opposed by the Chief Justice who clearly demonstrated, if any demonstration was needed, the inadvisability of a member of the Judicial Branch being also a member of the Legislative Council." “Fortunately” neither of the native members ever supported him together and often neither of them did, particularly on the final division.151 When he sent the Colonial Office the newly enacted Ordinance for Sovereign approval, Governor Rodger bitterly complained that “when the division was taken, the

151 GNA ADM 15/28, 8.10.1910.
Chief Justice after again expressing his disapproval, withdrew from the Council” without voting.\textsuperscript{152}

Now Griffith did something absolutely unheard of for the chief judicial officer of a British Colony. He petitioned the Secretary of State to disallow approval of an Ordinance passed with the sponsorship of his own colonial government.\textsuperscript{153} In multiple closely typed pages, he took apart the Ordinance clause by clause and submitted his own proposed bill that he said was simple and easy to understand. Griffith characterized the 1883 Ordinance as “ill drawn. In a short written peroration, he said that he was “making a stand for the inarticulate masses who are in the majority and whose interests are not always identical with those of the chiefs” for whom he says the Government displays “solicitude.\textsuperscript{154} Fiddian minuted to Ellis most disdainfully, “It is quite time Sir Brandford Griffith came home for good.”\textsuperscript{155} It is difficult to determine from the evidence available just what Griffith’s motives were beyond an egotism that refused to accept others opposing his detailed analysis of the Amendment Ordinance. It is however clear from his prior writings that he believed the people of the Gold Coast to be far better served by access to British courts for resolution of their legal disputes than by being required to bring them to traditional tribunals about which so many had complained so much.

However, Griffith was not entirely without support. Bryan, then Acting Governor, characterized the Ordinance as “reactionary.” He agreed with Griffith that Government had shown solicitude for the Chiefs but “none for the people.” He continued that he felt “very strongly that the rights and liberties of the people are about to be seriously curtailed.”

\textsuperscript{152} GNA ADM 1/2/75, No. 519, 8.10.1910; No. 574, 8.31.1910.
\textsuperscript{153} GNA ADM 1/2/75, No. 581, 9.5.1910.
\textsuperscript{154} \textit{Ibid.}, ¶63
\textsuperscript{155} \textit{Ibid.}, Minute, 9.24.1910.
He objected to universal application of the ordinance in part because “the number of educated natives in the Colony is rapidly increasing and . . . they form a section of the community whose aspirations and sense of justice are far removed, and tend to be still further removed from the atmosphere of native courts.” Compelling them to appear before Native Tribunals, he concluded, “cannot but be prejudicial to, as it is in opposition to, the Government’s liberal educational policy.” Fiddian scorned Bryan’s appeal and criticized his opposition to the Government.

Attorney General Hudson, responding to Griffith’s Petition demeaned it as an unnecessarily wordy and repetitious tome “on the principle that if only enough words are thrown some of them may hit the mark and overweighted with adverse epithets in the apparent hope that if only they are iterated and reiterated sufficiently often some of them will stick.” He denied that the Ordinance laid any disability on the natives and that it negatively affects their rights. The Attorney General defended giving Provincial Commissioners jurisdiction to hear land appeals by pointing to conflicting Supreme Court decisions that left the law up in the air, implying that the Provincial Commissioners would do no worse. Responding to Griffith’s assertions of solicitude for the chiefs, he argued that people could not be saved from subjection to poor traditional authorities except by making

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156 BNA CO 96/498, Confidential, 9.5.1910, ¶4. Bryan continued his defense of Griffith’s conduct, saying in October that he was humiliated by the manner in which the Chief Justice was treated during the Council debate: “it was with feelings of humiliation that I, as Colonial Secretary, and other official members of the Council, listened to the continued interruptions and witnessed the discourtesy with which Sir Brandford Griffith was treated throughout the proceedings. . . . I consider that Sir Brandford Griffith exercised remarkable self-control throughout the trying ordeal to which he was subjected, and the dignity of his office was, in my estimation, enhanced by his bearing on this occasion. CO 96/499, Confidential, 10.17.1910, ¶3.


158 CO 96/499, No. 661, 10.05.10, Enclosure 1, Memorandum of Attorney General Hudson, 10.05.1910.
“good chiefs and councillors through whom alone these large native communities can be governed.”

E. R. Darnley, an Assistant Undersecretary, minuted that Griffith should be told that his petition attacked a principle (to shore up the chiefs’ authority) already agreed to by the Secretary of State who had approved the Ordinance, with the exception of the amendments made in Committee, which had no great importance, and that he should give it a chance and see what imperfections show up. Sir Charles Lucas noted that the Attorney General’s response to Griffith’s petition was “intemperate” but that was the obvious result of friction and Griffith’s provocation. As to Griffith, Lucas wrote, “It is certain that he will do his best to make the law unworkable and the sooner he leaves the Colony – where he has been a great deal too long – the better for everyone.” Lord Crewe’s response to Griffith’s petition said that he had seen and considered it and the Attorney General’s response and after considering Griffith’s arguments, he would not advise the King to disallow the Ordinance. Indeed, he had decided even before passage of the Ordinance that the Native Tribunals should have exclusive jurisdiction. Griffith’s carping about “form and detail” could be dealt with in time, he wrote. Lastly, he asked for a report in one year on how the Ordinance was working.

The dilemma that Griffith’s opposition to the Native Jurisdiction Amendment Ordinance demonstrated was that of the colonial government throughout the period under study here: how to carry out a mandate to “civilize” the indigenous population through the benefits of English law and British justice while supporting traditional authorities through

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160 The chiefs had complained to the Governor that their authority was being undermined and that their subjects were becoming increasingly insubordinate. GNA 11/667, 1.30.1905.

161 BNA CO 96/449, Minutes, 10.21.1910.

162 GNA ADM 15/118, No. 617, 11.7.1910.
whom they wished to rule but who too often they found represented the antithesis of British justice. As will be seen below, it was not until the end of the 1930's and particularly with the enactment of the Native Courts Ordinance of 1944 that the position of the traditional authorities in dispensing indigenous justice was almost entirely reduced to a ceremonial role and better educated men assumed a position of responsibility on the Native Courts.

Popular response to the Ordinance was generally positive, unexpectedly so given that the newspapers were in the hands of educated Africans opposed to exclusion from access to the Supreme Court and the readership of which was similarly made up of educated coastal Africans who could read and write in English, an attribute rarely found in the interior of the country. Perusal of these papers shows that they were not shy about criticizing government policies and actions while expressing loyalty to the British Crown and Government.

A leading article from the Gold Coast Leader saw the passage of the NJO as a happy sign of a new order: “The principles underlying the ‘Native Jurisdiction (Amendment) Ordinance are such as may largely contribute to a rehabilitation of our Head Chiefs and Chiefs in the exercise of their immemorial rights as the natural Rulers of the country.” In a subsequent leader, it encouraged Governor Rodger to see to the approval of the Ordinance before leaving the Colony: “Nothing that Sir John has done would be more appreciated by Native Thinkers than His Excellency’s honest and sympathetic efforts to

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163 Gold Coast Leader, Cape Coast, 7.29.10, 3. Published in Cape Coast between 1902 and 1932, this newspaper, as others such as the Gold Coast Independent, the Gold Coast Echo, were founded and published by members of the mercantile and professional classes in Cape Coast and Accra and were aimed at these same classes and those English speakers interested in Gold Coast government. They offered a medium for criticism of the colonial administration and often reprinted articles about that administration found in the English press. Although not necessarily nationalist, the leading articles in the Gold Coast press rarely approved government actions that did not promote the material well being of the populace. Casely Hayford edited the Leader and made it into what Salm and Falola called “the paper with the highest quality among the newspapers that existed in the Gold Coast during the first thirty years of the twentieth century.” Steven J. Salm and Toyin Falola, Salm, Steven J., and Toyin Falola, Culture and Customs of Ghana, Westport, CT: Greenwood Press, 2002, 74-75.
recover the lost position of our Chiefs in the economy of Colonial Administration.”164 And again, in September, the leader said that the Chiefs would be forever thankful to Rodger for his “unparalleled and successful efforts” in passing the Native Jurisdiction Amendment Ordinance, “a law which, in principle, is destined to be the Charter of their liberty and indefeasible rights.”165

As might have been expected, the Gold Coast Bar was unhappy with an Ordinance keeping its members from access to Native Tribunals. Taking the brief for the chiefs, it also petitioned for disallowance of the Ordinance. Its Petition was based in large part on perceived infringement of the principle of inherent jurisdiction, because it was seen as “unworkable” and because it imposed additional duties on overworked District Commissioners, a “hardly desirable” result. Finally the Bar objected to pushing educated persons into Native Tribunals and limiting their appellate rights.166 In transmitting the Attorney General’s response to the Bar’s petition, Acting Governor Bryan characterized the latter as a “crude and inconsequential document.”167 Ellis’ minute on this second petition derides the Bar as being “not of much use” and encouraging litigation. The lawyers were unhappy, he said, solely because they wouldn’t be able to practice in the Tribunals. He suggested telling petitioners that the petition had been considered but there was found in it no reason to advise against approval.

The Colonial Office response to the Bar petition demonstrated British class and racial hostility to the educated elite that the Colonial authorities saw as potential nationalist adversaries. Simenssen argues that the British motivation for the Ordinance was to relieve

164 Ibid., 8.6.1910, 3. However, it did express regret for the Government’s opposition to the motion by J. M. Sarbah, supported by the Chief Justice, to associate educated Africans with the Native Tribunals and regrets even more that Mills opposed Sarbah’s amendment. Ibid., 9.14.10, 3.


166 CO 96/499, No. 686, 10.12.1910, Enclosure, Petition dated 9.17.1910,

167 GNA ADM 1/2/75, No. 698, 10.19.1910.
the District Commissioners of work for which they were too few in number. This argument seems to founder on the numerous burdens on District Commissioners added by the Ordinance, such as dealing with most appeals from the Tribunals, as well as the expressed intention of the Accra Administration to require the District Commissioners to supervise the Tribunals ever more closely. What is clear is that the Ordinance could not, by its terms, effectively achieve either or both of the objectives the Administration sought for it.

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CHAPTER VIII – NATIVE JURISDICTION – 1910 - 1927: CHIEFS VERSUS COASTAL ELITES

In this continuation of the discussion of Native Jurisdiction, I deal with the repeated efforts to correct the perceived deficiencies on the 1883 Ordinance and the failure of the colonial authorities to find a solution to the divergent objectives of fair justice and support of their native agents. The judicial landscape changed completely after enactment of the 1910 Native Jurisdiction Ordinance as the Native Tribunals became the exclusive forum for resolution of claims between and among indigenous people of the Gold Coast to the exclusion of the Supreme Court in almost all cases, particularly land cases. This provoked criticism and unhappiness among the educated elite of the coastal communities who objected to having their disputes decided by men they considered to be ignorant. In addition, complaints as to extortionate fees and fines, after initially diminishing again climbed. Complaints also claimed that the Native Tribunals were too slow in making decisions and granted unnecessary and dilatory adjournments of cases.

I describe the two failed efforts, in 1919 and 1922, to amend the 1910 Ordinance to deal with these complaints and the opposition of the chiefs to limitation of fees and fines that they deemed necessary to fund local government and to maintain their status among their subjects. I go on to detail the British decision to allow the traditional authorities to draft an ordinance that, with substantial British revisory input became the Native Administration Ordinance that for the first time limited the monetary jurisdiction of the Native Tribunals, established a hierarchy of such tribunals with that of the Paramount chief having appellate jurisdiction over those of the divisional and village chiefs and the highest monetary jurisdiction. It changed the basis of jurisdiction from personal to territorial and, again for the first time, expressly prohibited corruption by chiefs and imposed severe
sanctions on those found to have accepted bribes. I note the opposition of many chiefs, an opposition promoted by certain coastal lawyers, to the new ordinance that, it was claimed, unfairly infringed on their sovereignty. Finally, I describe the immediate recognition that the new Native Administration Ordinance, too, required numerous amendments and that it did not achieve the objective of delivery of fair and efficient justice to the people of the Gold Coast.

The drafting and enactment of the Native Administration Ordinance highlighted the increased prominence of traditional authorities in the making of policy through their new state councils and the newly created Provincial Council of Chiefs. Another voice now heard more frequently was that of the local press that represented the frustrated desires of the educated elite. The active involvement in the drafting process of the Secretary of Native Affairs, first J. T. Furley then John Maxwell, emphasized the importance of this department of the administrative secretariat created in 1902 to represent more directly to the chiefs the administration’s policy and to help settle succession disputes as well as those between different chiefs.¹

Life Under the 1910 Ordinance and Efforts to Amend It

The inconsistency of British policy between supporting the chiefs in their judicial jurisdiction and controlling them to prevent or at least diminish the corruption and exploitation of litigants in their courts, the themes discussed in the prior chapter, continued after enactment of the Native Jurisdiction Amendment Ordinance of 1910 despite the hopes of the colonial authorities that they had found the fine line they sought. Indeed, when Hugh Clifford assumed the role of Governor in 1912, he found that British policy was

“seemingly aimless and shifting.” Moreover he found much opposition by the coastal elites to the “venality” of the chiefs and disgust “with the ignorance, corruption, or general slowness of the chiefs to act.”

Over the next decade the Governors, first John Thorburn then Hugh Clifford as well as the two chiefs sitting on the Legislative Council, Matte Kole and Ofori Atta engaged in a debate over the perceived inadequacies of the 1910 Amendment. The chiefs opposed having village headmen, Odikros, hold courts and wanted to limit the jurisdiction of chiefs of lesser divisions and villages and to require Africans from other colonies to submit to the jurisdiction of the Native Tribunals. The debate over an attempt to revise the Native Jurisdiction Ordinance embodied in a 1919 Bill and that to come over one introduced in 1922 highlighted and exacerbated divisions between the traditional authorities of the interior and the coastal educated elites, a division that the elites, represented by such as T. Hutton Mills and J. E. Casely Hayford and the press that gave voice to their views saw as an effort by the British to divide and rule. Thus, we find in the Gold Coast Independent a leading article accusing the British of making a “grotesque” error in considering that the educated Africans “have little regard or respect for his (sic) chiefs.” The educated Africans, the article went on, just did not want their chiefs to “oppress and suppress his progress in the march of civilization.”

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3 Indeed, Governor Thornburn pessimistically told his Secretary of Native Affairs that he thought it unlikely that the chiefs would adhere to the provisions of the amended Ordinance for many years to come and that they would continue to decide cases just as they always had without consideration of the obligations the Ordinance imposed on them. GNA ADM 11/305, 3.15.1911, quoted in Bushoven III, 66-67.
4 GNA ADM 12/5/172A, The Gold Coast Independent, Vol. 141, No. 39, 11.27-12.4.20, 223-225. The coastal elites were not the only source of opposition to the traditional authorities. The Asofu, organizations found in the towns that, in Akan communities, generally consisted of young men that traditionally had been organized for war, also opposed chiefly authority. Terrence J. Johnson, “Protest: Tradition and Change, an Analysis of Southern Gold Coast Riots, 1890-190,” Economy and Society, Vol. 1, No. 2 (April 1972): 164-193, 168, 170, 178.
The Amended 1910 Ordinance would become effective on January 1, 1911 and in preparation for that date, the colonial Administration discussed a number of potential and actual issues, such as how a debtor could be imprisoned for debt by a Native Tribunal and who would pay for it, what form Writs of Execution should take, whether or not Native Tribunals had jurisdiction to issue search warrants at the request of a European and, most importantly, whether or not the Ordinance authorized Odikros to hold Court and, if so, whether they had the same jurisdiction as Division and Head Chiefs, because, if so, he believed that the Ordinance should be amended. As to this last, the Attorney General opined that the Odikros did have jurisdiction, but suggested an amendment to the 1910 Ordinance to define “chief” more precisely and directed the District and Provincial Commissioners to advise the chiefs that the earlier opinion of the Acting Attorney General to the contrary was no longer valid.

As noted above, within a year of passage, a number of shortcomings were seen in the 1910 Amendment Ordinance and not only by members of the Administration. The principal problem was the failure of the Government to provide a method of financing the Native Tribunals other than from fees and fines, thus permitting the chiefs to use them, in

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5 For example, the Superintendent of Police reported to the Governor that the Native Prison Ordinance of 1888 provided that where there was no registered Native Prison, defendants convicted of an offense in a Native Tribunal should be sent to a Government Prison. Consequently, the Government would have to charge the Tribunals for the maintenance of such prisoners and he suggested an amount that would be sufficient to encourage the chiefs to build and register their own prisons. GNA ADM 11/1/287, Minute, 12.22.1910. In accordance with Supreme Court practice, the District Commissioner of the district in which either the Tribunal or the prison was located would have to endorse the warrant, a requirement that the Secretary for Native Affairs Crowther believed would provide a check against wrongful imprisonment of defendants by Tribunals that lacked jurisdiction or where the term was excessive. Ibid., Minute, 1.18.1911.

6 GNA ADM 15/28, 1.26.1911; 3.7.1911.

7 Ibid., 8.9.1911.

8 GNA ADM 15/29, 7.13.1911. The Acting Attorney General had opined that Odikros could not hold Court under the 1910 Ordinance. Ibid., 7.14.1911.

9 Ibid., 12.9.1911, 12.28.1911, 2.23.1912. See also GNA ADM 11/1/305, Confidential, 7.20.1911, No. 56, 12.11.1911, No. 58, 12.12.1911 and No. 59, 12.13.1911.
the words of the Korsah Commission Report, as “a lucrative and valued privilege.” Yet no one proposed steps to remedy the problem.

Rather, attention focused on the distinction between and among chiefs. One of the more prominent chiefs, Nana Mate Kole, Kronor of Kobo, recommended amendments limiting divorce, paternity and custody cases to the courts of the Head Chiefs; more specifically defining the jurisdiction of Head and Division chiefs as the Ordinance seems to give them equal jurisdiction in contravention of customary law; limiting the right to keep and maintain prisons to Head Chiefs; and authorizing the Head Chief to define and set both the civil and criminal jurisdiction of subordinate chiefs. As he said, “What strikes me as the most objectionable of the Amended Ordinance No. 7 of 1910 is the equality of power given to Head-Chiefs and their subordinates. . . . This equality of power is sure to result in the disorganization of our society and political institutions.” He went on to request amendments to require natives of Sierra Leone and Nigeria to submit to the jurisdiction of the Tribunals in land cases where the land was within the Chief’s jurisdiction even if the transaction was based on English conveyancing documents since use of such documents was spreading rapidly and threatened, if his proposed amendment were not accepted, to deprive the chiefs of jurisdiction over most land cases; to add specific crimes, such as fighting in a public place, endangering life via a fetish charm, assembly for an unlawful purpose and aiding and abetting a crime to the Tribunals’ jurisdiction; adding some


___11___ GNA SC 17/25, Mate Kole Papers, Undated document, but from context seemingly from some short time after 8.17.1911.
additional fees to the schedules; and establishing a difference in the amounts of fines and fines between the Tribunals of the Head Chiefs and subordinate chiefs.\textsuperscript{12}

In September 1912, Governor Thorburn, who was replaced in December 1912 by Hugh Clifford, reported to Secretary of State Harcourt, as he had been requested to do, as to the workings of the 1910 Amendment Ordinance. Thorburn said that things were working well except in the coastal towns. While the people of the interior were satisfied to look to their chiefs for justice and the chiefs seemed to appreciate recognition of their judicial powers, the coastal elite continued to be opposed to traditional courts.\textsuperscript{13} However, he proposed an early amendment – as Mate Kole had recommended – that he said was necessary to clarify the status and jurisdiction of the various levels of Native Tribunals before minor village courts usurped the jurisdiction of the Division and Head Chiefs. Attorney General Hudson advised against a premature amendment and suggested waiting two or three more years to see better how things were working out.\textsuperscript{14}

A somewhat less positive view appeared in the 1912 Native Affairs Department Report that said that the working of the Native Tribunals was “fairly satisfactorily.” It said that the Ordinance was difficult for many of the chiefs to understand – belatedly acknowledging the criticism of Griffith and others -- and required amendment. The Secretary for Native Affairs, Francis Crowther, admitted that the Tribunals kept few

\begin{footnotesize}
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\item \textit{Ibid.} Responding to the penultimate proposal, the Attorney General said that it was not fair because he, Governor Rodger and J. M. Sarbah worked closely together and studied fines and fees of many Tribunals around the Colony to arrive at the scheduled amounts. GNA ADM 15/29, 1.12.1912.
\item \textit{Ibid.} GNA ADM 1/2/51, No. 628, 9.10.1912, 127-128. See also Thorburn’s Estimate Speech to the Legislative Council where he used the same language in describing the workings of the Native Tribunals. GNA ADM 14.1.10, 10.28.1912, 564.
\item \textit{Ibid.}, Enclosure, Memorandum form Attorney General, 1.12.1912.
\end{enumerate}
\end{footnotesize}
records, and the Commissioner of the Eastern Province noted that the Chiefs there sought a higher fee schedule and differing jurisdiction for Head Chiefs and lesser chiefs.\textsuperscript{15}

Governor Hugh C. Clifford acknowledged that the practice of dividing fees and fines among chief and councillors of his Tribunal encouraged excessive fees and fines and that the Ordinance should be amended to prevent such practice, an amendment that was never enacted.\textsuperscript{16} In 1915, the Government appointed a Committee to examine the workings of the 1910 Amendment Ordinance and to recommend necessary amendments. The most important issues to be examined were whether or not an Odikro had the right to form and hold a court and whether or not a chief’s jurisdiction was personal or territorial.\textsuperscript{17} In his 1915 Annual Report on Native Affairs, the Secretary for Native Affairs, Crowther, reported that a new Bill would try to deal with issues of land acquired by immigrants from other states of the Gold Coast who still owed loyalty to the chiefs of the states from which they came and would provide for grading Tribunals and assigning jurisdiction accordingly – a reform not implemented until 1944. He expressed his concern that the Tribunals “show a tendency to abandon their own traditions and to follow the forms and methods of the English courts.”\textsuperscript{18}

Issues, probably of long standing, as to inherent right showed, in Clifford’s words, “no sign of abatement.” As a practical matter, these issues meant little at that moment and the Secretary for Native Affairs felt that with close supervision, they could be reconciled

\textsuperscript{15} GNA ADM 5/1/66, Native Affairs Department Report 1912, 1.
\textsuperscript{16} BNA CO 96/528, Confidential, 3.13.1913.
\textsuperscript{17} BNA CO 96/697/4, Enclosure 1, , ¶16.
“with a system of wise regulation.” Of greater concern were reports, many of them said to be justified, that the Tribunals had a tendency to continue to charge fees in excess of the amounts allowed under the Schedule to the 1910 Ordinance, a fault attributable to illiterate chiefs who were “more or less in the hands of their Registrars.” In addition, it was reported that many of the Tribunals wrongly exercised their jurisdiction “through the ignorance or arrogance of the Tribunal Police or Clerks who are rather prone to an abuse of their powers.” The only remedy proposed was closer supervision by the already overworked District Commissions to see to it that Tribunal Registrars were knowledgeable as to the provisions of the Ordinance, a remedy that had not worked in the past.

Tribunal personnel, most of whom were illiterate, much less legally trained, were required to know and interpret an extensive and complicated statute and then the British carped because they failed to do so properly. One District Commissioner criticized the members and Registrar of a Tribunal for not understanding the elements of the crime of assault on the facts presented to it when assault was not defined except in the Criminal Code and then for imposing an excessive penalty. Since most defendants, as well as most civil litigants before a Tribunal, were also illiterate and poor, appeal to a superior tribunal or

\[19\] GNA ADM 12/3/26, Confidential, 1.26.1917, Enclosure. There were other issues to be addressed, that, as important as they seemed, did not get addressed then or for some time to come. For example, C, H. Harper, the Provincial Commissioner of the Eastern Province pointed out that a native tribunal was required at Nsawam but that there was no one qualified to hold it. He requested that the question of how to organize native courts be considered and made part of the next amendment to the Native Jurisdiction Ordinance. Williamson, 74.

\[20\] GNA ADM 5/1/73, 11, 1924. Acting Provincial Commissioner Bartlett noted in his diary a meeting on June 11, 1916 with an Omanhin and his councillors as to an unfavorable report on the fines charged by his tribunal made by the Acting District Commissioner. The fines seemed to be getting heavier daily. Bartlett’s diary said that he thought the Acting District Commissioner was “a little too exacting in his standards, but a little shake up will do them [the Omanhin et al] no harm.” Williamson, 116.
to the District Commissioner rarely was a practical remedy, particularly since lawyers were not permitted to represent or advise such parties.\textsuperscript{21}

Since 1915, work on a revised Ordinance Bill continued with apparently little progress toward completion. Governor Clifford had become convinced after study of the various proposals for amendments and consultation with the chiefs that amendment would be “useless” and that a new bill would be necessary.\textsuperscript{22} In early 1918, Clifford told the Colonial Office that the draft Bill, despite the fact that “preparation of which had occupied much time and thought,” was not yet ready although he hoped to be able to send it to the Colonial Office in a few months.\textsuperscript{23} In October 1918 it appeared that the draft Bill was still unready. The new Secretary for Native Affairs, T. J. Furley, reported that it “was again considered by a committee who redrafted the Bill prepared by a former committee.” He said that the principal changes related to “a procedure by which some finality can be secured to their [the Tribunals’] judgments especially in disputes relating to the ownership of land held under [native] tenure . . . .”\textsuperscript{24}

Most appeals from Native Tribunals came initially to the District Commissioner of the division in which the tribunal sat. It was the task of the District Commissioners to assure justice was done. In general however, Governor Clifford found that the District Commissioners were an unsatisfactory means by which to supervise Native Tribunals. He

\textsuperscript{21} GNA ADM 11/1/974, No. 56, 3.3.1925. Nevertheless, the chiefs were often dependent on the District Commissioners as to how they handled their courts. Captain B. H. W. Taylor, Acting District Commissioner in the Black Volta area of the Northwestern District noted in his diary for May 5, 1906 a visit by a chief who had tried a man for assault on Taylor’s instructions and now came, along with the defendant’s father, to ask Taylor if the verdict had been correct. No appeal had been filed, this was a purely informal visit. Taylor noted that he told the visitors that “I could not have done better myself.” Both visitors left satisfied. Williamson, 64-65. 


\textsuperscript{23} GNA ADM 12/3/28, Confidential, 2.4.1918, 146.

\textsuperscript{24} GNA ADM 12/3/29, Confidential, 10.9.1918, undated Enclosure, 248.
complained to the Secretary of State, Andrew Bonar Law, that they were rarely in their districts for more than twelve months before going on leave and even more rarely returned to the same district. Indeed, they “moved from post to post with so bewildering a frequency that they were precluded from acquiring a deep and intimate knowledge of any one district or of any of its chiefs or peoples,” so that “efficient” British oversight of Chiefs was “an impossibility.”

In the interim, complaints about the Native Tribunals continued unabated, relating, as they had continuously since the creation of the Colony, to excessive fees and penalties. Despite these complaints, the British asserted, that the comparatively low number of appeals to the District Commissioners demonstrated that “the system is one which is suitable to the ideas of the people and with the working of which they are as a whole content.” This assertion ignored the illiteracy of most of the population and assumed the failure to appeal was deliberate rather then the consequence of ignorance of the law and/or intimidation by the chiefs, a fact that Furley, the Secretary for Native Affairs, seemed to confirm when he wrote of the necessity, “to eliminate from the mind of the average chief the idea that his Tribunal is primarily a revenue producing institution and that an appeal from his judgment does not in itself constitute an act of disrespect or insubordination to his authority.”

In late 1918, the Governor reported that he was ready to introduce a new Bill into the Legislative Council. It declared that British sovereignty was unrestricted and that native jurisdiction was dependent upon the Colonial Government. Had this provision been enacted into law, much future debate would have been avoided. The draft bill provided

26 Ibid.
27 Ibid.
that only Head Chiefs would have jurisdiction in land cases and their jurisdiction in personal cases would be higher than that of Divisional Chiefs. District Commissioners would have the power to transfer cases and to sit with the Chiefs in their tribunals. Appeals in land cases would be to the Provincial Commissioners as a court of last resort, so that the Supreme Court would be deprived of all jurisdiction, original or appellate, in land cases as well as in stool disputes. A Colonial Office minute noted the obvious intent of the Governor to minimize the influence of attorneys and opined that the Governor had gone too far.\(^\text{28}\) At last, the proposed revised Bill was introduced into the Legislative Council in February 1919. It permitted the Governor in Council to extend, remove or restrict specified jurisdiction, thus restoring a provision of the 1883 Ordinance that had been removed from the 1910 Amendment.\(^\text{29}\) Since Governor Clifford was about to turn over his office to Governor Gordon Guggisberg, he adjourned the second reading of the Bill for six months.\(^\text{30}\) The provisions of the Bill requiring confirmation of a Chief by the Governor-in-Council and enabling suspension of the jurisdiction of a Tribunal by the same institution produced much opposition from both customary chiefs and the urban elite. Clifford reported to the Colonial Office that the Accra sub-chiefs, two doctors, ten merchants and three lawyers had petitioned against the Bill and that the petition was said to have been approved by a mass meeting.\(^\text{31}\) The petitioners argued that the Bill was an attack on traditional Akan democracy, converting chiefs into “quasi official” “Government creature[s]” and traditional democracy into a colonial bureaucracy.\(^\text{32}\) In addition, there was a petition from the ARPS challenging the Bill’s elimination of village chiefs’ jurisdiction and divisional chiefs’ jurisdiction in land

\(^\text{28}\) BNA CO 96/593, Confidential 11.28.1918.

\(^\text{29}\) BNA CO 99/34, Gazette, 2.15.1919, 219.

\(^\text{30}\) BNA CO 96/697/4, Enclosure 1, .. ¶21’.

\(^\text{31}\) BNA CO 96/614, Confidential, 7.7.1920.

\(^\text{32}\) Gold Coast Leader, 11.5.1920, 12..20.1920.
cases and arguing that people would be subjected to the mercy of corrupt chiefs without access to redress in the Supreme Court. Moreover, the elites accused the Government of attempting to “prop up the power of ignorant chiefs so they could resist the just demands of the educated but also of making them ore clearly the tools of the Europeans.” Faced with this opposition, the Bill was never read a second time but was withdrawn. Indeed, Governor Clifford’s biographer argues that Clifford could have imposed his Native Jurisdiction Bill on the people because he had an official majority in the Legislative Council and the support of the Colonial Office, but that unlike Lord Lugard in Nigeria, he refused to use coercion to force acceptance of his policies. While, as we shall see, the coming debate on the 1922 Native Jurisdiction Bill showed a solidarity between traditional chiefs and educated elite not seen since the 1895 and 1897 Land Bills, it also showed how closely the elite identified with the culture of their colonial masters.

In September 1922, Furley, the Secretary for Native Affairs introduced the latest iteration of a Native Jurisdiction Bill. He said that it contained provisions responsive to the criticisms of and suggestions for the 1919 Bill particularly with respect to confirmations of chiefs, appeals in land cases and the Schedule of fines and fees and Rules of Practice. The Attorney General’s Statement of Objects and Reasons noted that a 1915 Bill had been referred by a committee to Head Chiefs, judges, Provincial Commissioners and others for comment and their suggestions incorporated.

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33 Gailey, , 80.
34 Ibid., 80-81.
35 GNA ADM 14/2/8, 9.22.1922.
36 GNA ADM  6/68, 617.
J. E. Casely Hayford presented petitions from the ARPS and two Bar Associations to be heard by counsel as to suggested amendments.\textsuperscript{37} He asked to be heard before the committee stage because at that point only detail could be discussed and he argued that several key principles were at stake. With the support of Nana Ofori Atta, Mate Kole and the third chief on the council his request was granted.\textsuperscript{38} T. Hutton Mills presented the ARPS’ position objecting to the provision limiting chiefs’ jurisdiction because it made him “a Government creature” who “ceases to be the leader, the champion and the protector of his people that the Native Constitution expects him to be.” He argued for recognition of the inherent rights of the chiefs and for recognition of three levels of chiefs. Native customary law should not be defined but should be left to develop naturally as it always had. Lawyers should not be excluded from Tribunals, Mills argued, if their fees were deemed to be too high, they could be scheduled as in England. Boundaries should be settled if disputed by the Supreme Court and the Governor-in-Council should not be involved. Since land disputes were the most important ones, they should be dealt with by trained judges who had experience, not executive officers, and in courts that would properly hear counsel. Nor should Provincial or District Commissioners be allowed to sit with the chiefs in their Tribunals as that would “restrict the freedom of action” of the chiefs and their councillors. If a Tribunal were so incompetent, jurisdiction should be given to the Supreme Court. Appeals should not be limited monetarily and motions to transfer should be heard by the Supreme Court with the participation of counsel and no Executive Officer should be involved in determining leave to appeal, nor should Provincial Commissioners hear cases

\textsuperscript{37} One of these, from a local barrister, proposed that Tribunals should consist of a fixed number of people selected from the whole population, not just hereditary members with a rotating membership and rotating presidents, to be paid from a Tribunal treasury into which all fees and fines would be deposited and that would be audited by the District Commissioners. Beyond a statement by the Secretary for Native Affairs that the proposal was “interesting,” noting was done. GNA ADM 11/1/1240, Letter, 4.28.1921. This proposal found its way into law in the Native Courts Ordinance of 1944. See Chapter IX, \textit{infra}.

\textsuperscript{38} \textit{Ibid.}, 11.21.1922, 397-428.
whether in the first instance or on appeal as he is a political officer. The Supreme Court should be allowed to determine customary law as it deemed fit; assessors were unnecessary. Finally, judges should hear land cases as there was “No good ground shown” for them not to. Mills thus repeated several times the theme of ARPS and Bar Association arguments from the 1870's to the 1940's: The Executive should be separated from the Judiciary and he received the same response as his predecessors and his successors did, although as time went on even Government officials became more ready to accept his argument.

In moving the second reading of the Bill, Secretary for Native Affairs, Furley, averred that the reason for giving the Governor-in-Council power to add or restrict jurisdiction was to reward efficient Tribunals and punish inefficient ones. He asked a series of rhetorical questions that, he said, should be discussed in Committee, among which were was the Supreme Court a good venue for consideration of customary law? How, and to what extent, should Tribunal jurisdiction be limited, if at all? He then went on to argue that the current law by which appeals in land cases lay from Head Chiefs to Provincial Commissioners and then to the Full Court was good law and that there is no reason to change it, noting that since 1912 only nine of the fifty appeals to the Full Court from decisions of the Provincial Commissioners were allowed and an additional seven were remanded, a very good record.

Casely Hayford argued in rebuttal that Provincial Commissioners were less competent to decide land cases than the Chief Justice and the Puisne Judges who were

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39 GNA ADM 14/2/8, 445-474.
40 The next day, Peter A. Renner argued on behalf of the Bar Associations and essentially repeated Mills’ arguments: appeals and other legal matters were to often left in the hands of laymen “as a rule whose attention is most engrossed with executive and political matters.” Renner vociferously objects that the provisions excluding attorneys from helping litigants was, to say the least, vicious.” Ibid., 476-486.
41 Ibid., 491-503.
there as representatives of “the King’s justice,” and that administration of justice should not be diminished by being placed in the hands of administrative officers. He also opposed the transfer provisions and quoted at length from former Chief Justice Griffith to show the waste of time, effort and money in requiring transfers from the Supreme Court to a Tribunal. It was obvious, Casely Hayford asserted, that Tribunal jurisdiction should be coordinated and concurrent with that of the Supreme Court and that exclusive Tribunal jurisdiction was neither right nor fair. Responding to Furley’s statistics, he contended that dismissals of land appeals by the Full Court were as much a function of improper or bad records made in the Tribunals as the lack of merit of the case, so that those statistics were meaningless. Again quoting Griffith, this time from his Petition against the 1910 Ordinance, Casely Hayford cited the long delays in resolution of land cases by Provincial Commissioners who did not have time to view the land and who never got a proper plan from a licensed surveyor as did the Supreme Court. He concluded: “I say that British justice is appreciated in these parts more than anything else, and I am here today pleading for the integrity of the Judicial Bench of the Gold Coast, its pristine position as under the Bill of 1883.”

Sadly, the irony of an African lawyer arguing passionately for British law and justice against a pastiche of customary, English and administrative principles was lost on the colonial authorities.

Nana Ofori Atta joined in the opposition, expressing his displeasure with the provision excluding alien Africans from customary jurisdiction. Atta also argued that monetary jurisdiction should be uniform throughout the Colony so that one state did not try to undermine another. He strongly opposed the power granted by the Bill to the Governor-in-Council to vary jurisdiction as that would destabilize Native government and cause

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42 Ibid., 516-527.
unrest by making people suspicious of their chiefs. Finally, he proposed that appeals in land cases should go from the Head Chief to the traditional state council, rather than the Provincial Commissioner, and from its judgment to the Full Court. The Gold Coast Leader expressed wonder if such legislation originated with the Colonial Office or “are the offspring of limitless zeal on the part of the local Administration.” It asked if it was British policy “to strike at the roots of our institutions and our land system by an insidious process of legislation, the effect of which is to undermine the chiefs. Similar press criticism continued over the next several years, often focusing on popular unhappiness with political officers performing judicial functions. The paper’s leader then objected strenuously to appeals from Native Tribunals to District and Provincial Commissioners, executive officers who “nine times out of ten know no law.” Such appeals cause confusion and expense “to the ordinary litigant who formerly had the ordinary jurisdiction of the Supreme Court to rely upon with much satisfaction and less expense.”

In concluding the debate, the Governor defended his political officers, saying that he “strongly deprecates any disparagement” of the way that political officers administered justice. He iterated Government’s right to regulate Native Jurisdiction, but that it was clear from the debate that the Bill was not yet ready and required further study (“very close enquiry”) and, thus the Bill had to be withdrawn, which, on motion of the Secretary of Native Affairs, it was. Governor Guggisberg considered the debate in the Legislative Council over the proposed Native Jurisdiction Ordinance to have been the of the highest quality in which he had ever participated. Ultimately, however, the bill failed over the issue

43 Ibid., 12.1.1922, 556-568.
44 Gold Coast Leader, Cape Coast, 1.11.1925, 8.
as to whether the Administration or the indigenes held ultimate judicial and ministerial authority. 46

While this futile debate was going on, complaints about the conduct of the Native Tribunals continued to be received by the Colonial authorities. The Commissioner of the Central Province reported many complaints from all districts about excessive fees, assertion of jurisdiction outside and beyond that permitted and unjust decisions and heavy fines, complaints that the District Commissioners seemed unable to adjust and behavior that they seemed unable to prevent. The Provincial Commissioner laid responsibility at the feet of some “semi-literate and unscrupulous” Tribunal Registrars. He noted that some were being trained by District Commissioners, but that a better policy would be to pay them a regular salary so that they would no longer be dependent on a share of the revenues. He also recommended a reduction in the number of petty Tribunals so that the more important ones would be easier to control. 47

In 1924, operations of the Tribunals under the 1910 Ordinance were thrown for a loop when the Supreme Court ruled, that a Native Tribunal had no authority to order arrest for debt. 48 Puisne Judge Hall held that the Schedule to the Native Jurisdiction Ordinance provided for execution against property or any other method allowed by customary law that was not repugnant. Hall heard expert witnesses on what customary law allowed and based on such evidence as well as Sarbah’s Fanti Customary Law, he determined that it allowed

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46 Wraith, 194.

47 GNA ADM 5/1/79, 15. For example, the District Commissioner of Accra said that there were too many tribunals in Accra and that they did not carry out their work as per the Native Jurisdiction Ordinance, so that it was usual for a losing party to take his case to a different tribunal, thus prolonging litigation and compounding opportunities for charging fees and for corruption. BNA CO 99/37, Gazette Supplementary, Provincial Annual Reports, 6.17.1922, 18-19.

48 Appaw v Smith, Div. Ct., 12.29.1924, Hall, P. J. The case came to the Court on an appeal from the judgment of a Police Magistrate dismissing Plaintiff’s action for assault and false imprisonment against the claimant in a Tribunal case who had him arrested for debt after he had defaulted in appearance and a judgment was entered against him on the claim. The Tribunal issued a warrant for his imprisonment for three months or until the judgment against him was paid.
imprisonment for debt but without limit as to time. He decided that such unlimited imprisonment was repugnant to justice and natural law and thus could not be permitted.49

The Native Administration Ordinance of 1927

The purpose of the 1927 Native Administration Ordinance was to remedy the blatant defects that practice had shown existed in the 1910 Native Jurisdiction Amendment Ordinance, particularly to make litigation in the Native Tribunals cheaper and free of corruption. Albeit, from the chiefs’ perspective, the main purpose was to bolster their position as the traditional rulers of the country. As shall be seen, despite vigorous efforts by the chiefs led by Ofori Atta from 1922 and continuing even after enactment of the Native Administration Ordinance in 1927, neither goal was completely achieved since litigation in the Tribunals continued to be burdensome and subject to extortionate fees while the chiefs complained that British regulation was undermining their position with their people.

Almost as soon as the 1922 Bill had been withdrawn, officers of the colonial Government led by Governor Guggisberg and Secretary of Native Affairs Maxwell began consultations as to how to proceed to regulate native jurisdiction in the face of united opposition from both coastal elite and traditional authorities. Frustrated as to how to achieve enactment of such a bill, Governor Guggisberg said that Government would not move again unless and until the chiefs and State Councils moved first. He decided to

49 Under the Supreme Court Ordinance, Hall wrote, imprisonment for debt was limited to three months and just one arrest per judgment. No such limit was to be found in customary law, so that a Tribunal could imprison a judgment debtor, release him and rearrest him multiple times. Thus, he concluded that the Tribunal had no jurisdiction to issue the writ, so he reversed the judgment of the Police Magistrate and remanded the case for an assessment of damages. GNA ADM 11/1/903: 12.29.1924. In order to protect the Chiefs from multiple lawsuits and to make sure they were protected and judgments could be enforced going forward, the Legislature passed an Indemnification Ordinance, the Native Jurisdiction Protection [Indemnification] Ordinance No. 6 of 1925, providing that no one could sue a chief or his councillors or the Tribunal, for issuing a writ to arrest a debtor provided that it was issued in good faith. GNA ADM 6/73, 1126. At the same time, the Governor issued his Order No. 7 of 1925 under the 1910 Ordinance adding a new Rule 5 providing for execution against property or arrest of a judgment debtor for a period of up to three months, with the cost of subsistence to be added to the judgment debt. The debtor’s property could be sold, but except for perishables, not during his imprisonment without his written consent. Ibid., 128.
discuss the matter with Nana Ofori Atta, Head Chief of Akyem Abuakwa, and a member of
the Legislative Council. The Provincial Councils of Chiefs of the Central and Eastern
Provinces jointly prepared a draft that was substantially revised by Attorney General
Wilkinson. The Government decided that it would permit an unofficial Bill after it had
considered and approved the provisions. The chiefs, aided by Cape Coast Municipal
Member, R. J. P. Brown, met and agreed on certain principles, then informed all chiefs and
invited their views. The chiefs conferred for fourteen days, received letters from those not
attending, sent a memorandum of the results of the conference to all chiefs, and received
their comments. They agreed on many principles contained in the Bill then before the
Legislative Council, but did nothing more until May 1926 so that the chiefs could consult
their respective State Councils. In May 1926, the Head Chiefs of the Eastern Province met
along with many Divisional chiefs who took part in the discussions, after which they named
one Head Chief to put everything together. His draft was approved in July 1926 and sent
to the Central and Western Province Councils which expressed their views. The Bill was
redrafted and sent to the Government that appointed a committee to meet with
representatives of the chiefs to discuss the Bill and redraft it. The Bill on the floor was the
result which, according to Atta, all but two chiefs “warmly acclaimed.”

Ofori Atta introduced the Bill, the first time a private member had done so. He told
the Legislative Council that everyone felt the need for revision of the Native Jurisdiction
Ordinance in order to support the chiefs. He quoted the Governor as saying that “Government
will have to do something to strengthen the power of the chiefs to prevent their rule becoming a farce.” Atta listed the main features of the Bill as: 1) recognition of customary rights and powers of the State [Oman] Council; 2) giving Government the final

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50 GNA ADM 14/2/13, 3.3.1927, 243 -245, 467-468.
say on political disputes affecting States; 3) regulating and “placing on a sound basis the powers and jurisdiction of the Tribunals in their order of precedence and within their territorial limits with necessary powers for enforcing their judgments and verdicts;” 4) facilitating means of “preventing and checking abuse in the Tribunals by the Government through its Commissioners; 5) utilization of the provincial councils for administrative and judicial purposes subject to the Executive Government and the Judiciary; and 6) to provide the means to codify customary law.\textsuperscript{51}

In an effort to broaden the discussion of the Bill, which he adjourned until April 1927, Guggisberg named three extraordinary members to the Council, Casely Hayford, the Chief of Dixcove in the Western Province and Mr. Adda Glover. Casely Hayford declined to sit but attended the April meeting to argue in support of a Petition against the Bill on behalf of the ARPS. The Council rejected the Petition and denied Casely Hayford’s application to argue before the Council, the Governor expressing his regret that Casely Hayford declined the opportunity to present the ARPS views from inside the Council.\textsuperscript{52}

In moving the second reading of the Bill, Ofori Atta went into some detail as to certain of the Bill’s provisions. Most dealt with political relationships among the chiefs and between the chiefs and the Government, but some focused on the operations of the judicial fora. He said that he was eager to codify customary law because he saw how in the Supreme Court it was “twisted and distorted” by lawyers to promote their case, so provision was made for discussion of custom and traditional law in the State Councils and formulation by them of a definitive statement for approval by the Government as not

\textsuperscript{51} GNA ADM 14/2/12, 2.16.1927, 533-535.
\textsuperscript{52} GNA ADM 14/2/13, ., 4.19.1927, 457-458.
repugnant.\textsuperscript{53} Courts, neither Native nor British would have any jurisdiction in political matters involving stool disputes that should be decided by State Councils with help if necessary from Provincial Councils.\textsuperscript{54} Persons accused of undermining the chief might be tried by the State Council, not the chief who was the object of the alleged offense, with an appeal to the District Commissioner. Chiefs, Atta argued, were entitled to respect and while opposition was lawful and necessary, subversion was not.\textsuperscript{55}

He then turned to questions of jurisdiction of Native Tribunals. Traditionally, the Paramount Chiefs’ jurisdiction was unlimited but under this Bill it would be £100. Atta said that he tried for more but that £100 was the best to which he could get the Government to agree. He regretted that Divisional Chiefs’ jurisdiction was only £25 and not £50, but again, that was the best that the Government would accept. He hoped to be able to get it increased later when the chiefs showed how well they could operated their Tribunals. He rebutted criticism that Divisional and Paramount (formerly called Head) Chiefs should have equal criminal jurisdiction. It never was so and even Casely Hayford admitted that. Appeals under the Bill would lie to the District Commissioners because it was necessary to have someone close to “correct and guide the Native Tribunal.” For the same reasons applications for leave to appeal would be made to the District Commissioners because they were close and the Provincial Commissioners were difficult to reach.\textsuperscript{56}

Atta explained that the Bill sought to limit the number of Tribunals because too many could cause “confusion and trouble.” Only two levels, Paramount and Divisional were necessary. Clearly he intended to say that Odikros would not be authorized to hold courts.

\textsuperscript{53} Ibid., 465. This provision continued the colonial power’s control of law and justice by giving it the last word as to the propriety of any formulation of customary law.

\textsuperscript{54} Ibid., 471.

\textsuperscript{55} Ibid., 472.

\textsuperscript{56} Ibid., 475-476, 478-479.
However, he went on, chiefs not entitled to hold Tribunals under the Ordinance could still act as arbitrators as they had always done. Opponents of the Bill, led by Casely Hayford, said Atta, charged that the chiefs had more power under the proposed Ordinance than traditional law allowed, a charge Atta denied because traditionally chiefs had the power of life and death and they were now restrained by Government acting with an English sense of justice and fair play. He went on to defend against claims that Divisional Chiefs were reduced from being equal to Paramount Chiefs contrary to customary law, by citing Casely Hayford’s treatise to the contrary.

Kojo Thompson, an African municipal member, charged that not enough time had passed since leave to introduce the Bill was given to enable the public to understand and critique the Bill. He introduced what purported to be a resolution of some Akwapam chiefs against the Bill and against the restrictions on the jurisdiction of the Supreme Court that would work hardship and increase litigation by increasing Tribunal jurisdiction, a claim that is difficult to comprehend. Thompson said that the Bill would introduce conflict between people and chiefs and more time was needed to work things out. He claimed that the Bill was no different that the 1922 version that the Government had withdrawn. He attacked the provisions criminalizing opposition to the chiefs, saying that they struck at the roots of the traditional constitution. If such powers existed before, why was it necessary to put them in a statute now, he asked. Chiefs would use such powers against opponents who tried to destool them. All chiefs were equal, he contended, citing Sarbah’s Fanti National Constitution that a King was only first among equals. He proposed that a commission should be appointed to study Tribunals as was done in 1894. He also objected to the £100 jurisdictional limit of Paramount Chiefs’ Tribunals, but not because it was too low, but

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57 Ibid., 480-481.
58 Ibid., 483.
because it was too high; most chiefs were illiterate and incapable of rendering intelligible judgments, so that people should be able to take their mid sized claims to the Supreme Court.59

The debate exposed the fault lines between the people of the interior and the coast and between traditional, mainly illiterate people of the interior and educated merchants and professionals of the coast towns. Atta summed up the position on his side of the fault line: “In matters affecting Native Constitutions and Native Customary Law, the chiefs coming from the interior do not expect to be guided by people in Accra and the coast towns, much less from one [referring to Thompson] who, from infancy because of the kind of education he had received, has apparently lost touch with the Constitution and Customary Laws of his country.”60 One can just imagine how pleased Governor Guggisberg and his immediate subordinates were to hear such sentiments about the men whom the Government disdained and maybe even feared.

In Committee, the Government accepted amendments to increase the jurisdiction of Divisional Chiefs from £25 to £50, to require consent of all parties to permitting counsel to appear in transfer cases and to provide that when the Provincial Council was not functioning, its powers and duties would be exercised by the Provincial Commissioner. As so amended, the Bill was read a third time and passed as No. 18 of 1927. The Governor then stated his regret that Brown, Casely Hayford and Addo Glover were not present to participate in the debate because they represented an important constituency and should have made their views heard. More importantly, he cautioned that the chiefs should note that the municipal members attacked the integrity of the Tribunals and that they should

59 Ibid., 492-504.
60 Ibid., 536.
keep on “the very highest peaks of honesty and integrity, and that it is up to the chiefs and the State Councils to insure that the Tribunals meet this standard.\textsuperscript{61}

The Colonial Office having advised that the King would not disallow the newly enacted Native Administration Ordinance, the Legislative Council met in October 1927 to consider and approve the Rules of Practice. These were accepted without much dispute and it was announced that the Ordinance would come into effect on January 1, 1928.\textsuperscript{62}

Among the major provisions of the Ordinance dealing with the Tribunals were: making jurisdiction territorial rather than personal, \textit{i.e.}, jurisdiction would extend to anyone present in the State or Division when the claim arose; there would be jurisdiction over all civil actions except those arising from agreements to apply English law or where, because of the nature of the transaction, English law should apply; jurisdiction of the Paramount Chiefs’ Courts would be limited to £100 in personal actions and would cover divorce, paternity, custody, succession, and actions relating to land located in the State; the jurisdiction of the Divisional Chiefs’ Courts would be the same except the limit for personal actions would be £50 and in succession cases to property with a value of less than £200; all courts would be entitled to issue writs of execution against real and personal property; specifying the crimes subject to criminal jurisdiction and the maximum penalties for each; authorizing searches and seizure, except as to the property of Europeans, for stolen property; permitting arrest plus any customary method to insure the appearance of a defendant; permitting diversion of all or part of a fine to an injured party in lieu of damages and restitution; criminalizing holding an unauthorized Tribunal; proscribing presents, bribes and corruption and punishing these offenses with severe penalties; banning barristers and solicitors in Tribunals and cases transferred to a District or Provincial Commissioner’s

\textsuperscript{61} Ibid., 554-568, 579.

\textsuperscript{62} Ibid., 9.27.1927; 10.24.1927.
Court from a Tribunal except that where all parties consented and would be represented, the court to which the case has been transferred might permit counsel to appear; requiring all cases pending in the Supreme Court within Tribunal jurisdiction to be transferred to a Tribunal unless it had been previously transferred from a Tribunal or unless a claim in interpleader of a cross-claim had been asserted in a case otherwise properly before the Supreme Court; permitting, but not requiring, issues of customary law to be referred to a Tribunal for its opinion, but authorizing the referring court to accept or reject the Tribunal opinion as it wished in its sole discretion; making provision for nationwide service of process and for subpoenas to out-of-state witnesses; providing that European witnesses might be deposed before a District Commissioner; authorizing a Paramount Chief to remove a case from, or transfer it to, a lesser Tribunal when he deemed it expedient or doubted the lesser Tribunal’s jurisdiction; permitting a Provincial Commissioner to transfer a case from a Tribunal to a District Commissioner or to another Tribunal with jurisdiction or to a Divisional Court of the Supreme Court except in land cases; providing that appeals lay from lesser Tribunals to Paramount Chiefs’ Tribunals and then to a District Commissioner except in land cases and very petty civil or criminal cases; providing that land cases would be appealable from the Paramount Chiefs’ Tribunals to the Provincial Commissioner and from his judgment to the Full Court; authorizing appeals from a District or Provincial Commissioner, except in land cases to a Divisional Court of the Supreme Court; and granting discretion to any tribunal or court to which an appeal was taken to hear a case de novo all or in part on appeal or to remand for taking of new evidence.

This resume of the principal provisions of the Native Administration Ordinance relating to the Chiefs’ judicial functions clearly demonstrates a glaring weakness in the

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63 Once again assuring British control of customary law.
64 GNA ADM 6/78, 4.22.1927, 1584 et seq.
statute as the Government had not reserved the power to vary the schedule of chiefs who could hold tribunals, of which it has been said, there were too many.\textsuperscript{65} Another weakness was the failure to provide expressly for supervision of native tribunals by granting the District Commissioners revisory powers, a failure not remedied until 1935. Theoretically, the District Commissioners would closely supervise the Tribunals by meeting with the chiefs, but in fact they were too overburdened with their own judicial and administrative responsibilities and too few in number to carry out supervisory functions except as a forum for appeals. Moreover it was so intricate that many of the Africans required to enforce it misunderstood its provisions.\textsuperscript{66} Extortionate fees continued to be charged and unjust decisions continued to be rendered and the Government was obliged repeatedly to amend the Ordinance in ultimately futile efforts to strengthen it so that justice would be rendered.

Meanwhile, the Government faced a storm of opposition to the Ordinance from the coastal press. Even before it was passed, attacks began. Thus, in March 1927, the \textit{Gold Coast Independent} assailed Ofori Atta and the Bill as being only in the interests of the Chiefs and reflecting the “partisanship” of that interest group without consideration for the many people of the coastal communities. It encouraged the Government to go slow in pushing the bill as it did not deal with the interests or problems of all the people.\textsuperscript{67} The Government took such opposition seriously, opposition that continued throughout 1928 and into 1929 and manifested itself in part by the refusal of certain Chiefs to participate in the Provincial Councils of Chiefs, sometimes depriving them of a quorum and the ability to function.\textsuperscript{68} Acknowledging strong opposition being “carried on by a small minority,” the

\begin{itemize}
\item \textsuperscript{66} \textit{Ibid.}, 65.
\item \textsuperscript{67} \textit{Gold Coast Independent}, 3.19.1927, 369.
\item \textsuperscript{68} GNA 5/1/88, 5/1/89.
\end{itemize}
Administration sought to convince London and the public that most of the chiefs began to accept that the colonial government was attempting to restore autonomy to them. At the outset of the year only nine of twenty eight states were participating in the Provincial Council of chiefs, but by the end of the year, the Provincial Commissioner of the Central Province reported, all but three were participating. By refusing to recognize the Tribunals of the hold out chiefs, the Provincial Commissioner said, the Government would soon force them to participate in order to regain the revenue arising from their Tribunals. Things went better for the Government in the Eastern and Western Provinces where, although opposition had not yet ceased, it had lessened as people began to see that their rights and interests were not being restricted as the opponents of the Ordinance had told them they would and there were no attempts to hinder appeals from the Tribunals to the Government’s administrator-judges. Things would go much more smoothly, a colonial official opined, if better Registrars could be obtained, but the stools were too poor at the moment to pay enough to attract the “right class of man.”

In the following year, the Eastern Province reported more appeals from Tribunals, a fact that the Provincial Commissioner attributed to a greater use of the Tribunals rather than to their inefficiency. Moreover, better Registrars who had gone through a training program were making the Tribunals work better: “Comparatively few complaints” show that Native Tribunals were being run fairly and efficiently, albeit better in strong states such as Atta’s Akyem Abuakwa and Kole’s Manya Krobo and worse in states with weak leadership and government.


70 GNA ADM 5/1/89, Eastern Province Report 1929-30, 12. As noted earlier, it is unclear whether the reduction in appeals could be attributed to acceptance of customary justice or intimidation by the chiefs who had rendered the judgments.
Press criticism continued unabated. The newspapers attacked the Ordinance indirectly by attacking the tribunals, comparing the fees they charged with those the Supreme Court charged and accusing the tribunals of selling justice.\textsuperscript{71} People went to the British courts whenever possible, the \textit{Gold Coast Independent} said, because, “It is an open secret that they [Native Tribunals] very often allow prejudice, engendered by factional strife to influence their decisions.”\textsuperscript{72} Such factional strife was illustrated by the dispute among three chiefs, as a result of which two of whom would not enforce the summonses of the third and instead insulted him. The District Commissioner wrote to each chief telling them how badly their acts reflected on each of them and undermined their jurisdiction, but we have no evidence of what effect his letter had.\textsuperscript{73} The inability of the District Commissioners to oversee the Native Tribunals effectively was shown in the report of another District Commissioner who wrote that Tribunal monthly returns were invariably late and haphazardly prepared, so that he could not tell what had occurred in any particular case. The Tribunals frequently failed to respond to his inquiries as to excessive fees and fines unless he made such inquiries in person and he often had to order Chiefs to refund overcharges to litigants.\textsuperscript{74} District Commissioner W. H. Beeton noted in his diary that the complaints against the Ayokohene’s Tribunal concerning excessive fees and fines had been increasing, that he had repeatedly told the Ayokohene to stick to the amounts

\textsuperscript{71} \textit{Gold Coast Independent}, 6.18.1929, 945.

\textsuperscript{72} \textit{Gold Coast Independent}, 10.29.1929, 1329.

\textsuperscript{73} Oxford University Rhodes House, Mss Afr 5.650, Ramsey, District Commissioner’s Quarterly Report, 6/30/1929.

\textsuperscript{74} \textit{Ibid.} Letter dated 5.31.1929. We do not know if the offending Tribunal complied with his order. Often, the prejudice of the Tribunals was shown in improper trials for witchcraft. One such, conducted by the Omanhene of Bamainkaw, resulted in the conviction of a defendant where clearly there was no witchcraft. Holding a woman by the neck is an assault but not witchcraft, the District Commissioner reported. Moreover, the Omanhene exceeded the permissible punishment under the statute so he, the District Commissioner, had to vacate the judgment. Oxford University Rhodes House, Mss Afr 5.713, Report from A. F. L. Wilkinson to Provincial Commissioner of the Western Province, 3.27.1930.
specified in the schedule and that if he continued to violate the rules, he would have the Ayokohene prosecuted.75

Complaints about the Native Administration Ordinance were not limited to the coastal elite or extorted litigants. Thus, in 1928, Ofori Atta complained about prospective litigants entering into arbitration agreements in order to avoid his Tribunal (and the fees he would charge) and sought an amendment to stop this practice. The Attorney General objected, telling the Secretary for Native Affairs that such agreements are part of the ordinary law of contract and that nothing was wrong with them: “To take away the rights of the people to have their disputes settled (should they so elect) by consent out of court, would in my opinion, amount to an unprecedented and wholly unjustified interference with the liberty of the subject and would savor of oppression.” In any event, the proposed amendment might not entirely suppress arbitration but would make it much harder and would make the Ordinance even more unpopular that it was then, it that were possible.76 The Government did not accept Attorney General John Maxwell’s advice and an Amendment Bill was introduced to make arbitration more difficult by restricting the power to act as an arbitrator to “responsible native authorities.”77 Perhaps cooler minds prevailed, for the final version of the Bill passed in November 1928 eliminated Atta’s proposed amendments and all other suggested changes except one clarifying the transfer provision.78

As his term in office wound down, Governor Guggisberg expressed concern as to the probability of continued corruption in the Native Tribunals even after the Native Administration Ordinance had been passed. He asked his Secretary of Native Affairs, W.

75 Oxford University Rhodes House, Mss Afr 5.1608[2], 5.11.1928 W. H. Beeton Diary entry.
76 GNA ADM 15/120, 2.20.1928, 21-22.
78 Ibid., 11.15.1928. Enacted as the Native Administration Amendment Ordinance No. 18 of 1928 on November 9, 1928.

-353-
J. A. Jones, to brief the new Governor, Alexander Ransford Slater, on this issue. Jones, in turn, asked the District Commissioners for their suggestions.\textsuperscript{79} Shortly after assuming office, Slater minuted on District Commissioner of Akwamu’s Quarterly Report that new legislation was necessary to remedy “this scandal.”\textsuperscript{80} Yet the amendment that was enacted, as were all the subsequent amendments, contained nothing directed toward eliminating corruption in the Tribunals nor effectively controlling imposition of excessive fines and fees. It was not as if proposals were lacking. The new Attorney General, Sidney Abrahams, wanted District Commissioners to be able to interpose themselves in Tribunal cases and to make any order they deemed fit to do justice. Even some of the chiefs, particularly Ofori Atta, sought a provision requiring Tribunals to account for income and disbursements but the Government decided that such a provision should be the subject of separate legislation.\textsuperscript{81} And such legislation didn’t come about until 1939.

In 1929 another amendment Bill was introduced seeking further to strengthen the powers of the chiefs. It would criminalize “usurping” or counseling, encouraging or assisting usurping the position of a Paramount or Divisional Chief, defying their authority or doing any act “amounting to a claim of independence” from the Paramount of Divisional Chief under penalty of imprisonment or, on the Governor’s order, deportation.\textsuperscript{82} The Bill

\textsuperscript{79} GNA ADM 12/5/157, Confidential, 3.21.1927.

\textsuperscript{80} GNA ADM 11/1048. Simenssen argues that this concern as to corruption in the Native Tribunals was less about the need to protect the people from extortion than to prevent the loss of respect for the Native Tribunals and the undermining of the ability of the chiefs to continue as effective agents of Government. Simenssen, \textit{Dissertation}, 282.

\textsuperscript{81} GNA ADM 11/1/983.

\textsuperscript{82} GNA ADM 6/81, 723. This amendment, also proposed by Atta was inspired by the attempted secession of a Divisional Chief and an Odikro from Atta’s State of Akyem Abuakwa, about which more below. Native Administration Ordinance Amendment Ordinance No. 12 of 1929, drafted by Ofori Atta, prompted criticism only from the barristers on the Legislative Council. It gave jurisdiction to Native Tribunals over acts committed and causes of action arising within their geographic jurisdiction no matter where in the Colony the accused or defendant resided. It also required the Paramount Chief of the State where the defendant was found to assist with service of process or arrest. Repassed as No. 22 because of typographical errors. BNA CO 96/689/15.
also contained proposed amendments to provide for extra-territorial service of process and writs of arrest and to allow plaintiffs as well as defendants to move to transfer to another Tribunal or to a court. A Native Administration Further Amendment Ordinance No. 22 of 1929 limited pre-trial detention in Native Tribunals to the same extent as in the Supreme Court.

In early 1930, Secretary for Native Affairs Jones presided over a meeting of the Joint Provincial Councils of Chiefs that discussed possible additional amendments to the Native Administration Ordinance, among which were: requiring that Writs of Execution served outside the State were to be upon notice to the Paramount Chief of the place where the property was located, and eliminating the monetary limits on a District Commissioner's appellate jurisdiction. Ofori Atta and Mate Kole pushed for a new inferior Tribunal with a monetary limit of £10, but Jones declined to consider the proposal. Attorney General Abrahams, pointed out that a Tribunal had no authority to order execution on property outside the State and if it was doing so, it was doing so illegally, so that an amendment to authorize that practice was necessary on the same basis as extra-territorial service of process. He opposed eliminating the limits on the District Commissioners' appellate jurisdiction.

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84 GNA ADM 6/81, 10.18.1929, 1593-1695.
85 GNA ADM 15/66, 2.26.1930, 588. In 1940, the Native Administration Ordinance was amended (No. 64 of 1940) to authorizes a State Council to modify any statement of customary law previously made and if the Governor was satisfied that the modified statement had been approved by the Paramount Chief, Divisional Chiefs, Headmen (Odkros), linguists and councillors or a majority of them, and if not repugnant to natural law and justice, then the Governor may (emphasis mine) declare the modified custom to be the native law of the State. The statute was totally devoid of any standard by which to measure the Governor’s exercise of discretion. Evidently, he could only judge whether or not the modified custom was or was not repugnant.
In April 1930, the Acting Secretary for Native Affairs, C. E. Skene, asked the Attorney General to prepare an amendment to allow for extra-territorial execution. He went on to say that in certain civil and criminal cases in Tribunals, costs and fees continued to be disproportionately high and that an avenue for review was needed. Abrahams was against lumping costs in with the judgment amount to reach a monetary threshold for appeal, but since a separate Bill of Costs rarely included the value of non-monetary costs such as a sacrificial animal or alcohol, costs were often understated. There was no way at that time, Abrahams went on, for a District Commissioner to remedy costs exceeding the Scheduled limits, so he recommended that costs in excess of £5 be appealable. Abrahams also recommended amendments to specify that “Execution” included attachment and sale of property and to allow execution outside the State on the same basis as service of process. In addition to being made separately appealable, he recommended that District Commissioners be authorized to review and revise costs on their own motion. Indeed, he preferred the latter option because it provided not only for correction of error but also protected against “incompetence and perversity.” The extra-territorial execution and appealability of costs provisions were included in subsequent amendments.

Yet another amendment, Native Administration Ordinance Further Amendment Ordinance No. 13 of 1930, authorized persons serving arrest warrants to break and enter and use limited force to effect an arrest of persons who had notice of the warrant and imposed a three months statute of limitations on claims against the process server for alleged violation of the Ordinance.  

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89 GNA ADM 6/84, 7.17.1930, 1366.
By 1931, it seemed that amending the Native Administration Ordinance was becoming an annual event with little consideration being given to the impact of such repeated amendments on the stability of native administration of justice. Nevertheless, the amendments kept coming. The 1931 Native Administration Amendment Ordinance No. 23 of 1931 eliminated witchcraft as an offense to be tried in Native Tribunals, authorized execution against property anywhere in the Colony, put a floor under appeals from a Divisional Tribunal to a Paramount Tribunals and, in the words of the Attorney General, to “put a stop to the practice of some tribunals of mulcting litigants in unjustifiably large costs in civil cases,” made costs greater than £2 appealable to the Paramount Tribunal and those greater than £5 in a civil case and £2 in a criminal case appealable from a Paramount Tribunal to the District Commissioner.90

The next year’s amendment, Native Administration Ordinance Amendment Ordinance No. 12 of 1932, dropped the floors for appeal of fines to 10/ in Divisional Tribunals and £1 in Paramount Chiefs’ Tribunals and authorized all Tribunals to imprison a defendant in default of paying his fine until the fine were paid or a maximum of ten days to three months depending on the amount of the fine.91 It also restored the right to appeal

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91 GNA ADM 6/57, 3.15.1932, 215-217. The part of the Amendment authorizing imprisonment in default of paying a fine was occasioned by a Supreme Court decision that Tribunals were not authorized to impose such a penalty. Attorney General Abrahams criticized omission of such a “general section” as “distinctly unfortunate.” GNA CSO 4/1/185, No. 4, 11.20.1931.
sentences of imprisonment “inadvertently” taken away by a drafting error in the 1931 Amendment.\textsuperscript{92}

Acting Governor Geoffrey Northcote proposed to amend the Native Administration Ordinance further to suspend any state not participating in the Provincial Council of Chiefs from exercising any judicial jurisdiction. He felt that deprivation of fees would effectively pressure recalcitrant chiefs to participate.\textsuperscript{93} Bushe minuted that the proposal was a good way of dealing with the problem, but Attorney General J. de Haart feared that such a suspension would permit the suspended Tribunal to operate outside the regulation of the native jurisdiction ordinances.\textsuperscript{94} The Colonial Office decided to let it slide for the moment. But, the next amendment authorized the Governor-in-Council to suspend chiefs and their State Councils from the exercise of judicial functions if the Chief did not attend meetings of the Provincial Council of Chiefs and imposed criminal sanctions if he or they continued to exercise judicial jurisdiction after suspension.\textsuperscript{95} These actions demonstrated once again the contradictory approach of the colonial Government to dealing with the traditional authorities: forcing them to bow to colonial demands even when the demand was to permit them to exercise some autonomy.

As we shall see, as the Native Administration Ordinance continued to be amended throughout the 1930’s, it soon came to be seen as ineffective in protecting against corruption and that an entirely new scheme of regulation would be necessary.


\textsuperscript{93} BNA CO 96/70/3/10, Confidential, 6.10.1932

\textsuperscript{94} \textit{Ibid.} 8.22.1932.

\textsuperscript{95} GNA ADM 12/3/56, Confidential, 6.10.1932.
CHAPTER IX – NATIVE JURISDICTION 1927 -1944:
REFORMING TRADITIONAL COURTS

At the end of the Twenties, despite the continued opposition of the coastal elites, it became more and more apparent that the traditional authorities were becoming comfortable with the powers and limited autonomy granted them by the Native Administration Ordinance. This comfort was demonstrated, among other ways, by increased participation of the chiefs in the Provincial Councils of Chiefs. However both the dispute over the nature of indigenous jurisdiction and continued complaints as to extortionate fees, politically motivated decisions and cronyism both on native courts and in native litigation, all of which constituted corruption in the mind of the British, led, at the end of the Thirties, to a consensus among colonial authorities as well as the public that substantial, indeed radical, change was necessary. Responding to behind the scenes advocacy of an number of groups, the Colonial Office asked Malcolm Lord Hailey to visit the African colonies and to report on indigenous government with an emphasis on traditional courts. His report, a multi-volume tome, included a long section on and made numerous recommendations for reform of the native tribunals. At about the same time as Lord Hailey was preparing his report, a conferences of Gold Coast colonial officials considered proposals for restructuring the traditional courts made their own recommendations to the colonial government. Nothing however was done until the arrival of a new Governor, Alan Burns, who appointed a committee chaired by the Gold Coast Attorney General, Harry Blackall, that heard many witnesses, received memoranda and documents from throughout the colony and rendered a report that led to ordinances that radically altered the nature and operations of the traditional courts, yet failed to solve the problems completely.
Sally Falk Moore correctly observes that the object of the British administration to insure that the local courts rendered fair and impartial justice and to preserve the prestige of the traditional authorities was as contradictory in the 1920's as it was in the 1950's. Moreover, she writes, repeated injunctions to the traditional authorities by the British colonial government to conduct their courts in an “idealized court-as-it-should be” manner were little more than “self-serving discourses on power, as justificatory representations of the ideology control.”¹ As noted previously, the reservation of control over the native courts through appeals to British tribunals as well as the power to determine custom strongly supports the conclusion that there was little desire on Britain’s part to afford more than the most limited space to the traditional courts.

In this chapter I describe dissatisfaction with the operations of the Native Tribunals found by the Colonial Office Legal Advisor, Grattan Bushe, during his tour of West Africa. Bushe strongly criticized these tribunals as delivering illusory justice: appellate rights to redress grievances against those tribunals were without meaning because the costs imposed and security required of appellants deterred all but a very few litigants from pursuing appeals in higher tribunals. I look at continuing efforts to make the native tribunals fairer and more efficient by making available to supporting personnel, particularly court registrars, courses sponsored by the colonial administration in legal subjects and the administration of tribunals. Governor Shelton Thomas encouraged such training but failed to enact legislation that would have made it mandatory. Once again the administration specified the fees and costs to be charged to litigants and by means of a 1935 Ordinance empowered District Commissioners to look at the records of Native Tribunals on a regular basis to assure themselves that the limitations on charges were being honored. An


-360-
ordinance requiring the establishment of state treasures and requiring tribunal fines, fees and costs to be paid into such treasuries was enacted in the late Thirties under the aegis of Governor Sir Arnold Hodson. Finally, Native Courts Ordinance was passed in 1944 that limited the number of and classified Native Courts, removed the chiefs and their councillors from more than a perfunctory role as decision makers therein and replaced them with men chosen from panels established by the colonial administration. But first, I discuss the long-standing dispute as the nature and source of native jurisdiction, whether it be inherent in the office of the stool or derivative from the King of England’s justice.

I conclude this examination of native jurisdiction with a brief discussion of three commissions or committees appointed by the Colonial Office in the post 1944 period. The first of these, that of G. R. Havers, as a single commissioner examined the cost of litigation and found it to be excessive because of legal fees and excessive costs incurred in the native courts. The second, a committee chaired by Puisne Judge J. H. Coussey was to recommend constitutional changes. It suggested appointment of unpaid lay magistrates to sit in the native courts and be subject to control by the Chief Justice. It also suggested the appointment of a formal commission to look at native justice. This suggestion was adopted with the appointment of a commission head by another Puisne Judge, K. A. Korsah, that found that corruption in the native courts, by which is meant not merely exploitation of litigants through imposition of extortionate fees and costs but rendering of decisions influenced by political or social considerations removed from the merits of the cases before the court, continued little abated and recommended complete separation of chiefs from the traditional courts that should then be headed by full time stipendiary magistrates.
Inherent or Derivative Jurisdiction

The nature of native jurisdiction created a dispute between the colonial authorities and the colonized almost from the first British intervention in Gold Coast affairs in the early nineteenth century. Albeit primarily a matter of theory, the ongoing ideological dispute between the British and the traditional authorities as to the source of the latter’s jurisdiction caused the colonial power considerable anxiety and demonstrated British concern for their claim to possess absolute power over those upon whom they claimed to need to govern the country. Thus, the Gold Coast Government showed more and more concern about assertion by native authorities of their “inherent right” to rule, run their courts and even legislate for themselves. If native jurisdiction was, as many Gold Coast natives argued, inherent in the position of the chiefs as traditional rulers of the country, the steps that the colonial authorities could take to regulate and control how the chiefs could deliver justice to their people.

The issue definitively came up during a debate in the Legislative Council about a cocoa “holdup,” a boycott of European cocoa buyers by native producers seeking to force an increase in the price paid for their commodity. Many of the chiefs sought to enforce compliance with the boycott by requiring their subjects to swear a Chief’s Oath, the breach of which would subject those taking it to severe penalties imposed by the Chief’s Tribunal. Governor Slater reported to Lord Passfield, the Secretary of State, his concern with a assertion during the debate by Nana Ofori Atta in which the Omanhene claimed that the Chiefs acted legitimately pursuant to their inherent rights. Rather than confront him at that time, the Governor preferred to repeat a prior governmental statement as to using oaths to enforce the boycott, “that whatever might be the source of the powers which the chiefs
claimed, Government could not tolerate their exercise for coercion of His Majesty’s subjects in matters of trade. . . .”

In October 1931, Governor Ransford Slater sent to the Secretary of State, J. H. Thomas, an extensive Memorandum prepared by W. J. A. Jones, his Secretary for Native Affairs, detailing the history of Native Jurisdiction legislation and arguing strongly against the doctrine of inherent right and proposing amendments to the Native Administration Ordinance that would, once and for all, lay that doctrine to rest. The Governor and Jones asserted that the creation of the Provincial Council of Chiefs by the Native Administration Ordinance promoted a tendency among the chiefs to consider themselves “as administrative entities separate from Government and free to exercise their judicial functions without Government’s control.” Jones urged that it was necessary in order to end the debate once and for all to provide for confirmation by the Governor as a condition

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2 GNA ADM 12/3/53, Confidential, 12.10.1930. The Governor had said that: “To me it is most regrettable that the chiefs who are in reality agents of Government in carrying on the administration of the country (emphasis mine) should have challenged Government’s right in dictating what is, and what is not, the doctrine of the liberty of the subject.” GNA ADM 11/1/1420. See also Oxford University Rhodes House, Mss Afr 5.1608[4]), District Commissioner W. H. Beeton notes in his diary, 12.6.1930. In Inspector General of Police v. Asane Panyin, [1931](Div. Ct. ‘29-‘31) Deane, C. J. held that a Chief’s order forbidding his people to sell cocoa on pain of arrest was ultra vires and requiring an oath to that effect was illegal. For further discussion of the 1930-1931 cocoa hold up, see Sam Rhodie, “The Gold Coast Cocoa Hold-Up of 1930-1931,” Transactions of the Historical Society of Ghana, Vol. 9 (1968): 105-118. Rhodie points out that the strike of the cocoa farmers was well organized but that their collective action only lasted about two months and was never “complete or unanimous” in the interior in part because of the almost complete dependence of the farmers on British firms for working capital. Ibid., 109. Indigenous brokers, agents of the European buyers, worked against the boycott because fear that their power and profits would be undermined. Ibid., 112. Finally, argues, social divisions between wealthier and poorer farmers worked to defeat the boycott as the former began to reach individual agreements with the buyers. Ibid., 117. Bourret attributes the strike to reaction to formation of a monopolistic pool by cocoa buyers to control the market and depress prices already suffering due to the Depression. F. M. Bourret, Ghana, the Road to Independence, 1919-1957, Stanford, CA: Stanford University Press, 1960, 66. A second hold up in 1938-39 was more successful in part because of almost unanimous support of the traditional chiefs. A Parliamentary committee investigated the marketing of cocoa and criticized both the buyers’ attempts to control the market but also the “inefficient and dishonest methods of the African brokers and middlemen.” An agreement satisfactory to the farmers was negotiated and the entire crop that had been withheld was sold at a price they found to be acceptable. Ibid., 66-68. As to the latter hold-up, Josephine Milburn points out the weak response of the Colonial Office to the agreement among the major buyers to control the price of cocoa and attributes to Governor Hodgson the strong opposition that ultimately forced the buyers to come to the table and reach an agreement acceptable to the farmers. Josephine Milburn, “The 1938 Gold Coast Cocoa Crisis: British Business and the Colonial Office,” African Historical Studies, Vol 3, No. 1 (1970): 57-74, 63, 73.
precedent to the chiefs’ exercise of judicial jurisdiction. He made three proposals: declare in the statute that jurisdiction was derivative, not inherent; provide for adequate control over the Tribunals, a proposal first made in the 1880's, repeated continuously through the years and never carried out; and transfer to the District Commissioners jurisdiction now exercised by the State Councils to punish those who were alleged to conspire to undermine the chiefs. Despite the then Attorney General Wilkinson’s demolition of the claim of inherent jurisdiction in the debate over the 1922 Native Jurisdiction Bill, in his demonstration that annexation of the Protectorates established sovereignty in the Crown from which all justice derived and that no judicial jurisdiction could be exercised except as permitted by the Crown, belief in inherent jurisdiction and that the chiefs had rights that “it is not within Government’s power to control persisted.”

In a Minute dated December 31, 1932, both Slater and Jones noted that it would be a bad time to try to introduce the Bill that Jones had drafted in order to lay the matter to rest and that had been sent to the Secretary of State in October because, Jones feared, the chiefs would question the Government’s good faith (and rightly so, I contend) in saying that it proposed to delegate more responsibility to the chiefs if at the same time it were pushing a Bill to declare that the chiefs exercised only rights derivative from British sovereignty as were really only British agents. Such a Bill should not be introduced, Jones opined, until it could be accompanied by a Bill to provide revenue to the chiefs that they would accept.

Fiddian attributed the claim of inherent rights to “a certain type of native lawyer” and “a certain type of half-educated Chief [who] is the kind of person who would furnish an excellent soil for such good seed. But quite clearly, the theory has got to be uprooted.” He suggested that the Bill not be introduced at that time because of agitation about income tax

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3 GNA ADM 12/3/55, Confidential, 10.13.1931.
4 GNA ADM 12/3/56, Confidential, 4.2.1932.
legislation and proposed that the Secretary of State telegraph his appreciation of the importance of taking “early steps to dispose of the claim of inherent jurisdiction on the part of certain chiefs, and approves entirely the principles and substance of the Bill.” In another minute, dated December 18, 1931, Fiddian suggested a confirming dispatch quoting Secretary of State Lyttelton’s dispatch of July 27, 1905, denying any inherent rights of jurisdiction and suggesting that it be made public. ⁵ Although Governor Slater proposed to introduce this Bill and a Revenue Bill at the December 1932 Legislative Council session, he never did, because Cunliffe-Lister, adopting Fiddian’s suggestion, told the Governor that, quoting Fiddian’s language, it would not be politic to move the Bill then because of disturbances over proposed direct tax legislation. As an alternative, the Governor might consider publishing a statement on the subject as “a definitive pronouncement issued with the Secretary of State’s approval.” ⁶ Needless to say, nothing was done at all at that time. Since the creation of a stool treasury system co-joined with a source of stool revenue as envisioned in Governor Slater’s Native Authority Revenue Bill was deemed to be essential to the concept of indirect rule, such rule was, as Shaloff has noted, “seriously diminished.” ⁷

Continued Dissatisfaction With the Workings of the Native Tribunals

British colonial policies with respect to the administration of traditional justice were not distinctive during the late Twenties and early Thirties. Indeed until passage of the 1944 Native Courts Ordinance, changes in policy were incremental. Thus, passage of the Native

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⁵ BNA CO 96/697/4, Minute from Fiddian, 11.27.1931, 12.18.1931.

⁶ GNA ADM 12/1/79, Confidential from the Secretary of State, 1.11.32. Two African members of the Legislative Council responding to the Governor’s declaration of his intent to introduce tax legislation strongly objected, in part because of the “irritated militant spirit” of the people and the feeling that direct taxation without equal representation would be “humiliating and against the principals of progressive states.” The Governor was surprised by the support the African members received from the European mercantile community. Stanley Shaloff, “The Income Tax, Indirect Rule and the Depression: The Gold Coast Riots of 1931,” Cahiers d’Études Africaines, Vol. 14, No. 54 (1974), 359-374, 362-363, 365, quoting Frederick Victor Nanka-Bruce and Arku Korsah, who would one day sit on the Gold Coast Supreme Court.

⁷ Ibid., 360.
Administration Ordinance did little to alleviate complaints from the educated elite as well as colonial officials as to improprieties in the Native Tribunals. Citizens complained that chiefs routinely rendered political decisions to bolster their positions or to punish their opponents. Grattan Bushe, after a tour of the Gold Coast wrote that by reason of the imposition of excessive fees, appellate rights of litigants in traditional courts were illusory. The educated Africans continually complained of having their disputes adjudicated by illiterate chiefs whose decisions seemed to be influenced by who had paid the most for the judgment. Finally, much dissatisfaction derived from the manner in which the funds received by the traditional courts were spent. An effort at reform was made via an ordinance authorizing chiefs to establish stool treasuries into which court income could be deposited and court expenses, as, e. g., the salaries of registrars could be paid. However only two of the chiefs acted to establish such treasuries. Finally, in 1939 the Legislative Council enacted a Native Administration Treasuries Ordinance requiring the establishment of stool treasures for the receipt of stool income, primarily that from the Native Tribunals, and requiring the chiefs to account for their income and expenses. This Ordinance also had the effect, as we shall see below, of reducing the Chiefs’ incentive to sit on traditional tribunals.

A further effort was made to reform the Native Tribunals by amending the Native Administration Ordinance in 1935 to authorize District Commissioners to examine and revise judgments of the traditional tribunals without the necessity of a formal appeal. However, as we shall see, in order to overcome arguments that this provision completely undermined the native authorities, the District Commissioner was obliged to hear the

8 Gold Coast Ordinances of 1931.
9 F. M. Bourret, Ghana, the Road to Independence, 1919-1957, 107.
10 No. 16 of 1939, F. M. Bourret, Ghana, the Road to Independence, 1919-1957, 158.
arguments of the chiefs and consult with the Provincial Commissioner before exercising his revisory powers thus vitiating the authority granted to him.

It was hoped that the provisions of the Native Administration Ordinance permitting State Councils to define customary law would help make the decisions of the Native Tribunals less subject to outside influence. In the first usage of such provisions, the Commissioner of the Eastern Province submitted a statement of the Akyem Abuakwa State Council purporting to declare the customary law with respect to pledging and mortgaging. The Commissioner said that he had never seen a custom such as that declared and that both Danquah, in *Akan Law and Customs* and Sarbah, in *Fanti Constitution and Law*, wrote that the customs was to the contrary to that declared by the State Council.\(^{11}\) Nevertheless, the Commissioner went on, since the State Council declaration was equitable and favorable to the debtor, it should be accepted.\(^{12}\) Jones, the Secretary of Native Affairs explained that the custom was not mentioned by Danquah because it was newer than his book – Attorney General Abraham’s marginal note asked “Then how is it proper customary law?” Responding to Jones’ assertion that it was good law,\(^{13}\) Abrahams said that no matter how good the law is, it could not be declared if it were not customary; the State Council had to declare what was not what should be, and the Governor-in-Council had to be satisfied that the State Council “truly and accurately records such alleged to be customary law. Section 123 of the Ordinance did not give the State Council ‘a blank cheque’ to make new law.”\(^{14}\) The Government flexed its muscles once again, rejecting the purported purpose of supporting the traditional authorities, and asserted its control over both customary law and

\(^{11}\) It should be noted that Danquah was the half brother of Ofori Atta, Omanhene of Akyem Abuakwa.

\(^{12}\) GNA ADM 15/64, 3.4.1929, 342.


claims of inherent jurisdiction by rejecting the declaration of the Akyem Abuakwa State Council.

During his tour of West Africa to observe the workings of the British and Native courts, Grattan Bushe, the Colonial Office Legal Adviser, noted that most chiefs were illiterate and were supported by the Government despite obvious shortcomings because policy required that chiefs “be bolstered up at all costs.” He opined that appellate rights of litigants in Native Tribunals were illusory because fines and fees had to be paid as a condition of appeals and were often too high. Generally, “corruption and oppression are rife.” He reported that the number of educated people in the Colony was increasing rapidly and that they resented being subjected to the jurisdiction of illiterate chiefs as required by the ordinance governing native jurisdiction. The Gold Coast native, he continued, did not get equitable and fair treatment: “I say without fear of contradiction, that the greatest wish of the native is to be given the benefit of the ‘white man’s’ justice.” No native, he said, preferred a Native Tribunal to a British Court. Indeed, Native Tribunals did not exist in the interest of the natives, that was a “pretense,” but existed only because “we cannot afford any other system.”

Consistent with Government’s efforts to improve the functioning of Native Tribunals to reduce corruption by educating Tribal Registrars, the Commissioner of the Central Province sponsored a training course which exposed attendees to lectures on the Native

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15 BNA CO 554/90/13. In a Minute dated May 28,1932, Bushe wrote that he couldn’t prove the existence of corruption, but he believed it to be true from talking to many different people, District Commissioners, judges and Crown Counsel who prosecute corruption, African attorneys who get complaints from clients and merchants whose employees complained about corruption. Nevertheless, he didn’t find much evidence of hostility toward the institution itself. He also heard many complaints that District Commissioners overlooked injustice because of the necessity to support the prestige of the chiefs. BNA CO 554/90/16. Kuklick quotes a Colonial Office minute by C. Bottomly to the effect that District Commissioners were “obsessed” with the need to prop up the chiefs at any cost. Bottomly said that the District Commissioners would do better to deal the Native Tribunals with the object of educating them to provide “incorruptible and impartial justice” for “even the lowest and humblest person.” The Imperial Bureaucrat, , 56.
Administration Ordinance, court procedures, court accounting, process and execution under the Native Administration Ordinance, office routine, Native history, law and custom, bookkeeping, simple rules of evidence and English. Among the lecturers were the Principal Instructor of the Tribunal Registrars Association, Woolhouse Bannerman, then Circuit Judge of Ashanti, District Commissioners, barristers, the Commissioner of Police and the Commissioner of the Central Province. Those successfully completing the course, after an examination, were awarded a Certificate of Completion, something that they apparently deemed valuable to have.\(^{16}\)

In early 1933, Governor Thomas visited Cape Coast and spoke about his unhappiness with Native Administration. He reported the complaints he had received from throughout the Colony about Native Tribunals exceeding their powers “unjustly.” Thomas said that the Ordinance had to be amended so as not to “bolster up inefficient chiefs and to put money in their pockets and those of their friends.” He said that in the amendment he would propose, the Governor would “take power to exercise proper supervision over the workings of the Tribunals and to close those which are corrupt or inefficient.”\(^{17}\) Like so many others over the years by prior Governors, this promise went unfulfilled during the balance of Thomas’ term.

Just before he left the Colony, the Colonial Secretary, T. S. W. Thornton, minuted that political unrest was due to widespread dissatisfaction with the way stool funds were spent and the workings of the Tribunals. Part of the problem, he argued, stemmed from reliance of the chiefs on Tribunal funds that incentivized them to milk the litigants. The chiefs had little if any income other than that they derived from the fees and fines they charged those who sought to resolve their disputes in the traditional courts. Moreover, that

\(^{16}\) GNA CSO, 21/7/107.

\(^{17}\) GNA ADM 12/3/58, Confidential, 2.13.1933, Enclosure No. 5, 1.28.1933.
income had to be shared with those of the tribal elders who sat with the chiefs in deciding cases. Often, Thornton noted, one or both of the parties offered bribes to the chief and/or his councillors to decide in his favor. Nor did the judges try very hard to conceal this conduct. As we shall see, the colonial government sought to end these practices by requiring that the fees and fines imposed on parties be paid into a stool treasury and, later, by increasing the universe of judges beyond the chiefs’ councillors and having them paid a small stipend from the stool treasury.

Thornton went on to write that the current law did not permit revision of judgments. Of course appeals were allowed, but there was no automatic review of judgments by District Commissioners as was the case with the judgments of Magistrates and District Commissioners by judges of the Supreme Court on review of monthly returns and no appeals at all with respect to small cases, yet it is just these small cases that caused the most dissatisfaction. Automatic review was in the interests of justice as well as of the Tribunals, as it would help them to become more efficient and gain in prestige and public confidence. At the same time, although Thornton did not say so, it would emphasize that the native institutions remained firmly under the thumb of the colonial power. Accordingly, he proposed that District Commissioners have the authority to inspect the records of the Tribunals on their own initiative and to revise judgments and sentences in criminal cases as well as to reduce costs. The Tribunals would be required to make monthly returns to them just as the District Commissioners were required to make monthly returns to the Puisne Judges. Thornton said that the chiefs had agreed to this proposal, but wanted the right to have the Provincial Commissioner review any revision of their judgments that the District Commissioner might make. He disagreed as, he said, nowhere in the world does a court have the right to appeal a superior court’s judgment concerning their decisions. In so
saying, Thornton iterated the implied British position that despite lip service to indigenous autonomy, the British were the superior court and the Native Tribunals the inferior ones. Thornton would also require all fines and fees paid to the Tribunal to be held and not shared among the Tribunal members until the revision process had been completed and only then divided, one third to the chief, one third to the other members of the Tribunal and one third to be used as a fund to pay back to litigants fines and fees found to be unjustified or excessive. Of course, this would have required institution of state treasuries. He asked all of the members of the Executive Council and the judges for opinions on this proposal and one to limit the number of councillors who could sit on a Tribunal. He noted that in that part of Togo administered by the British, they were already limited to from three to seven. Finally, he proposed that only Registrars certified by the Government after having successfully passed a course be permitted to be employed by a Tribunal and that the Government should fix their salary at a level high enough so as not to encourage them to charge excessive fees. However, Thornton concluded, the Government had to take into account the impact of a reduction in Tribunal income that such reforms would entail. This caveat would, it was clear, prevent any effective action as the Government was unwilling to make up any shortfall in Tribunal revenue from Government funds.

Whether or not Thornton’s proposals were made public or not is unclear, but in early 1935, the press urged the creation of a college to train Registrars for the Tribunals at which District Commissioners and barristers could teach various aspects of the functions of Native Tribunals. Registrars would be required to read and understand a manual for practice in Native Tribunals to be written by E. Norton Jones, a District Commissioner who trained other District Commissioners in the Central Province, as well as a Tribunal Registrars’

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18 GNA CS0 21/7/67, 5.11.1934, Minute.
Handbook written by A. C. Duncan-Johnson. The newspaper would also require regular visits to the Tribunals to be made by the Principal of this training college or his deputy to check on the Registrar’s work, and would require Registrars to visit other Native Tribunals and to confer with other Registrars.  

It appears that the *Gold Coast Independent* was ignorant of just such a course that had been in existence for a number of years, but its other proposals apparently were not being seriously considered by the Government, because the 1935 Amendment included nothing to require Registrars to be certified.

The 1935 Amendment Ordinance did, in fact, make some substantive reforms. It carried out Thornton’s proposals to enable District Commissioners to revise Tribunal criminal judgments and Bills of Costs in civil cases on their own initiative, because, as the new Governor, Arnold W. Hodson, said, up to then “Tribunals have been able to perpetrate the most grave injustices and to use the machinery placed at their disposal for mulcting litigants of large sums of money.” However, he was able to convince the African members of the Legislative Council, who acknowledged that the chiefs were often corrupt in their dealings with those bringing cases to their courts but still sought to maintain some semblance of chiefly autonomy, to agree to the Amendment Ordinance only by promising that the District Commissioners would be required to consult the Provincial Commissioners before revising any Tribunal decision.

Here, once again, we may see how the British policy of trying to rule through indigenous chiefs hamstrung them in their efforts to afford the inhabitants of the Colony fair

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19 *Gold Coast Independent*, 2.2.1935, 101, 117.

20 Rather, the 1935 Amendment Ordinance focused on repairing errors made in the original Native Administration Ordinance because, as the Attorney General said, the original drafters did not make their meaning clear in a number of instances and because subsequent amendments did not help clear up the ambiguities. GNA ADM 14/2/21, 3.26.1935, 60: “The architects of this measure left a somewhat unwelcome legacy to their successors who tore their hair in despair in endeavours to get it in shape.”

21 GNA ADM 1/2/212, No. 293, 5.17.1935. Bushe’s view of the native courts bordered on cynicism. He said that the only purpose for Native Tribunals was to save the Home Government some money and to bolster corrupt chiefs at the expense of the people. BNA CO 96/730, note on dispatch dated 11.14.1936.
and efficient justice. They professed to be aware of the continuing and almost universal complaints about the corruption of the Native Tribunals, but they utterly failed to provide any effective remedy. Merely burdening already overburdened District Commissioners with the task of reviewing every Tribunal decision, a task they must have known could not be carried out, would not make the native courts fairer or more efficient. Indeed, the British, despite their protestations to the contrary, saw the Tribunals as “prerogative” courts attaching to the chiefs ex officio and independent of considerations of need or efficiency.\(^2\) Quite simply, they were stuck with the native courts but they did not trust them.\(^2\) By the end of the Thirties, however, the administration had evidently determined that assuring that indigenous litigants would not be oppressed by chiefly judges because things now began to change.

**The Blackall Committee**

From the late 30's until 1944, and despite an understandable focus on World War II, the colonial government did not completely ignore efforts to reform native justice. From a visit to the Gold Coast by Malcolm Lord Hailey, through meetings of colonial administrators, the appointment and report of committee of Gold Coast officials and members of the public, recommendations, many of them overlapping, were considered and a Native Courts bill drafted and enacted as the Native Courts Ordinance of 1944. Although Bushe, the Colonial Office Legal Advisor found little in Lord Hailey’s initial criticisms of native justice to be new, Secretary of State Malcolm Macdonald endorsed Lord Hailey’s ideas and sent him to Africa to report on his observations of the local courts. Despite Governor Hodson’s apparently

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\(^2\) GNA ADM 5/3/80, 6.

\(^2\) Another manifestation of the Administration’s mistrust of the Native Tribunals came in 1940 when another Native Administration Ordinance Amendment Ordinance, No. 11 of 1940, deprived the Tribunals of jurisdiction in master and servant cases between natives because of widespread belief that no servant could obtain a fair result in a Native Tribunal. Contrary to the principle that disputes between natives should be resolved by natives in native courts, the amendment conferred such jurisdiction exclusively on the District Commissioners who would no longer be required to transfer such cases to any Tribunal. GNA 12/3/72, Confidential, 7.5.1940.
lukewarm endorsement of his report, many of Hailey’s recommendations, such as limiting
the number of native courts as well as the number of councillor-judges participating in
judicial business, paying judges a fixed amount and separating chiefs from the judicial
function found their way into a report of a committee appointed by Governor Burns and into
the Native Courts Ordinance.

In the autumn of 1938, Macdonald, and senior Colonial Office officials, including
Bushe, had met with William Malcolm Lord Hailey, a veteran administrator in India,
Government Minister and recognized expert on African, and particularly West African,
affairs, who bemoaned the variety of Native Tribunal procedures and administrative
supervision of Native Tribunals. Hailey suggested that Native Tribunals were run by the
most conservative elements unwilling to adapt customary law and both their conservatism
and the rigidity of customary law would be a bar to progress. He opined that British and
native courts should be better integrated as development could never happen if, for
example, the law of debt and limitations continued to be different in British and native
courts, as the objective of native courts was to maintain the status quo and “native law was
insufficiently fluid and adaptive.” Hailey thought that “readjustment of the machinery of the
courts should be considered, as “procedure of judicial administration is a more important
factor in gaining respect for the law than the substance of the law itself.”

Bushe said that he did not see anything new in Lord Hailey’s observations and that
sooner or later native courts would die out from inertia, but that unless native tribunals were
improved, the whole system might collapse. The British, he explained, had to find a place
for educated Africans in an improved system of native courts. He expressed worry about a
tendency of administrative officers “to bolster up the courts of the chiefs instead of

\[24\] BNA CO 847/13/2, 10.30.1938.
concentrating on seeing that justice was done," a view he and others had often stated over
the years. Bushe averred that the administration of justice in the Gold Coast by native
courts was "particularly bad" and that the idea of indirect rule, that is rule through the
traditional authorities who were in charge of their subjects, was no longer a means to an
end but had become an end in itself resulting in neglect of reforms and insufficiently
checked abuses and that indirect rule was regarded with "extreme distaste" by a growing
number of educated Africans as being corrupt. As I have argued herein, the British
administration of justice in the Gold Coast dependency required a stricter supervision of the
indigenous courts than it had been able or willing to exercise up to this point. Bushe’s
critique challenged the prevailing view that the Gold Coast Colony could be governed
through the agency of the chiefs, at least insofar as the latter’s operation of their tribunals.

Evidently impressed more by Hailey’s exposition of the problem than by Bushe’s,
Macdonald advised the Governors of the West African colonies that he intended to send
Lord Hailey to West Africa for about nine months to study native administration Hailey
made his visit and produced an extensive report that was delivered in September 1941. He
criticized the Native Tribunals for expense of litigation, “reduplication of actions,” confusion

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25 *Ibid.*, Minute 1.12.1939. While Hailey had suggested that Africans be appointed as assistants to
District Commissioners and Magistrates to control Native Tribunals and opined that such was as it should
be, Bushe pointed out that District Commissioners controlled Native Tribunals in their administrative not in
their judicial capacity and asked rhetorically in which capacity would the Africans be appointed. Bushe
noted that British law and native law could not continue to coexist long term where Europeans and
Africans lived together (e.g., as in the large towns) as the tendency was toward European law. J. A.
Stewart-Boyd, an Assistant Undersecretary in the Colonial Office, agreed with Bushe: "it is absurd to erect
what is an ephemeral expedient into a sacrosanct principle" that is increasingly out of date. *Ibid.*

26 BNA CO 554/16/4, 12.12.1939, 12.15.1939. Hailey had made an earlier tour of some of the
African dependencies in 1935 to 1936 to study and report on issues involving scientific knowledge. Tilley,
Helen, *Africa As A Living Laboratory*, Chicago: University of Chicago Press, 2011, 101-103. Thus, he was
an obvious candidate for the report that the Colonial Office sought. In his report on that earlier study, he
pointed out the need for colonial officers to learn indigenous languages because otherwise, controlling the
population would be "next to impossible. Tilley, Helen, "African Environments and Environmental
1940,” in *Social History and African Environments*, edited by William Beinart and Joann McGregor,

-375-
of function of civil and criminal law, difficulties in “strangers” (i.e., Africans originating outside the Gold Coast) obtaining justice, particularly where chiefs were involved in the case and the fact that court members divided fees and fines. He recommended establishment of Magistrate’s Courts in all towns, requiring that all fines and fees be paid into native treasuries and accounted for, and limiting the number of members of the traditional courts who should be paid fixed salaries. Judicial jurisdiction of State and Provincial councils should be abolished and the political disputes within their former jurisdiction should be settled administratively. Hailey criticized native courts as continuing to be corrupt and inefficient despite supposedly being subject to close supervision by the District Commissioners, because that supervision was not systematically carried out. The native tribunals were badly equipped and poorly run and the number of cases they handled “suggests that they are far from popular” (123 courts handled about 5500 cases a year). Akan courts imposed Akan customary law on native “strangers” (i.e., non Akans) whose customs were different, e.g., imposing Akan matrilineal succession on those such as the Ga whose custom was patrilineal -- something that the Supreme Court through repeated reference to the works of J. M. Sarbah, had been doing by then for forty years. The courts did not do justice when a chief was involved for fear of retribution. They fomented litigation to increase the fees and fines to divide among court members and encouraged swearing an oath because it increased the costs of litigation since, in addition to dealing with the substance of the case, the court had to decide if the oath was properly sworn.

Hailey argued that past efforts at reform, such as a proposed amendment to the Native Administration Ordinance that would have stated that all judicial power derived from the Crown and would have permitted Government to establish or eliminate native courts,

27 Lord Hailey noted that the Gold Coast Government “has found reason to characterize the Native Tribunals generally as corrupt.” GNA ADM 5/3/42, 24.
would have prescribed a minimum and maximum number of court members who would have been nominated by the Governor in Council and who would not have been limited to chiefs and councillors allowing educated men to sit and would have required fines and fees to be paid into accounts controlled by the District Commissioners was not pressed by the Government and had been abandoned. Magistrate’s Courts could and should be created in most larger towns and staffed with African Magistrates.28

Hailey recommended restricting the number of Tribunal members as a necessary reform in the Gold Coast and suggested a roster system for Tribunal members and payment of those that served from treasuries established under the Native Treasury Ordinance of 1939.29 Students should be trained in customary law to become advocates in the native courts, concomitantly, such a reform might also discourage the training of Gold Coasters in English law with its consequent animus toward customary law and Native Tribunals. Hailey went on to recommend appointment of a Judicial Advisor knowledgeable in customary law to suggest to chiefs ways to improve functioning of their to Tribunals through, for example, issuance of procedural rules, and with full revisory powers to enable the close control of the Tribunals and their adaptation to modern needs.30 Hailey would eliminate the hereditary role of Chiefs as heads of Native Tribunals – he said that many people he interviewed told him that the chiefs were ready and would be glad to go. The number of District and Assistant District Commissioners should be increased so that they could systematically review Tribunal criminal decisions and the Bills of Costs in civil cases.31 In effect, Hailey was

28 BNA CO 847/22/6.
30 Ibid., 32, 35-36.
31 Ibid., 36, 131. A letter from the President of the Joint Provincial Councils of Chiefs confirmed what Hailey had heard said about the chiefs’ willingness to step down from the Tribunals. The letter described a strong feeling among the chiefs that they should withdraw from Tribunals and appoint Tribal Magistrates to preside, albeit only with Government financial assistance. GNA ADM 5/89,12.16.1942.

(continued...)
proposing to resolve the dilemma as to supporting the chiefs or insuring fair administration of law in the traditional courts by promoting the latter. As shall be seen, almost all of the reforms Lord Hailey proposed were echoed by a conference of Provincial and District Commissioners that had met in Accra and the subsequent Report of the Blackall Committee and were adopted and made part of the Native Courts Ordinance of 1944. Improvement of administration of justice in Native Tribunals, the conferees resolved, “could be brought about only by such a reconstitution as would permit their control being removed from the hands of those whom illiteracy, ignorance and venality led to acts of injustice and given to a trained body of men to whom security of tenure and possibility of advancement would unfold an honourable profession.” Accordingly, the conferees proposed a new native jurisdiction bill to allow State Councils to appoint educated persons to preside over Native Tribunals, reducing the number of Tribunals and proposing that their judges be paid. Courses in elementary principles of law and customary law should be made available to train Tribunal judges. This would be consistent with a proposed policy “of entrusting judicial powers only to those whom specialized training and judicial independence qualify to administer the law.”

If Africans such as Sarbah or Casely Hayford had been alive to read these statements and resolutions, they would have been astonished since the Commissioners, stalwart protagonists for the status quo, were recommending the same policies, and in

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31 (...continued)
Nevertheless, and despite the provisions of the 1944 Native Courts Ordinance providing for others than chiefs to preside over the Native Courts, the 1951 Korsah Commission found that chiefs still presided over most of the Native Courts. K. A. Korsah,(Chairman), Report of the Commission on Native Courts, Accra: Government Printing Department, 1951), ¶¶ 61-62.

32 GNA ADM 12/3/68, Confidential, 11.10.1939.

33 Ibid., ¶11.

34 Ibid., ¶12. In transmitting these proposals to the Colonial Office, Governor Hodson said that he didn’t agree with all of them, but he did not specify which ones with which he disagreed.
almost the same words, as those educated African lawyers had been advancing for the prior half century. This is particularly true of the proposals to deprive administrative officials such as the Commissioners of their judicial jurisdiction and confining that jurisdiction to legally trained magistrates.

A repeated theme in the communications to the Governor was that justice suffered because of the native tribunals' need for fees to fund political support for the chiefs.35 Another was the paucity of District Commissioners who were too overburdened to supervise too many tribunals and “the many errors and instances of injustice and corruption which occur.”36

Sir Alan Burns, the newest Governor of the Gold Coast, determined to appoint yet another committee to investigate the native tribunals and to “report on the necessity for reform in the administration of justice in native tribunals.”37 The Secretary of State, Lord Moyne, perhaps subtly attempting to prevent Burns from wasting time and money, suggested that he first look at and consider Hailey’s Report focusing on the Gold Coast without reference to the other colonies.38 Burns agreed but insisted that he wanted to reform native administration generally.39

35 Ibid., 3.9.1940. A similar sentiment was expressed by the District Commissioner of Djiaweo who complained that Tribunals that were the sole or main source of stool income were a “sinecure” for chiefs and their friends. He recommended appointment of salaried Tribunal Magistrates with specialized training. Ibid., 4.10.1940.

36 GNA CSO 4/4/57, 3.6.1940., 3.22.1940. The Ga Manche, the principal chief of Accra, was a particular source of difficulty, repeatedly being accused of charging excessive fees. In one instance, his Tribunal collected forty four shillings for issuing and serving a summons but no writ was served, then the plaintiff and his co-plaintiff were arrested for nonpayment of costs the Tribunal awarded against him in favor of a non-appearing defendant. GNA CSO 21/7/80, 1.6.1942.

37 BNA CO 96/775/13, 1.30.1942.

38 Ibid., Telegram No. 86, 2.3.1942.

39 Burns reported that he had shown Nana Ofori Atta a draft Ordinance based on Nigerian and Ashanti models. He thought that Atta would not oppose in principle such a reform even though he was the chief draftsman of the existing Native Administration Ordinance of 1927. Ibid., No 311, Secret, 3.20.1942.
By this time, Britain was fully engaged in World War Two and was, understandably, not focused directly on colonial judicial issues. Nor does the historiography of the period discuss domestic Gold Coast issues other than to point out that economic austerity and regulation similar to that imposed in Britain were extended to the Empire. Thus the entire Gold Coast cocoa crop was purchased by the metropolitan Ministry of Food.40 Rather it engages with matters related to contributions by Gold Coasters to the war effort. Conscription for military labor service was resisted in the Gold Coast often by men fleeing from their villages into the bush, but nevertheless began in late January 1942, although unlike in Nigeria where men were conscripted for work in the tin mines, there was no conscription for non-military labor in the Gold Coast.41 As Nancy Ellen Lawler points out, the Gold Coast was mobilized for war.42 David Killingray also, like Lawler, focuses on the African soldiers and their experiences fighting for Britain and her allies. He also looks at the question of whether returning soldiers contributed inordinately to post-war nationalist agitation and concludes that they did not. There is little evidence, he says, to support a view that Gold Coast soldiers learned new political ideas or the manner in which to express them from their military service.43 The war also gave rise to a more intense interest in nationalism and post war reforms. A delegation of Gold Coast journalists reminded the colonial power of the words and meaning of the Atlantic Charter and of a statement by


Prime Minister Churchill that the terms of that document were “not inconsistent with the declared Colonial policy” of the British Government. Self government looking to responsible government was stated as a critical objective, starting as soon as the war was over.44

In late autumn 1942, Governor Burns appointed a Native Tribunal Committee of Enquiry to be chaired by the Attorney General Harry Blackall and consisting of the Acting Secretary for Native Affairs, two chiefs, J. B. Danquah and J. C. deGraft Johnson to consider (A) the constitution and procedures of Native Tribunals; (B) the working of Native Tribunals in urban and mixed tribal areas and the suitability therefor; C) procedures as to land disputes, including appeals; and (D) generally such reforms in the administration of justice in Native Tribunals as seemed necessary and desirable.45 As we shall, the recommendations of the committee’s report were almost entirely carried into the ordinance that was enacted in 1944. The Secretary of Native Affairs, T. R. O. Mangin, handled the debate on behalf of the Government while opposition was desultory at best, being limited to a single, readily defeated motion to refer the bill to a select committee.

In a major departure from tradition, Attorney General Blackall gave a radio address encouraging his listeners to contact the committee with their comments and/or desire to testify. Beyond what Blackall said in his address, the record in barren of evidence as to his motives in reaching out to the population in this unique manner. We can speculate that seeking popular involvement in an issue clearly of concern to them fit into the Government’s plans to mobilize the people for war.

44 West African Press Delegation to Great Britain, 1, 3, 9.

45 GNA ADM 6/108, Gazette, 12.12.1942, 1443. On December 19, 1942 a revised notice advised that C. E. Woolhouse Bannerman, P. J. had been added as a member. Ibid., 696. The Gold Coast Independent, 12.12.1942, 251, said that the appointment of the Committee “should be welcomed” in view of the “regular influx of complaints” about the workings of the Tribunals “as an opportune and timely step to save the country from further inconsistencies under the Native Administration Ordinance.” In a leader on January, 16, 1943, (14) the paper said that Native Tribunals were the subject of continuous complaints so that everyone should cooperate with the Committee to correct the “exercise of misguided authority” by the Tribunals that “do not translate properly to the people the meaning of British Justice and Fair Play.”
In his address, Blackall specified a number of the issues that his Committee would consider, among which were whether continued membership on Native Tribunals by reason of birth was an “entirely satisfactory arrangement nowadays” or should another method be used to get suitable people on the courts; whether Native Tribunals should operate in the larger towns; whether Native Tribunals should try cases involving a stranger as one party; whether Tribunals should be graded and have differing powers; whether fees and fines were fair and reasonable and whether Native Tribunal proceedings were unreasonably delayed.46

Hundreds of documents and memoranda were received and thirty eight witnesses gave evidence, among whom were colonial officials, traditional chiefs and two current and former Registrars.47 Prior to commencing hearings, the Committee prepared a questionnaire with thirty five questions and asked that it be sent to all Provincial and District Commissioners. The Committee received fifty seven responses and memoranda with suggestions. The questions posed dealt with the issues raised by Hailey and the Commissioners’ Conference, e.g., how judges should be appointed; should Tribunals be graded with jurisdiction according to grade; should the number of judges be limited and, if so, to what number; should judges be paid and, if so, whether monthly or by sitting fee; were Tribunals suitable for large towns; should there by a Judicial Advisor to review Tribunal judgments; should native law be codified; should there by a Land Judge; should there be

46 Oxford University Rhodes House, Mss Brit Emp 5.477, 95, Transcript of Blackall radio address.
47 GNA CSO 21/7/109, “Report of the Native Tribunals Committee of Enquiry,” 5.1.1943, Appendix “A.” Among the material listed in another of the appendices was a schedule entitled “Summary of Contents of Memoranda” including “Hereditary System of Appointment Unsatisfactory,” “Other Educated People Should Be Appointed,” “The President of Each Tribunal Should Be an Educated Man and Not Necessarily a Chief,” “Each Tribunal Should Have a Member Trained in Native Law,” “The Number of Times Hearing Fees Are To Be Charged Should Be Limited,” “Adjournments Should Be Limited,” “Courts Should Be Graded With Jurisdiction According To Grade” and “Registrars Should Be Trained.” GNA CSO 21/7/104.
representation in a Tribunal by a certified pleader; and should Provincial Councils of Chiefs continue to have any judicial function.48

Over the course of many sittings, after having heard the witnesses and reviewed the written evidence, the Committee discussed all of the issues mentioned by Blackall in his radio address and discussed by Lord Hailey and the conference of Commissioners.49 Each issue was addressed separately and a recommendation decided on. For example, Atta and Kole both said that judges in their Tribunals were paid from their State Treasuries, Atta by a monthly salary and Kole by “sitting” fees neither of which were related to the fees and fines collected by the Tribunals. The Committee agreed to recommend payment by one method or the other at the choice of the State Council.50

In considering the role of chiefs as the heads of Native Tribunals, the Committee heard the President of the Native Administration Ordinance Staff Association who testified that having sitting chiefs on a Tribunal lead to trouble and that chiefs became unpopular through the exercise of their judicial power and were always fearful of being destooled by making a judgment that offended some influential subject, so they should be “divorced from their judicial functions.”51 Practically all of the witnesses and those who sent documents favored having a Judicial Advisor, continuing to permit the District Commissioners to review and revise Tribunal criminal judgments, but under the supervision of the Judicial Advisor

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48 GNA CSO 21/7/101, 103, 105.
50 GNA CSO 21/7/101, Minutes, 12.18.1942, 2. In connection with this issue, the Committee reviewed an unsigned memorandum, probably authored by Lord Hailey noting that in the view of some administrators, payment to native judges was inconsistent with indirect rule, but payment was a widespread practice outside the Gold Coast and should be encouraged to eliminate incentives to “accept presents from litigants.” Payment should be in an amount “adequate also to attract to the service of the courts the better type of progressive African and to secure a court in which the clerk is not in a position in which he can exercise undue influence over the court members by reason of the prestige deriving from superior pay.” Ibid., 3, ¶9.
51 Ibid., Minutes, 2.8.1943, 1. An unsigned, undated memorandum, probably from Lord Hailey considered by the Committee encouraged appointment of presiding officers with “special qualities” and allow them to stand in for the chiefs who might retain a titular presidency of the Tribunal. Ibid., 4.
and that revisory power should be extended to civil cases.\textsuperscript{52} The Committee agreed to recommend the appointment of a Judicial Advisor in light of the success had by this official in Uganda. They agreed to recommend that no Tribunal be permitted to function unless it employed and paid “a properly trained registrar.”\textsuperscript{53} The Committee also agreed that Native Authorities, organs of local government to be created under a new ordinance reforming customary government, should prepare rosters of people qualified to serve as judges from which panels would be drawn and to recommend a minimum of three and a maximum of five judges. Appointments to Native Tribunals should be made by the Governor-in-Council in consultation with the appropriate State Council. The Governor-in-Council would also have the authority to constitute courts and grade them with jurisdiction for each grade being set out in a schedule to the proposed Ordinance. The courts should have both hereditary and non-hereditary members, but all would have to be “suitable,” although no definition was given to that term. All judges, who, as noted above, would be paid, would be paid at the same rate as all other judges of the same grade.\textsuperscript{54}

There should be a Land Judge, the Committee decided, who would sit with assessors on interstate land disputes but alone as an appellate judge whose decision on questions of law only in cases of lesser value would be final but in larger cases would be appealable to WACA.\textsuperscript{55} In a significant proposed change from the current practice, the Committee discussed having the Magistrates, not the District Commissioners exercise revisory powers in both criminal and civil cases.\textsuperscript{56} In personal cases, appeals would be to Magistrates’ Courts where the amount in issue was between £50 and £100, to Divisional

\begin{footnotesize}
\begin{enumerate}
\item GNA CSO 21/7/107, 57; GNA CSO 21/7/101, Minutes, 12.28.1942, 1.
\item \textit{Ibid.}, 2.
\item GNA CSO 21/7/103, Minutes, 3.1.1943, 1-3.
\item \textit{Ibid.}, Minutes, 3.2.1943.
\item \textit{Ibid.}, Minutes, 3.8.1943.
\end{enumerate}
\end{footnotesize}
Courts with leave to appeal granted by the Magistrate or the Divisional Court on questions of law only in cases where the amount in issue was between £100 and £300 and to WACA where the amount in issue exceeded £300.57

The Blackall Committee Report

In late May 1943, the Committee issued its Report and Recommendations. Each paragraph focused on a particular issue and recommendation, most if not all of them consistent with the discussions held during their meetings.58 Its view of the Native Tribunals was extremely negative, sounding much as former Chief Justice Griffith, Jr., had in the first decade of the twentieth century: “In the Colony alone [Ashanti and the Northern Territories having long had more controlled Native Tribunals] the old pernicious system remained. Sheltering under the doctrine of ‘inherent rights’ – and as it seemed the ‘divine right of King to govern wrong – were many corrupt, inefficient and redundant tribunals.”59 The Committee condemned the sharing of fees among the members of a court as a “pernicious practice” and the most “fruitful source of abuse and one of the chief defects of the present system” leading to imposition of excessive fines and costs and encouragement of frivolous litigation. Although the situation had improved, the Committee found, since the implementation of the Native Treasuries Ordinance No. 10 of 1939, it persisted, principally where no such Treasuries existed. No Tribunal should be permitted to function unless there was a State Treasury from which payments could be made by either a monthly salary or sitting fees. Judges would sit in rotation for a month at a time and get paid only for that month. It should be up to the State Councils to choose the method of payment, but it should be only for services performed. Where there was a permanent President, he should get an annual

57 Ibid.
58 GNA CSO 21/7/109.
59 Ibid., 1, ¶4.

-385-
salary. All compensation, the Committee recommended, should be considered as honoraria and not as a means of making a living. As to fees charged by the Tribunals, the Judicial Advisor whose appointment the Committee recommended should review and prescribe fair fees that would be simplified and reduced from current levels.\textsuperscript{60}

All courts should be graded with the higher grades having greater jurisdiction in amount and geography. The number and location of courts was related to politics and not to the judicial requirements of the people and were all out of proportion to the public needs. Native Tribunals were “falling all over each other to attract business” which encouraged frivolous litigation and wasteful competition. Accordingly, the number of courts should be reduced. Moreover, the requirement that each State had to have a Paramount Chief’s Tribunal and a State Council irrespective of size and population “fosters and prolongs the existence of petty states incapable of undertaking the civic responsibilities which nowadays devolve upon Native Authorities.” Thus the Committee recommended merger of “‘pocket States’ into confederations of workable extent.”\textsuperscript{61}

Too often, the Committee found, the Registrar was the only literate person in the court and then was usually only semi-literate. He had to interpret “intricate provisions” of the Native Administration Ordinance to the illiterate members of the court and too frequently did so incorrectly. Many were corrupt and wrote down judgments in favor of those who paid them. Often they were hired by Tribunals despite convictions for bribery and/or theft. Often as well, they were poorly and uncertainly paid, generally from the fines and fees collected. The Registrar’s appointment and dismissal should be subject to the approval of the Provincial Commissioner. Those convicted of crimes involving dishonesty during the prior five years should be disqualified from employment, and after a date to be specified by

\textsuperscript{60} Ibid., 2 ¶6, 3 ¶12, 12 ¶51.

\textsuperscript{61} Ibid., 4 ¶15
the Governor, no Registrar could be employed unless he had been certified after having taken a training course and passed an examination.\textsuperscript{62}

The Committee agreed that Native Tribunals were best suited to try land cases where native tenure was involved. It recommended that the top level courts to be established should have jurisdiction in land cases with appeals to lie to a native court of appeal and from there to the Land Court and thence, if large enough, to WACA. A Land Court should be established to hear cases between states \textit{in situ} and with assessors whom they would be able to consult in private as to the customary law involved and the testimony heard concerning such customary law. The Committee decided that the Provincial Commissioners should be relieved of all jurisdiction in land cases as they took up too much time. This recommendation would respond to criticism, particularly from attorneys, who, for years, pressed for cases to be heard by British judges and not by executive officers.\textsuperscript{63}

The Committee’s consensus was that Native Tribunals were insufficiently and inadequately supervised by administrative officers. However, it was cheaper and more expeditious to have District Commissioners supervise and they had an educational function to perform as well. Thus, the Committee recommended, albeit not unanimously, extension of the District Commissioners’ review and revisory powers to civil cases and to authorize them to suspend sentences of Native Tribunals in criminal cases pending confirmation by the Judicial Advisor, because it afforded poor people a free appeal.\textsuperscript{64}

The question of attorneys appearing in the Native Tribunals on behalf of litigants still roiled the Native justice system sixty years after the first Native Jurisdiction Ordinance. The

\textsuperscript{62} \textit{Ibid.}, 5-6, ¶22.
\textsuperscript{63} \textit{Ibid.}, 9, ¶¶32-33, 36.
\textsuperscript{64} \textit{Ibid.}, 10, ¶¶39-40, 10-11, ¶42. It recommended that the District Commissioner give the Tribunal an opportunity to explain the reasons for its decision, give it notice of his proposed revision and the opportunity to object and, if an objection is lodged, the Judicial Advisor would have the final say. \textit{Ibid.}, 11, ¶43.
Committee heard considerable evidence concerning “Bush lawyers” who pretended to be litigants’ family members in order to be able to appear as such family members were allowed in most Tribunals to speak on behalf of their relatives. Some witnesses testified that attorneys should be permitted or that “bush lawyers’ should be trained and certified after testing as to their knowledge of customary law and procedure. However, the Committee consensus was that no lawyers, “bush” or otherwise should be permitted because they were unnecessary as witnesses knew the facts and “native law was not a technical matter which called for expert advocacy, as it was usually a matter of common knowledge.” While that statement might have been true for the Native Courts, it ignored completely the related question of the ability of litigants to organize the presentation of their evidence, properly question their witnesses and make coherent arguments, all skills in which attorneys were trained. Nevertheless, the Committee adhered to the rule against appearance by counsel and recommended that anyone claiming to be a family member should be required to prove the relationship before being allowed to be heard.65

The Committee reported that educated members of the community, by which they meant those who were literate and had received some degree of advanced education, were excluded from participating in the administration of justice unless they happened to be stool holders or had been appointed councillors, which was not often the case. It heard evidence that to appoint educated men would generate opposition from conservative elders who did not want to see anything changed, but the great majority of tribunal members were illiterate and unable to understand most of the laws they were asked to enforce, such as, for example, sanitation by laws, except customary law. The members of current Tribunals combined executive and judicial functions that empowered those members to create a

65 Ibid., 14 ¶¶56-58.
“formidable weapon against anyone who offends them.” On the one hand, the problem with appointing too many educated judges was that they would have a tendency to ignore the elders in whom the ordinary people reposed great confidence. On the other hand, if too few were appointed, the current unsatisfactory situation would continue. It would not be enough to create courts per native custom, “there must be a more enlightened superior authority who is in a position to ensure that the most suitable local elements are represented.” Therefore, the Committee recommended appointment of Tribunal members by the Governor-in-Council, after consultation with the State Council, that would create panels from which judges would be chosen to sit for a specified time, e. g., a month. Existing courts with fifteen to twenty five councillors were too large and often its members were uninterested in the case being tried before them, with judges leaving and returning or even sleeping. There should be a minimum of three and a maximum of five to seven members of each Court.66

Usually, the Committee found, the Chief was the ex officio presiding officer of the Tribunal whether or not he was qualified. There was a strong consensus on the Committee that a Paramount Chief should not sit on a Tribunal, so that the members of the Tribunal could discharge their executive and administrative duties and “avoid incurring the enmity of those they convict or against whom they give judgment.”67 One might ask what changes had occurred during the prior decades that would suggest to the chiefs that they should no longer sit in their Tribunals. They always had executive and administrative functions to fulfill and they always risked alienating powerful subjects or their friends and retainers by giving judgment against them. Why now? The answer that most prominently suggests itself has to be that presiding over the Tribunal was no longer as profitable as it once was because of

66  Ibid., 15-16, ¶¶60-62.
67  Ibid., 11, ¶63.
the implementation of limitations on sharing fees. Although representatives of the Provincial Councils told the Committee that the Councils agreed that Paramount Chiefs should no longer sit, the Committee felt that it might become necessary or desirable for them to preside from time to time on some important cases, so that the Committee would not recommend an absolute prohibition, but only that as a general rule they should not sit. The Committee suggested that the State Councils should choose the presidents of the tribunals with the approval of the Governor-in-Council, and some states might want to provide for multiple presidents so courts could sit in divisions. In any event, the presidents should be men of good character, literate and versed in customary law and court procedure. It would help if they had taken and passed a registrar’s training course.\textsuperscript{68}

Perhaps the most significant recommendation dealt with creation of the position of Judicial Advisor. Somewhat akin to the nineteenth century role of Judicial Assessor who sat with the chiefs and advised them on the criminal cases before them, the Judicial Advisor would be a “'guide, philosopher and friend' to the Native Courts" as he was in Uganda where the system worked well. He should have legal qualifications but not have “too legalistic: an outlook. He should have a general knowledge of customary law and local conditions, so that someone with an administrative background would be a good candidate. He should be required, \textit{inter alia}, to advise with respect to improvement of the administration of justice in Native Courts by preparation of model rules of procedure and evidence, suggest to State Councils declarations of customary law to be made and edit those the Council has produced. He would have final review authority, direct Registrar training and liaise with the Native Courts, the Supreme Court and the Executive.\textsuperscript{69}

\textsuperscript{68} \textit{Ibid.}, 11 ¶¶64-65.

\textsuperscript{69} \textit{Ibid.}, 21 ¶¶73-74.
The Governor caused the Committee’s Report to be published, as it was in the *Gazette* as well as in several consecutive editions of the popular press. A Bill would be drafted to establish courts where the population was at least ten thousand and two hundred cases per year would be heard so that the courts would be kept busy. In fact one court was created for every 15,147 people and that heard and average of two hundred ninety three civil and criminal cases in 1944-45.

The Blackall Committee had rejected appointment of judges by State Councils lest conservative chiefs and councillors failed to appoint educated men. Although the Government would be required to consult them, in practice it was expected, and this was the way it worked out, that the State Council would nominate panel members, District Commissioners could comment or make their own nominations and the Governor-in-Council would accept them.70

While the Bill was being drafted, Governor Burns wrote to Acting Chief Justice Doorly, reminding him that the Blackall Committee Report had recommended establishment of a Land Court with a Land Judge. The Governor told Doorly that he wanted the Land Judge to have the “prestige that attaches to the office of Puisne Judge” and he asked for Doorly’s views on whether the Land Court should be separate or part of the Supreme Court. Doorly expressed his opposition to an independent Land Court and argued that a Land Court Judge could not be equal to a Puisne Judge unless he actually were a Puisne Judge. Moreover an independent court would require a separate and expensive staff and the Chief Justice and the Puisne Judges could not substitute for the Land Judge to assist him or act for him while he was on leave.71 The Governor accepted Doorly’s arguments and the Bill creating the Land Court did so as a division of the Supreme Court.

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70 GNA ADM 5/3/80, 9.
The Native Courts Ordinance

In November 1943, Arthur J. Loveridge, who subsequently was appointed Judicial Advisor, reported to the Governor that all the recommendations of the Blackall Committee had been adopted and incorporated into a proposed Native Courts Ordinance insofar as possible.72 The reaction of the Colonial Office to the proposed bill was mixed. While giving approbation to the idea of a Judicial Advisor, Sir Sidney Abrahams, formerly a Gold Coast Attorney General and now a Colonial Office advisor and A. Russell, an Undersecretary of State, both objected to an independent Land Court. They also objected to the extent of the power the Governor was to have over the operation of the Native Courts, a power that they believed should be vested in the judiciary. The Secretary of State, Oliver Stanley, adopted this critique and requested that the bill be revised to reflect these criticisms and to make the powers of the Judicial Advisor less vague. The debate in the Legislative Council, led by Secretary of Native Affairs, T. O. Mangin, was not at all contentious and after some minor amendments, the Ordinance was adopted.

Loveridge had stated in his report to Governor Burns, that the Land Court was to displace the Provincial Commissioners’ courts in land cases, Native Courts were to be set up such that the Governor had full control of them. He continued that the draft Bill followed the recommendation of the Committee that anyone who was subject to customary law in his own community would be subject to Native Court jurisdiction. However, he said that draft would not follow the Committee recommendation as to making those who had entered into Christian marriages and custody matters as to their children subject to Native Court jurisdiction, nor did the draft proscribe Registrars convicted of crime as recommended by the Committee because the Provincial Commissioners appointed Registrars in their

72 D. G. R. Williams of the Colonial Office noted only minor variations from the recommendations. BNA CO 96/775/15,
discretion and they could be trusted to exercise that discretion wisely. Finally, he advised that he believed that the Committee's recommendations as to appeals were too restrictive, conflicted with generally accepted standards and would be revised.73

In December 1943, the Acting Governor sent the two draft Bills dealing with the Native Courts and the Land Court to the Colonial Office. Explaining the need for two Bills, he said that Governor Burns wanted the Land Court to be separate and independent from the Supreme Court and exclusively to exercise appellate jurisdiction in land cases appealed from Native Courts as well as plenary jurisdiction in land cases where no native court had jurisdiction and land cases transferred from native courts by the Land Judge on cause shown. Where English law, concession issues or interpleader were involved, jurisdiction would remain in the Supreme Court with appeals to the WACA. In creating the Land Court as a separate institution, the draftsmen of the Bill rejected Judge Doorly's arguments as to making the Land Court a division of the Supreme Court but provided for a separate Land Court that would displace the Provincial Commissioners' courts, have the same rules and practices as the Supreme Court and be under the Courts Ordinance. Although all land cases pending in the Supreme Court, the Provincial Commissioners' courts, the Provincial Councils or the State Councils would be subject to Land Court jurisdiction, the draft was silent on transferring them to the Land Court leaving a big question yet to be answered.74

If the Courts Bill were to be enacted in the form submitted to the Colonial Office, the Governor would have had complete control over native courts: he would constitute them and appoint their judges after consultation with native authorities; the native authorities would have had to satisfy the Governor as to their means to pay court members, Registrars and other staff before their courts could be constituted; fees and fines would have had to be

73 Ibid., Memorandum, 11.12.1943.
74 BNA CO 96/775/15, 12.5.1943.
paid into native treasuries; courts would be graded with different levels of civil and criminal jurisdiction for each grade; appeals would be from lower grade to higher grade courts with appeals from highest grade courts to Magistrates’ Courts if the sum involved exceeded a specified amount or to the Land Court in land cases; and appeals from Magistrates’ Courts would lie to the Divisional Court and from the Land Court to WACA.  

Abrahams, now part of the Colonial Office staff, and Sir A. Russell, one of the Undersecretaries, questioned the necessity for an independent Land Court, to which no answer was forthcoming. They thought that it should be a division of the Supreme Court with a Puisne Judge in charge. Abrahams charged that Burns was seeking to diminish the prestige of the Supreme Court. Russell also questioned the apparent restrictions on the right of appeal specified in the bill: “a right of appeal to a court of justice is an inalienable right of every British subject,” he said. Russell also said that he agreed with Williams that the Land Court should be subject to oversight by the Chief Justice. They questioned the role of the Judicial Advisor as set forth in the draft Bill. The only apparent role he had was to approve prosecutions of people fraudulently holding themselves out as members of a native court, exempting certain Africans from native jurisdiction, confirming a District Commissioner’s decision to review a Native Court judgment and acting as amicus on appeals. Russell pointed out that the Committee’s report recommended a much more expansive role as a guide to Native Courts, to inspect Native Court records and be the final reviewing authority, yet no explanation was given as to why the Bill failed to provide for these roles.

Russell also questioned why it should be the Governor and not the Chief Justice that was to make technical rules for operation of the Land Court. It was “essential” he said for

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75 Ibid.
76 Ibid., 1.17.1944.
all courts, indigenous and native to “be under the general supervision and guidance of the Judiciary. The carefree pioneer days of the District Officer sitting under his palm tree administering rough and ready justice undeterred by the thought that a judge might wish to look at his proceedings are gone beyond recall; and I very greatly deprecate any attempt to return them.”

He recommended that the Governor be told that the Land Court should be part of the Supreme Court and that the Supreme Court would be authorized to intervene in Land Court operations, as it was in Uganda, to prevent and correct any miscarriage of justice. Duane, an Undersecretary, agreed with Russell and Abrahams and said that it was unfortunate that this struggle between the executive and the judiciary had reemerged. He suggested that the Bill should be submitted to the Acting Chief Justice as well as to the Attorney General for revision and comment. Another official, Williams, minuted his wonder as to how one Land Judge would deal with the work now occupying seven Puisne Judges even with help from the Judicial Advisor. He wouldn’t permit publication of the Bill until Burns commented on the Land Court issue.

Oliver Stanley, the Secretary of State, telegraphed Governor Burns that the Colonial Office saw difficulties in separating the Land Court from the Supreme Court and his apparent intention of subjecting it to the Executive and asked for his reasons. Two weeks later, Stanley, in the terms of Russell’s minute, told Burns that the Judicial Advisor’s powers were very vague and limited and did not carry out the Committee’s recommendations. He should be given access to Native Court records and powers of revision as in the Uganda Ordinance. It was undesirable, Stanley continued, for the Judicial Advisor to act for the

77 Ibid.
78 BNA CO 96/775/15, Minutes, 1.17.1944, 2.2.1944.
79 BNA CO 96/780/1, No. 184, Secret, 3.6.1944.
Land Judge, that task should be fulfilled by another judge. Moreover, the Supreme Court should have the power to deal with injustice as in the Uganda Ordinance. Finally, he told Burns, it was preferable for the Provincial Commissioners and the Chief Justice to make rules for the Native Courts rather than the Governor.\footnote{\textit{Ibid.}, Secret 3.20.1944.}

Burns responded denying that the Land Court would be subject to the Executive. The Land Court Judge, he said, would be as independent as a Supreme Court Judge, but that he wanted a Land Court Judge with some administrative experience that was as important as his legal qualifications and if the Land Court were part of the Supreme Court, the judge assigned by the Chief Justice might not have that administrative experience. If the Land Court was to be part of the Supreme Court it should be as a Land Division with a separate Judge who could not be assigned without the Governor’s approval.\footnote{\textit{Ibid.}, 3.22.1944.} A Colonial Office telegram approved a Land Division, but Stanley told the Governor that he would not have any power to approve the Judge as that would appear to subject the Judge to the Executive, but “It should be an established matter of practice and convention that Puisne Judges not specifically appointed to the Lands Division should not sit in that Division.”\footnote{\textit{Ibid.}, telegram 4.7.1944} Burns’ telegram in response acknowledged defeat. He agreed to a Supreme Court Land Division with “such Puisne Judges as necessary.” If a temporary vacancy arose, he agreed that, in consultation with the Chief Justice, he would appoint a “fit and proper person” to act per Section 9 of the Courts Ordinance.\footnote{\textit{Ibid.}, Secret Telegram, 4.17.1944.}

Previously the Colonial Office had advised Burns that it liked the proposal for a Judicial Advisor (“a very useful innovation”), but said that the powers of that officer were not
clearly set forth in the current draft and appeared to be much less than what was recommended in the Blackall Committee report. He should be given access to all courts and powers of revision, he should not be an Acting Land Judge as that would conflict with his other functions. Lastly, the Supreme Court should be empowered to redress miscarriages of justice in Native Courts as is the High Court under the Uganda Ordinance of 1940.84

Shortly thereafter, Stanley approved a revised draft Native Courts and Courts Amendment bills save for Section 29 of the proposed Native Courts Bill, requiring that it and the Courts Amendment Ordinance Bill be reconsidered to clarify that the Lands Division would hear pending cases *de novo*. The revised Native Courts Bill added a new section giving the Judicial Advisor power to revise on his own motion any Native Court decision and to reverse, remand or modify it to the same extent as could a District Commissioner. A new section sixty three also gave the Judicial Advisor access to Native Courts and their records, and despite the prior comments from Colonial Office officials, the revision retained the provision authorizing the Governor, not the Chief Justice, to make procedural rules for the Native Courts. The Courts Amendment Bill added three sections creating the Land Division with exclusive jurisdiction over native land cases, the Judge to sit with assessors and appeals to lie to WACA.85

Secretary for Native Affairs, T. R. O. Mangin introduced the Native Courts and the related Courts Amendment Bills into the Legislative Council in June 1944. He emphasized the important fact disclosed during the Committee’s hearings of the desire of the Paramount Chiefs and to a certain extent the Divisional Chiefs as well to be dissociated from most of the judicial functions that they now performed under the Native Administration Ordinance.

Mangin told the Council that Native Authorities created under the Native Authorities Bill also being introduced that day were to nominate men to the Governor-in-Council to serve on a panel from which three or five people would be chosen from time to time to constitute the Court. Jurisdiction of the newly graded courts “is in many respects considerably greater than jurisdiction of the existing four corresponding grades of Native Tribunals.” 86

The classes of people subject to Native Court jurisdiction would be persons of African descent, provided that the mode of life of such persons would be that of the general community, and that such persons are in their country of origin subject to African customary law however that customary law might be modified or applied.87 The Bill carried out the recommendations with respect to the Judicial Advisor and his powers and authority are spelled out that he may be, in the words of the Committee Report, “‘guide, philosopher and friend’ to the Native Courts which is the intention he should be.” Registrars, Mangin went on, would be required to pass courses designed by the Judicial Advisor to improve their status and efficiency. Finally, appeal procedures were the same as under the Native Administrative Ordinance except that Land Appeals would go to the Land Court rather than to the Provincial Commissioners. After completing this introduction to the Bill, its consideration was adjourned to the October session.88

During the summer, A. C. Smith, one of the Puisne Judges, reported to Chief Justice Harrigan with questions as to whether the draft Bill gave a right of appeal in paternity or divorce cases and whether interlocutory appeals were permissible. In addition, he said that he did not believe defaulting parties should have a right of appeal on other than questions of law after leave granted. He suggested to Harrigan that the Bill should be redrafted to

86 GNA ADM 6/111, 6.22.1944, 377.
87 GNA ADM 6/139, 324.
88 Ibid., 377-378.
deal with those and other issues. Just before the autumn legislative session began, Smith wrote again, saying that there was an enormous problem underlying the entire Bill, the uncertainty as to state and divisional boundaries, so that before the Bill was considered, a Boundary Commission should be set up to resolve these uncertainties.  

The Government declined to defer consideration of the Courts Bill to take care of boundary issues that might be years in the resolution. Rather, on October 4, 1944, the Mangin moved the second reading. The Municipal member for Accra moved to refer the Bill to a Select Committee, which motion was defeated without a division. The Bill was read a second time and referred to the Committee of the Whole. Several amendments were accepted by the Government, among which was one enabling a defaulting defendant time to move the Native Court to review, vary or discharge the default judgment and to permit him to appeal the denial of such motion; another to give parties and witnesses in the Native Court the right to decline to answer questions the responses to which “in the opinion of the Native Court, is likely to incriminate them;” one requiring court Registrars to provide records of the proceedings of his Court and its judgments to the District Commissioner on demand in default of which, or if he provided false records, he would be punishable summarily by jail or fine. Finally, the Bill submitted to the Council having inexplicably failed to contain it, an amendment was passed directing the Governor to appoint a Judicial Advisor and his assistants. The Bill was then read a third time and enacted as No. 22 of 1944.

The Native Courts Ordinance of 1944 represented a totally different approach to the organization of indigenous courts in the Gold Coast from any prior effort to provide native justice. At the same time, it imposed much tighter restraints on the Native Courts and

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90 GNA ADM 6/112,10.4.1944,618.619, 620; GNA ADM14/1/41,10.4.1944, 28-30.
91 GNA ADM 6/138, 323 et seq.
effectively dissociated the hereditary chiefs from any control of the native justice system. Firstly, the Ordinance did not compel the establishment of a native system of justice at all. The operative language, Section Three, gave the Governor discretion (he may, not he must) to provide for the constitution of Native Courts, including native appellate courts, to exercise jurisdiction in areas that the Governor-in-Council specified.\(^92\) Rather than being obliged to deal with the personnel of the Courts who sat as a matter of hereditary right, as discussed above, the Ordinance authorized the Governor-in-Council to appoint the judges who would constitute the Native Courts not only from chiefs but others upon taking “advice and considering” the recommendations of Native Authorities by which he was not legally bound. Moreover, these judicial positions, even those held by the chiefs, were not permanent, but were held at the discretion of the Governor and who could revoke the appointments at any time. There could be no stronger indication of a lack of judicial independence that being subject to removal, apparently without cause. Thus, woe unto the Native Judge who offended the British Governor.\(^93\) To emphasize the power of the Administration over the Courts, Section Six prohibited anyone not appointed by the Governor to sit as a member of a Native Court. No chiefs sitting ex officio here. Again contrary to history and tradition, a quorum for the Court consisted of three or five members, and rather than requiring a unanimous decision as was formerly the case, a simple majority could reach a verdict. Section Nine embodied one of the potentially most effective measures to prevent corruption, the requirement that the Governor not create a Court unless and until he was assured that provision had been made for the members of the Court and the staff to be paid from a Treasury maintained by the Native Authority into which all fees and fines imposed by the Court were to be paid. Thus the incentive to extort litigants by imposing excessive fees

\(^92\) *Ibid.*, 327.

\(^93\) *Ibid.*, 328.
and fines was reduced, if not eliminated because no longer would those fees and fines be shared among the members of the Court.

Section Thirteen told the Governor to grade the Courts as “A,” “B,” “C,” and “D” with varying jurisdiction specified in the First and Second Schedules, the “A” courts having the broadest jurisdiction and the “D” courts having the most narrow. As in the past, customary law had to be administered in Native Courts, but customary crimes were not justiciable except for those few specified on the First Schedule, such as putting in fetish, seducing the Chief’s wife, etc. As with all prior legislation authorizing native courts, this Ordinance prohibited lawyers from appearing, acting for or assisting any party or from acting in any matter or cause or assisting in seeking a transfer to a British Court, except in this latter case, with the consent of the Supreme Court. Perhaps recollecting the cocoa hold up of 1931 when oaths were used to enforce the boycott, the Ordinance criminalized swearing an oath for an unlawful purpose and both the party administering and the one taking the oath were deemed to be liable. The Ordinance specifically outlawed fetish and personal oaths and said that they were not binding.

As to Appellate jurisdiction, the Ordinance for the first time created native appellate courts to hear appeals from most lower courts. All appeals might, but were not required to, be heard de novo and all appellate courts were to have full revisory power.

The statute had tighter control provisions than any of its predecessors. Thus, Section Fifty Nine required monthly reports to the District Commissioner as to all cases.

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94 Ibid., 329-330, 346-347.
95 Ibid., 333, 334. The administration of oaths by chiefs was not the only thing dividing the people. Cooper argues that by the 1930’s, less land was available for new entrants into cocoa agriculture and older, larger scale cocoa farmers had differentiated themselves from their smaller scale compatriots with a concomitant increase in social tensions. Frederick Cooper, Africa in the World, Cambridge, MA.: Harvard University Press, 2014, 24-25.
96 Ibid., 336.
Section Sixty authorized the Judicial Advisor to review anything occurring in a Native Court on his own initiative without the necessity of giving notice of his intention as required of a District Commissioner. The Judicial Advisor had standing without the necessity of applying to the Appellate Court to appear as amicus curiae on every case on appeal.97

If the Government expected popular support for the Native Courts Ordinance, it was sadly mistaken. The Gold Coast Independent, the largest circulation English language newspaper in the Colony and one read by almost the entire African mercantile and professional community, characterized the Ordinance as utterly contrary to the principles of British justice.98 In speeches to a rally of the Gold Coast Youth Conference, Accra on August 1, 1944. The introductory speaker said that the Bills deprived the “natural rulers” of their rights. If by this he meant traditional rights, he was absolutely correct as the British rigidly tightened the regulatory noose around the native justice system and its courts. The principal speaker said that the power of Judicial Advisor and the District Commissioners to enter Native Tribunals, demand records and revise decisions was “detrimental to the honour of the Elders. Dr. Danquah, who chaired the meeting, disagreed and said that Government appointment of Tribunal members was necessary and proper and was subject to consultation with the Chiefs, his argument was rejected and the meeting resolved to object to this provision, one speaker saying that it “was a mean trick.”99

In early 1945, the Governor issued the first of nine Orders constituting and grading Native Courts.100 There were sixty eight in the first group, of which there were only four “A” Courts belonging to four Native Confederacies - consolidations of smaller states – created

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97 GNA ADM 6/139, 11.28.1944, 588-613.
99 Ibid.
under the Native Authorities Act, fifty one “B” Courts, fifty seven “C” Courts and thirty three “D” Courts. A few of the higher graded courts were designated as both Native Appeals Courts as well as graded trial courts. He also issued an Order (No. 10 of 1945) setting forth procedures for the Native Courts. Most of those procedures were the same as those under the Native Administration Ordinance and were similar to comparable procedures in the Supreme Court under the Courts Ordinance, but there were fewer requirements in the Native Courts for writings and alternative provisions for oral motions and pleadings, claims or charges were required to be read to defendants and Registrars were obliged to record all oral testimony. The Court was required to exhibit to the public in a prominent place all of the fees set forth on the Second Schedule to the Regulations. As was the rule in the Supreme Court, judgment debtors could, in the discretion of the Court, be arrested for debt, but such discretion was to be exercised in light of the debtor’s ability to pay, whether he had purposefully moved money or property in order to defeat his creditors, whether the judgment against him was based on fraud or breach of trust, whether the debtor willfully or negligently refused or failed to pay and whether he had incurred the debt knowing that he couldn’t pay it. Imprisonment did not discharge the debt but with his consent, the debtor’s property could be sold within one month of his entering prison to pay or reduce the debt. The Regulations authorized interpleader with respect to attached property and writs of possession and permitted third parties with claims to the property for which possession was sought to challenge the right to possession.\footnote{Ibid., 230 et seq.}

Several months after passage of the Native Courts Ordinance, Governor Burns reported to the Colonial Office about organization of the Courts in Accra. He noted that as a precondition to organization of the Courts under the Ordinance, Native Authorities had
first to prove that they had made adequate financial provision for the courts and that revenue from those courts could be guaranteed to be properly administered. These conditions had yet to be met in Accra, he said, so no Native Courts had been established in the Ga State or in a number of other states as of May 1945. The number of Native Courts had been reduced to eliminate competition and jealousy between chiefs and had been limited to those necessary to serve the people “and not to constitute them as marks of personal dignity of the Chiefs of a certain State.” Burns said that many chiefs had stopped presiding over Native Courts because fines and fees were no longer being made available to them to share as they were being paid into Native Authority treasuries and because they didn’t want the fall out from unpopular decisions – something that never seemed to bother them before as long as the fees were coming in.\textsuperscript{102}

Burns reported that £61,000 in fees and fines received by native courts equaled those received by British courts. Since the costs incurred by the Courts were less than £37,000, £24,000 was available to be used by the Native Authorities. He estimated that Native Courts would handle about 45,000 cases relieving the Supreme Court and Magistrates’ Courts of considerable work and settling almost all the cases according to native law and custom. In the near future, Burns said that eight “B” courts were to be regraded to “A” courts covering fifty per cent of the population. He was pleased to report that the number of complaints of tribunal corruption had fallen, but there still was a “glut” of unqualified registrars the number of which should be reduced by introduction of certification

\textsuperscript{102} BNA CO 96/780/5, No. 149, 5.4.45.
procedures. He went on to say that the Native Courts were taking advantage of the Judicial Advisor provisions by seeking his help and advice.

Although the Gold Coast had changed substantially since the creation of the Colony in 1874. For example, the life expectancy of British officials in the Colony had increased substantially as the cause of malaria had been determined and the treatment of that disease had improved. Railroads into the interior and motor roads had been constructed and exports had increased exponentially along with the living standards of the population, albeit they were still extremely poor by European measures. Despite these changes, until 1944 the system of indigenous judicial administration had changed only incrementally and complaints as to oppressive conduct by judges of the Native Tribunals had hardly diminished. As we shall see below, despite the almost radical reforms of the Native Courts Ordinance of 1944, fees charged and fines imposed by the Native Courts remained a source of complaint right up to the date of independence.

Subsequent Events

After the close of the period under study in this dissertation, three studies of native justice took place. The first, by G. R. Havers, a barrister, looked at the cost of litigation in the Gold Coast and recommended limiting attorneys’ fees and adjournments of cases and implementation of his recommendations did, in fact, reduce costs somewhat. The second,

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103 Ibid., No. 79, 3.9.1946, Enclosure 1; Oxford University Rhodes House, Mss Brit Emp 5.447, 12.21.45, 79a-e.

104 Anti argues that the creation of the position of Judicial Advisor proved to be one of the most popular of the Ordinance despite the extremely intrusive powers given to that official. He had, Anti says, an immediate impact on customary law as he helped to codify it and encouraged the modification of outdated customary rules. Kojo Kwakil Anti, The Legal Institutions of the Gold Coast, University of Leeds, 1957, 96. Writing in 1948, Lord Hailey pointed out that the Judicial Advisor discussed each appeal with the court from which it came and explained why leave to appeal had been granted or not. Hailey described how the Judicial Advisor had issued circulars as to common matters of customary law (e.g., long occupation of land), mostly dealing with interpretation of various ordinances, as the “main method of influencing the development of law in Native Courts” quoting the Judicial Advisor, Loveridge in a dispatch to Cox of the Colonial Office. BNA CO 1018/18, 2.16.1948.

-405-
a Committee headed by Puisne Judge J. H. Coussey that recommended placing the traditional courts under the direct supervision of the Chief Justice and separating the chief’s administrative role from his judicial one by removing him from the courts. It suggested a further study which was carried out in 1951 by Commission headed by another Puisne Judge, K. A. Korsah. This group reorganizing the native courts into District and Area courts presided over by professional magistrates with appeals to the British courts.

Shortly before the Native Courts and Native Authorities Bills were introduced into the Legislative Council, Burns complained of the high cost of stool litigation and proposed a Commission to Inquire into the problem. Stanley proposed a single commissioner who would be a lawyer. Burns reluctantly accepted a single commissioner, but so as not to insult the new Chief Justice, Walter Harrigan, he suggested that he or Stanley first consult Harrigan before appointing a commissioner so that Harrigan didn’t get any idea that they were hostile to a Bench that Burns previously characterized as “weak.” At a conference in the Colonial Office also attended by Harrigan and Colonial Office officials, Burns told them that he wanted the initiative to come from the Colonial Office so that it wouldn’t be seen as another Gold Coast Government attempt to get control of land. The Colonial Office suggested that G. R. Havers, K. C. would be agreeable to do the job.

The Governor explained Stanley’s terms of reference for the Commissioner implied criticism of current court procedures and proposed a more general reference to inquire into costs and to make recommendations, including those affecting court procedures, to facilitate the expeditious settlement of disputes and the reduction of the cost of legal
proceedings. Havers was appointed on December 27, 1944 and came to Accra almost immediately. He sat for thirty days, heard one hundred two witnesses and received seventy memoranda and documents. The Governor advised the Colonial Office that Havers was doing a good job and that the enquiry was being supported by the press and public and that the Bar seemed to have been intimidated into not protesting. Havers prepared an extensive report in which he concluded that fees in the Native Courts were still unreasonably high. Fees such as oath fees should be no higher than those for a summons and hearing and judgment fees should be done away with entirely, as should those charged for visiting land and granting adjournments. Witness fees should be no higher than they were in the Supreme Court. He recommended limiting adjournments to those instances where good cause was shown. Havers concluded that legal fees were excessive and should be limited by enforcing the Legal Practitioners Ordinance and a scale of fees as established by the Ordinance should be exhibited to all litigants and published or, alternatively, fees should be set by the court on taxation of costs. He also recommended that proposed stool litigation should not be permitted to be financed by stool treasuries unless an independent legal practitioner of five years standing had opined that the claim or defense was valid and that the District Commissioner concurred since land title disputes were still “a curse of the Gold Coast.” Adjournments should be required to be reported on each Court’s monthly return and appeals in land cases should lie directly to the Land Court

108 Ibid., No. 1307, 12.12.1944.
109 BNA CO 96/780/3.
110 Ibid., 1.9.1945
112 Ibid., ¶13.
113 Ibid., ¶44.
114 Ibid., ¶69.
and should be final except for questions of law that could be appealed to WACA so as to reduce costs further. Moreover, parties should be permitted to waive appeals in advance and a Boundary Commissioner should be appointed to fix disputed boundaries in non-stool cases. Finally the Land Court should be authorized to direct that a survey be made showing the boundaries decreed by the Land Court and to order that the judgment embodying such survey be registered.\footnote{115} Havers’ report produced a substantial decrease in fees, but not enough to make Native Court litigation inexpensive enough to eliminate complaints that continued during the remainder of the Colonial Period and even after the independence of Ghana.

In 1949, the Governor appointed a committee under the chairmanship of J. H. Coussey, a Puisne Judge to recommend constitutional changes in both colonial and native institutions. Insofar as Native Courts were concerned, the Committee pointed out that despite the Native Courts Ordinance provisions for appointment of judges, there had been little separation of the judicial and administrative roles of traditional government and that the Native Courts were still distrusted by the indigenous population.\footnote{116} The Committee recommended appointment of unpaid lay magistrates from outside the traditional ruling families except in the cities where full time professional magistrates should be named to preside over the traditional courts.\footnote{117} Control over the Native Courts should, the Committee suggested, be vested in the Chief Justice and officers appointed by him for that purpose with appeals from all Native Courts to lie directly to the Supreme Court,\footnote{118} Finally, the

\footnote{115} BNA CO 96/780/4.
\footnote{117} Ibid., 33, ¶¶ 229, 230.
\footnote{118} Ibid., 33, ¶ 233.
Coussey Committee recommended the appointment of a separate commission to examine native justice.\textsuperscript{119}

Following the Coussey Committee’s recommendation, in December 1950, the Governor appointed a Commission under the Chairmanship of Mr. Justice K. A. Korsah to examine the Native Court system and make recommendations as to reorganizing it.\textsuperscript{120} Thus, less than seven years after passage of what was then considered to be the “radical” and final change to the native justice system and less than nine years after the extensive inquiry conducted by the Blackall Commission, the indigenous courts were again considered to be in need of reorganization.

The Commission criticized the manner of appointment of judges because consultation with traditional authorities prior to appointment resulted in naming only the most conservative persons who were too often closely associated with and politically acceptable to the chiefs and their intimate councillors.\textsuperscript{121} Accordingly, the Commission recommended that all indigenous courts be divided according to the geographical area they would cover into Area and District Courts, the former to have limited and the latter unlimited jurisdiction over land cases, the former to have limited jurisdiction over personal, paternity and matrimonial actions while the latter’s jurisdiction would cover the same matters of greater value. The judges of the Area Courts would be one full time stipendiary lay justice or two or three part time honorary judges. The District Courts would be presided over by either a full time paid professional magistrate or a stipendiary lay magistrate.\textsuperscript{122} All these judges would be appointed by the Chief Justice on recommendation of local committees.

\textsuperscript{119} Ibid., 33, ¶ 234.
\textsuperscript{120} K. A. Korsah, (Chairman), \textit{Report of the Commission on Native Courts}, Accra: Government Printing Department, 1951), 1, ¶¶ 1,2.
\textsuperscript{121} Ibid., 12, ¶ 67.
\textsuperscript{122} Ibid., 26 ¶¶ 147-150, 36, ¶ 236,
and could be demoted or dismissed by the Chief Justice who would also have complete control over the personnel and operation of the local courts. Finally, appeals would lie in most cases only to the Supreme Court, but in larger personal actions and land cases to the Supreme Court and then to WACA. Moreover, despite British efforts to eliminate all those aspects of corruption about which the British had complained for more than sixty years, the Korsah Commission found that the Native Courts continued to exploit litigants corruptly, that is to render decisions for political reasons rather than on the merits, to extort fees and fines unjustifiably large in relation to the matters before them and to favor friends and relatives of the judges in deciding cases.

This exposition illustrates a theme of British rule: the colonial administration complained bitterly about the fact that native judges rendered decisions based on matters and influences arising from political and social considerations rather than the merits of the cases before them as well as their exploitation of the people through extravagant fees and fines. Yet elimination of such corruption and exploitation required intervention by colonial officials on a level in which the administration was unable or unwilling to engage. It was thus caught between what McLaren called the “Scylla of Imperial Politico-Legal Aspirations and the Charybdis of Colonial Micro-politics,” between a desire to support the traditional authorities through whom it wished to rule and the felt necessity to control their judicial actions thereby undermining them. As In so many other matters, until 1944, the British let things slide and the often corrupt manner in which indigenous authorities administered their

123 Ibid., 24 ¶ 133, 35, ¶ 222.
124 Ibid., 36 ¶¶ 2242-246.
125 K. A. Korsah, (Chairman), Report of the Commission on Native Courts, Accra: Government Printing Department, 1951), ¶ 142. See also Hooker, 211.
courts continued to Independence and beyond. Toward the end of the period under study, it became apparent that a strong intervention, one that had been suggested throughout the period, was required if the traditional courts were to operate in a fashion with which the British could live. Thus the Native Courts Ordinance that reduced, the role of chiefs and traditional councillors in the administration of justice with the expectation, or more likely the hope, that the provisions of the Ordinance would substantially resolve Britain’s dilemma. As we have seen, that expectation was not fulfilled.
CHAPTER X – CRIMINAL PROCEDURE

Perhaps the most important aspect of the British administration of justice on the Gold Coast was the manner in which crimes were dealt with. T. O. Elias has written comprehensively of the substance and administration of criminal law in the British dependencies in Africa, noting their similarities and differences.\(^1\) As discussed below these similarities and differences relate to the availability of trial by jury and the right to counsel. Thus, in Ashanti, until the middle of the 1930's an accused, even in a capital case, whether European or African, had neither the right to a jury trial nor to counsel to assist him. In Central and East Africa, trials, even in capital cases were usually by the Court sitting with assessors, although Europeans were most often tried by juries.\(^2\)

Dr. Elias argues that purposefully or incidentally the history of British administration of justice was moving toward a fully integrated common law, that is, a common law including both British principles and those of customary law. Moreover, he contends, the influence of English law on African societies and polities was both inevitable and salutary “if orderly development in social and economic life were to be ensured.”\(^3\) Antony N. Allott agrees with Elias' views and notes the creation of what I describe here and in other chapters as a hybrid common law, that is one formed by judges with common law training who viewed local

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custom from an alien perspective and infused it with ideas unknown to traditional law. As may be seen below, this hybridization was most evident in land law and was least evident in criminal law, the latter being almost entire English in content and form. In this chapter I confirm Elias’ and Allott’s views, particularly with respect to the right to trial by jury and to counsel, and evidence the critical role of British criminal justice in establishing a stable basis for development of the Gold Coast. Mark J. Roe argues that Britain did not transplant jury trials to most of its colonies, even in criminal cases as its experience with jury nullification in Ireland conflicted with its ability to run a colonial empire. This view is contradicted by the facts discussed below and the arguments of historians and jurists such as R. Knox-Mawer who point to the extension of jury trials to the Empire during the Victorian era where they were received “with great enthusiasm” in West Africa, albeit the use of juries in civil cases was eliminated later. Berhan Macaulay notes that although jury trials were available in the Gold Coast, trial by the court with assessors was authorized in the Gold Coast by the Criminal Procedure Ordinance of 1876, having which incorporated provisions of the Bengal Regulation of 1832. In both the Bengal and Gold Coast legislation, the role of assessors was to give opinions that were not binding on the judge presiding. From the Gold Coast Criminal Procedure Ordinance, principles of criminal procedure migrated to East Africa where they were incorporated into the East African Criminal Procedure Code. Thus, as Ibhayoh argues, rather than administering British principles of criminal procedure, the

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6 Knox-Mawer, 161.

British courts of the Gold Coast were operating under Indian legal procedures that “provided the required imperial standards.”

Criminal justice was seen by the Britains as being the jewel in the crown of British colonial administration and the principal element in demonstrating to the Africans the superiority of British justice. Martin J. Wiener quotes James Fitzpatrick Stephens, a long serving civil servant and professor of law, who said that the “administration of criminal justice is the indispensible condition of all government, and the means by which is in the last resort carried on.” Accordingly, law “lay at the heart of the British imperial enterprise. And criminal justice was at the core of law.” Indeed, this was the essence of the Bond of 1844 executed by then Lieutenant Governor Hill and a number of Fanti chiefs, discussed in Chapter II; an agreement that criminal matters were to be determined by British magistrates according to the principles of English law. Up to the date of independence, British judges continued to administer English common and statutory criminal law. However, as shall be seen, not all of the strictures of English criminal procedure were applied to or followed in the Gold Coast. Indeed, in Ashanti, until the 1930's criminal cases were determined by a judge without juries and without the defendant having the benefit of counsel. In the infamous case of Rex v Knowles, however, the defendant was an Englishman and the outcry among metropolitan newspapers after his conviction for murdering his wife as to the unfairness of trying an Englishman without counsel or jury, something not heard at all when the defendant was an African, led to a reform of the law. Clearly, Knowles demonstrated that English law was not so color blind as the colonial power expressed it to be.

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8 Ibhawoh, Imperial Justice: Africans in the Empire’s Courts, 82.
9 Wiener, 5.
That English law was to govern criminal procedure was true throughout the Empire. Thus, although much civil jurisdiction was accorded to customary courts in the rest of Africa and India, criminal justice there and in the Caribbean was, with very minor exceptions, retained by British courts with British judges.\textsuperscript{11} As a result of the Bond of 1844, the agreement among a number of Fanti chiefs and the British to permit British judges to try felonies, criminal cases were almost dealt with by the British courts. The indigenous authorities retained jurisdiction to deal with minor crimes such as simple assault, petty theft and offenses traditionally dealt with by customary law such as oath violations, insulting the chief or seduction of a chief’s or elder’s wife. All other crimes were handled by British judges sitting at assizes or by District Commissioners sitting as magistrates.\textsuperscript{12}

\textsuperscript{10}(...continued) that the sense of racial superiority of the British in Africa was also demonstrated by their unwillingness to dirty their hands with the carrying out of executions as that would damage the prestige of the colonial power. It would be better for one “native” were to “inflict violence upon another” by bringing the condemned to the gallows and placing the noose around his neck as that would confer “a degree of legitimacy” on the state’s action in ordering the execution. Stacey Hynd, “Killing the Condemned: The Practice and Process of Capital Punishment in British Africa, 1900-1950.” The Journal of African History, Vol. 49, No. 3 (2008):403-418,416.


\textsuperscript{12} Despite the seemingly voluntary adherence to the Bond by numerous chiefs and other traditional authorities, Opoku contends that nowhere was English law voluntarily received in the Gold Cost. The people, he argues, had never been asked to “pronounce on the introduction of a foreign system of laws, written entirely in a foreign language which is understood only by some ten percent of the entire population.” Kwarne Opoku, The Law of Marriage in Ghana: A Study in Legal Pluralism, Frankfurt Am Main: Alfred Metzner Verlag GmbH., 1976, 1, 9-10.
Several different areas of the Empire contributed to the development of criminal law in Africa. Thus, the Gold Coast Criminal Procedure Code of 1876 derived from that of Bengal. Its 1890 amendment originated in that of Queensland via St. Lucia and became the model for subsequent procedural codes throughout Africa.\(^{13}\) Morris suggests that the migration of criminal procedure legislation was approved, if not instigated, by lay District Commissioners who knew little of the common law and found it difficult to apply. Nevertheless, as Morris points out, English common law remained the basis for both civil and criminal procedure in the Gold Coast, and formed the matrix of the Criminal Code and Criminal Procedure Code adopted in 1876. It remained in effect, with a minor amendment in 1890, until 1935 with little reference to the Indian models in part because of the antipathy of Sir Julian Paunceforte and his successors as Colonial Office Legal Advisors, Risley and Bushe to Indian codes.\(^{14}\) In 1935 as part of the reform initiated by Bushe following his West African inspection tour discussed above, the Criminal Procedure Ordinance was entirely replaced by one modeled on a relatively new “more up-to-date model, that of the Gambia.”\(^{15}\)

Unlike the situation in the British colonies, up to 1946 the French did not maintain a monopoly on enforcement of criminal law. Until the passage of a new constitution in 1946, “the criminal law applicable to persons of customary status was also based on local custom.” While accusations of major crime were within the jurisdiction of the Tribunal de Cercle and the Cour de Cassation and all citizens faced trial in French courts under French law, subjects, that is most of the population, could be tried pursuant to customary law.\(^{16}\)

\(14\) Ibid., 6, 7.
\(15\) Ibid., 8. The Gold Coast Ordinance and that of Southern Nigeria formed the basis for procedure codes for Kenya, Uganda, Tanganyika and Nyasaland. Ibid., 22.
\(16\) Salacuse, 54.
The British were absolutely certain that their law was superior to that of any indigenous group in the Gold Coast and that they were entitled to alter the common law to enable them to rule the local population more easily. Indeed, this view was sustained by the Privy Council, which ruled in 1939 that local colonial ordinances could properly expand liability under English criminal law so that eliminating violence as an element of the crime of sedition as in the Gold Coast Criminal Code was lawful.\textsuperscript{17} The Gold Coast Criminal Code fully states its law of sedition, the Court said, and is not subject to any “glosses or interpretation of the law of England or Scotland.” Thus, proof of incitement to violence, a necessary element of the crime of sedition in Great Britain is not an element of the offense in the Gold Coast. Moreover, the West Africa Court of Appeal had held that even if incitement to violence were to be considered necessary to prove the crime, the opinion of the Secretary for Native Affairs that the “local inhabitants (the mass of the people) believe every word they see in the paper” was properly admitted as expert opinion on the issue of incitement because it is his duty to study such opinion and therefore he qualified as an expert as to popular reaction.

In this chapter, I discuss some of the most important themes of British criminal justice and procedure in the Gold Coast: common law defenses in a non-common law community, jury trials, availability of defense counsel and appeals. However, like much of British policy with respect to justice generally, the administration of criminal justice was fraught with inconsistencies. Thus, British judges were unable to come to terms with certain defenses asserted in circumstances with which the judges had no experience. Moreover defense counsel in capital cases at state expense were provided in some places whereas defendants were often tried without any professional representation in others. Trial by jury

\textsuperscript{17} Wallace-Johnson v Rex, [1939] 5 West Africa Court of Appeal 56 (Privy Council) affirming [1937] 3 West Africa Court of Appeal 204
was available in capital and specified other cases in some places whereas capital cases were tried without jury in others. Lastly *habeas corpus* was always available as a remedy for Europeans but not for Africans.

In dealing with the issue of the “superiority” of English criminal law, we should briefly examine the application of British law to some widely employed defenses to criminal charges in an African context. A mistake of fact was a valid total or mitigatory defense to a charge of murder under the common law, but British courts refused to accept the most common reason asserted by Gold Coast defendants for mistake as a defense against a charge of murder when the victim was claimed to be a “witch,” because they could not acknowledge that an uneducated African could reasonably believe in witchcraft or the supernatural and *no reasonable Englishman* (emphasis mine) would accept the reality of witchcraft. Similarly, self defense was not accepted when the alleged aggressor was claimed to be a witch because the courts held that “the threat must be physical, not metaphysical.”

Seidman notes that the Colonial Criminal Codes “assume a system of beliefs at war with that of the indigenous population . . . the defendants are convicted without any subjective appreciation that what they have done is wrong, let alone criminal.” British courts “deny the world view of the ordinary African and hold him rigidly to a foreign [i.e. English] standard” as to what an Englishman would consider to be reasonable. Moreover, the British courts ignored proof that the killer of someone alleged to be a witch

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19 Seidman, “*Mens Rea* and the Reasonable African: The Pre-Scientific World-View and Mistake of Fact,” 1152, 1156.
truly believed the victim to be a witch holding that mens rea (intent) was an objective, not a subjective, test. They similarly refused to accept delusion, insanity or provocation as defenses, even in mitigation.\textsuperscript{20}

Right To Counsel

In the Gold Coast Colony, as well as in the Protectorates other than Ashanti and the Northern Territories, it had been accepted from the date the Colony was created that those accused of capital and some other serious crimes in the British courts had the absolute right to be represented by counsel. Indeed, as early as 1893, the Governor had accepted the suggestion of Chief Justice Hutchinson that Puisne Judges be permitted to authorize payment to local counsel from public funds to defend accuseds in murder cases of up to five guineas for each case.\textsuperscript{21} In Ashanti and the Northern Territories from their annexation in 1902 to their absorption into the Gold Coast Colony in 1935, criminal cases were tried only by the Chief Commissioner and/or the Circuit Judge without either jury or Assessors and the accuseds were not entitled to be represented by counsel. This disparity in treatment between the Colony on the one hand and Ashanti and the Northern Territories was most often explained by the paucity of potential jurors who could understand English as well as the hostility of the English authorities to local barristers who, it was believed, would merely obscure the facts of any particular case.

The Government’s policy with respect to criminal cases in Ashanti and the Northern Territories aroused a great deal of popular opposition, albeit somewhat muted opposition. T. Hutton Mills and J. E. Casely Hayford, eminent Gold Coast Barristers and once and future members of the Legislative Council, attended a conference in London between

\textsuperscript{20} Hooker, 134.

\textsuperscript{21} GNA ADM 1/2/48, Confidential, 2.10.1893.
representatives of the National Congress of British West Africa and the League of Nations Union where they attached British criminal justice in West Africa for British refusal to permit counsel to represent criminal defendants.\textsuperscript{22} Condemned by the Gold Coast Colonial Secretary for his assault, Hutton Mills defended his statements pointing out that his remarks were aimed at the situation in Ashanti and the Northern Territories and alluded to the Congress’ Petition to the King seeking discontinuance of these practices, which Petition, needless to say, was summarily rejected.\textsuperscript{23} In 1925, W. H. Stocker, KC, a former Nigerian Puisne Judge attacked courts of administrators such as that of the Chief Commissioner of Ashanti where capital cases were heard without counsel or jury or any right of appeal other than to ask the Privy Council for leave to appeal.\textsuperscript{24}

Shortly afterward there arose a case that set on the road a new policy as to counsel for criminal defendants in Ashanti. In 1928, Dr. Benjamin Knowles, a physician employed by the Government and based in a small town not too far from Kumasi, the capital of Ashanti, was accused of murdering his wife. The couple had entertained some friends for lunch and had imbibed a considerable amount of wine before retiring to their bedroom for a nap. A few moments later, the house servants heard what they thought might be a gunshot. One of the servants summoned the District Commissioner who came to the house but was assured nothing was wrong. Sometime thereafter, a surgeon from Kumasi arrived at the house and learned that Mrs. Knowles had been shot. In response to his questions, she said that she had been examining Dr. Knowles’ pistol, sat on it and when trying to remove it from beneath her, the trigger got caught in her clothing and it fired. Taken to a hospital in Kumasi, Mrs. Knowles repeated her explanation under oath and shortly thereafter, she

\textsuperscript{22} GNA ADM 12/3/35, Confidential, 6.2.1921. \textit{Ibid.},
\textsuperscript{23} Enclosure, 2.4.1921.
\textsuperscript{24} \textit{Gold Coast Independent}, 1.19.1925, 73.
died. Dr. Knowles was charged with murder and brought to trial before the Ashanti Circuit Judge without a jury or counsel. Dr. Knowles was convicted of murder and sentenced to be hanged, but the sentence was commuted by the Governor to life imprisonment and an appeal was taken to the Privy Council, the only court to which an appeal could not be prohibited as were appeals to the Full Court of the Gold Coast. Knowles’ counsel specified four grounds for appeal: failure to try him by jury; lack of evidence upon which a verdict of murder could be based, i. e., malicious intent; the Acting Circuit Judge’s failure to require the prosecution to bear the burden of proof; and his failure to transfer the case to the Supreme Court of the Gold Coast for trial by jury. After an extensive hearing, the Privy Council allowed the appeal and quashed the verdict but not on the grounds that Knowles had been deprived of counsel or a jury trial, because, The Times reported, the Privy Council could not put itself in the position of a local court to decide if a jury trial was practicable and permitted by local circumstances and the right to a jury trial in the colonies is not a sine qua non, but because the Circuit Judge, despite extensive evidence to support a verdict other than murder considered only the possibility of murder and not manslaughter and erroneously relied on the rejected dying declaration as evidence of murder. Thus, while


26 Ibid., 12.

27 Ibid., 29.

28 Lieck, 130. The Acting Circuit Court Judge rejected Mrs. Knowles’ dying declaration as a mere effort to protect her husband. Ibid., 126. Counsel argued with respect to the second and third grounds for appeal that the Acting Circuit Court Judge erred by using the rejected statement of the victim, which should have been treated as a nullity, as proof positive of guilt. Ibid., 155

29 Lieck, 183. The Times, 11.20.1929; Adam, Murder Most Mysterious, 32-33. The Privy Council rarely heard criminal appeals. Normally, it considered only those cases where there was “a clear departure from the requirements of justice” or where “by a disregard of the forms of legal processor by some violation of the principles of natural justice or otherwise, substantial or grave injustice has been done’ robbing the accused (continued...)
reaching what most observers saw and a just and correct result, the Privy Council ignored “the remarkable method of criminal procedure that deprived the prisoner of the right of being tried by a jury and callously denied him the professional and skillful services of either solicitor or counsel.”

Stacey Hynd argues that this strange decision, as she characterized it, was made under pressure to release Knowles while avoiding a requirement for counsel and juries in colonial murder trials.

In 1931, the Acting Circuit Court Judge reluctantly convicted two men of murder but noted that the right to counsel was necessary to achieve justice in criminal cases. Sidney Abrahams, a former Olympic athlete and brother of the one hundred meter dash gold medalist in 1924 Harold Abrahams (“Chariots of Fire”) commenting on the Acting Circuit Judge’s remark wrote that “What every fair-minded person, lawyer or not, desires to see in the administration of justice is the 100 percent insurance against a miscarriage of justice and without the aid of counsel on both sides it is accepted in all civilised (sic) communities that this is unlikely to be achieved.”

Ultimately the combination of public reaction to the Knowles case and pressure from the legal officers in both the Gold Coast and the Colonial Office swayed the Secretary of

(…continued)


31 Hynd, “Benjamin Knowles v. Rex, Judging Murder, Race and Respectability from Colonial Ghana to the Judicial Committee of the Privy Council, 1928-1930,” 84. Hynd notes the concern of colonial authorities as to future Privy Council appeals, reporting that Governor Slater, acknowledging the Colonial Secretary’s direction to advise Knowles of his right to seek Privy Council review, that “guidelines for appeals to the Privy Council were subsequently ‘kept under rigid lock and key’ to prevent knowledge of this right [to appeal] from spreading.” BNA CO 96/686/56, 4.12.29, quoted at 82.
32 GNA ADM 15/70.
State to agree to permit criminal defendants anywhere in Ashanti and the Northern Territories to be represented by counsel. Even before the Privy Council’s statement of reasons in the Knowles case had been made public, the Gold Coast Independent was speculating on what the Privy Council might say as to the death penalty imposed without a jury or counsel and suggesting that the shortcomings it expected the Privy Council to describe should be rectified as soon as possible.  

In reporting to the Secretary of State, Hazelrigg of the Colonial Office minuted that the Governor, Chief Justice Deane, Attorney General Abrahams, the Solicitor General and three former Circuit Judges all agreed with Bushe that attorneys should be allowed in all cases other than in Native Tribunals and, contrary to Bushe, would allow juries in capital cases. Hazelrigg explained Bushe’s opposition to jury trials on the basis that cases needed to be tried locally and that it was nearly impossible to empanel juries in Ashanti and the Northern Territories with an adequate knowledge of English. Hazelrigg argued that Bushe’s reasons were “conclusive.” Three weeks later, the Secretary of State accepted Hazelrigg’s explanation and agreed to the admission of attorneys in Ashanti Circuit Court in all criminal and civil cases except in land cases as well as Bushe’s reasons for not having juries. This was not the end of the evolution of criminal procedure in Ashanti and the Northern Territories as, in 1935, the jurisdiction of the Gold Coast Supreme Court was extended to and amalgamated with that of the Circuit Court and all procedures applicable to the Colony were applied in those territories as well, including jury trials for capital cases and, indeed, lesser felonies to the same extent as in the Colony.

34 Gold Coast Independent, 3.16.1929, 343. BNA
35 CO 96/705/1, Minute 5.25.1932.
36 Ibid. 6.19.1932.
As was exemplified by the Knowles case, race did not usually play a role in the administration of criminal justice, but this was not always the case. Thus, in 1910, the Privy Council ruled that the writ of *habeas corpus* was available only to Europeans and not to the African subjects of the crown.\(^{37}\) This situation endured in the Gold Coast until 1935 when Chief Justice Deane granted the writ of *habeas corpus* to two African men jailed by the Accra District Commissioner.

The matter arose out of a contested election for the post of Ga Manche, the principal chief of the Ga people. In accordance with the provisions of the Native Administration Ordinance of 1927, the Provincial Council of Chiefs that had jurisdiction over native political disputes found in favor of one of the contestants and preparations were made for his enstoolment. The new Ga Manche’s Linguist swore an affidavit before the District Commissioner in which he charged unnamed followers of the losing candidate with a desire to disrupt the enstoolment ceremony. The District Commissioner asked, not summoned, the men who ultimately sought the writ to come to see him where he met them in his private office, not in his courtroom along with the Inspector of Police. He read the affidavit to them and then asked them to sign a Peace Bond with sureties for £250. When they declined saying that they had done nothing wrong, the District Commissioner summarily ordered them to be jailed for three months at hard labor.\(^{38}\) They petitioned for the writ which the Chief Justice granted.\(^{39}\) Deane wrote to the Governor saying that the case reinforced Bushe’s recommendation, discussed elsewhere, that District Commissioners should not

\(^{37}\) *Rex v. Crewe*, [1910] 2 Kings Bench 576 (Privy Council). This discriminatory rule was rendered nugatory by the subsequent Privy Council decision in *Eleko v. The Officer Administering the Government of Nigeria*, [1931] AC 652 (Privy Council) which granted the writ to undo the deposition and deportation of a local chief.

\(^{38}\) GNA ADM 1/2/213, No. 342, 6.15.1935.

retain jurisdiction in criminal matters, and that the case showed the problems that arose where a District Commissioner acted as a judge in cases where he has a political interest. Deane found that the Petitioners were imprisoned without being summoned, charged, or given an opportunity to defend themselves, facts that the Solicitor General conceded on the hearing of the application for the writ. Deane held that there must be a complaint that shows that the accused is doing an act or has made a statement that can reasonably be said to threaten a breach of the peace. Reading the Linguist’s affidavit as a complaint, it shows no such act or statement and does not even mention the Petitioners’ names, avering only that the followers of the Ga Manche’s opponents may threaten violence and the District Commissioner should have known this as he was experienced in his position. The request that the petitioners meet the District Commissioner in his office did not substitute for a summons and a meeting in a private room is not a trial which must be in a public place. No witnesses were present and thus Petitioners were deprived of their right to confront and cross examine them. Deane decried the District Commissioner’s conduct, writing: that he knew and should have known that a District Commissioner “is not supposed to interfere with the criminal work of the Magistrate, [yet] he determines to deal with this matter himself, and is so anxious to quell all opposition to the Manche that on the vague affidavit of [the Manche’s Linguist], he proceeds to send for people whom [the Linguist] had not even mentioned but which presumably he knew as opponents of the Manche.” In the future, the District. Commissioner should leave criminal matters to the Magistrate “especially when politics enter into the questions at issue and he himself is more or less concerned.”

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40    Ibid.
Chief Justice Deane confirmed the trend toward a more liberal view of British procedure seen in the spread of jury trial and availability of counsel that mirrored those in the metropole. This will be seen again as we turn to a discussion of criminal appeals.

**Jury Trials**

Richard Vogler has argued that British imperialism was largely responsible for the global development of jury trials. He points out that the effect of the right to jury trial benefitted the colonial minority of white settlers. Accordingly, the right to a trial by jury came first to Canada, Australia and New Zealand and was introduced into Africa in the Cape Colony. Trial by a jury of one’s peers was not a common right in the Empire, however, but available only where enacted by Ordinance as an exercise of the Royal Prerogative. The 1861 Indian Code of Criminal Procedure entitled Europeans to a jury trial where the panel had a European majority and the judge was British. In 1883 the Code was amended to permit Indian judges to preside over the trial of Europeans provided that the panel was composed of at least an equal number of Europeans and Indians. In many parts of the Empire, such as the East African Protectorates, Kenya, Uganda and Tanganyika, trial by jury was made available only to Europeans and Americans. In West Africa, by contrast, Africans in the Gold Coast Colony had such right and those who spoke English and met local property qualifications were entitled to sit on juries.

The Criminal Procedure and Criminal Code Ordinances of 1876, drafted by David P. Chalmers, the first Chief Justice of the Gold Coast Colony, passed into law along with the

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42 Ibid., 531-532.
43 Wiener, 10.
44 Kolsky, 658, 682.
Supreme Court Ordinance and were among the first enacted in the newly proclaimed colony. The Criminal Procedure Ordinance established the manner in which all criminal matters were to be handled from arrest and initial interrogation of the accused through trial and appeal, capital cases and such other felonies as the Governor decided were to be tried to juries. These juries were empaneled from Europeans and indigens who could read, write and understand English. Although the Criminal Procedure Ordinance of 1876 authorized jury trials for capital cases and many other felonies designated by the Governor, Chalmers anticipated that most trials would be conducted by the court with Assessors, three in number, chosen from the same panel as were juries, but whose determinations were subject to being overruled by the presiding judge.⁴⁶

While Vogler writes of the expressed policy of the Colonial Office favoring extension of the jury system in West Africa, Wiener highlights the reluctance of local colonial officials to promote jury trials because of their fear, justified in many cases according to them, of jury nullification resulting from racial antagonisms. Wiener points to a substantial body of evidence to show that the Gold Coast Governors were not at all happy with criminal offenses being tried by juries or even by assessors.⁴⁷ These expressions are not necessarily inconsistent. The Colonial Office while concerned with “miscarriages of justice,” was promoting a policy it deemed to be consistent with a desire to extend to its colonial subjects the rights of Englishman, while local colonial Governors could and did state their concern that Colonial Office policy would not work very well in their colonies.

Thus, Governor Ussher complained to the Secretary of State Lord Kimberly in Summer 1880 about criminal proceedings on a trial for slave dealing held at Lagos [then part of the Gold Coast Colony] “it has become more and more evident that it is impossible to

⁴⁶ GNA ADM 1/2/22, No. 119, 6.10.1878.
⁴⁷ Wiener, 25.
rely upon an impartial decision from either a jury or assessors, in cases where the accused [as in the case being discussed] can command local influence.” Only because the Puisne Judge presiding, Macleod, overruled the assessors would there have been a guilty verdict.\textsuperscript{48} The Governor’s complaints about the difficulty in obtaining criminal convictions extended beyond one particular case. The following month, Ussher again wrote to Lord Kimberley noting that despite the prestige of his Queen’s Advocate as a prosecutor, convictions were not forthcoming. Perhaps, he suggested, if an experienced barrister to assist in prosecuting criminal cases was sent to him, the Administration would be more successful.\textsuperscript{49}

Eighteen months later, Governor Rowe also complained that there were too many acquittals despite “most positive evidence of the guilt of the prisoners and noted a Lagos Times leader saying that such verdicts were a “serious and painful miscarriage of justice.” At the request of the Colonial Office, he asked the judges to comment on the workings of the jury system. They replied that they believed that the juries in Cape Coast were as good as those in England but were indifferent in Elmina and bad in Accra while in Lagos they were no better than those in Ireland. One Acting Puisne Judge, Watts in Lagos, complained of juries acquitting obviously guilty accuseds and enclosed with his response a news clipping attacking such verdicts as “iniquitous.” Mcleod said that he was “highly dissatisfied with the moral qualifications of the men on the Jury List in Lagos” and that he tried cases there with assessors and rejected many of their “not guilty” verdicts. He recommended that only Cape Coast cases should be tried with juries.\textsuperscript{50}

Governor Rowe wrote to Chief Justice Marshall, telling him that Lord Kimberley was concerned about “miscarriages of justice” because of the “unwillingness of juries to convict

\textsuperscript{48} BNA CO 147/41, Confidential, 7.26.1880.
\textsuperscript{49} BNA CO 96/131, No. 202, 8.19.1880.
\textsuperscript{50} BNA CO 96/139, No. 131, 4.7.1882.
although clear evidence of guilt has been presented to them.” He asked the Chief Justice’s opinion on the issue to be sent as soon as convenient directly to the Secretary of State.51 Dissenting from the views expressed by McLeod and Watts, Chief Justice Marshall said that during his service on the Gold Coast since 1873, he had much experience with juries of both Europeans and educated Africans and had “a very agreeable surprise at the intelligent attention they exercised and the real assistance they were to me in criminal trials.” He said that when the Court summed up impartially at Cape Coast and elsewhere, juries responded properly with “less danger of any miscarriage of justice” than in England. Now that jury panels had been expanded to include all men in the District not just those able to understand English, juries are even more effective, although it is more work because of the necessity for interpreters, but jurymen who speak English watch and check that the interpreter does his work properly. Interpretation also encouraged counsel to speak to the jury more simply. Moreover, including chiefs and all natives on jury lists worked particularly well in Accra and some other coastal communities by breaking down “prejudice and bias” among the “small educated clique” against the traditional people. He stated his belief that the assessor system should be abolished in criminal cases and that all such cases should be tried by juries, because, since most defendants are unrepresented, juries were an even more important aid to the Court as the judge had to act at times to assure that the defendant’s case is presented properly. Marshall disagreed with a statement made by the Queen’s Advocate, Collyer, that Accra residents would not convict because they were hostile to the Government. The Chief Justice noted his concurrence “without reservation” with the views expressed to him by Puisne Judge Smalman Smith as to the value of juries as well as similar views expressed by then Puisne Judge Bailey. With respect to slave

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51 GNA ADM 1/7/12, Confidential, 4.20.1882.
cases heard by Macleod where Macleod overruled the Assessors’ verdict to acquit, Marshall said that while he could not challenge the trial Judge, he urged that such cases should be appealable on the facts as well as the law to a Full Court to allay public concern as to the propriety of the Court’s action.\(^{52}\)

Marshall went on to note that jury verdicts depended not only on the evidence before the jury but the manner in which it was presented, thus indicating that verdicts which may be unsatisfactory to the Administration derived as much from the manner in which the prosecutor presented the case as from any possible jury prejudice. He recommended that the jury system be maintained throughout the colony with appeals to a Full Court from verdicts where the judge overruled the Assessors.\(^{53}\)

Perhaps trying to mollify his Chief Justice, Governor Rowe advised the Colonial Office that he’d never had any complaints of dishonest juries in Cape Coast or Elmina. He was aware of anecdotal evidence of bias in acquittals in murder cases but had no evidence that any such bias was systematic.\(^{54}\) However, the Governor disagreed with his Chief Justice and concurred in the opinions of Bailey and Macleod against permitting appeals from judgments overruling assessors’ verdicts on issues of fact because, in part, of the difficulty in convening a Full Court. He would rather extend the jury system if necessary since the majority of the judges say that it worked well.\(^{55}\)

The Acting Governor, W. Brandford Griffith, Sr., reported that two of his Puisne Judges, Bailey and Macleod, opposed Marshall’s proposal as did he. Bailey said that the Full Court was no better in these cases than a single judge. He had no objection to appeals

\(^{52}\) BNA CO 96/147, Confidential, 6.15.1882.

\(^{53}\) GNA ADM 1/1/56, 6.15.1882.

\(^{54}\) GNA ADM 1/2/27, No. 292, 7.12.8182.

\(^{55}\) GNA ADM 1/2/27, No. 427, 9.8.1882. It should be remembered that capital cases were required by the Criminal Procedure of 1876 were required to be tried before a jury.
on questions of law, as would be the case in England, but “as a matter of expediency and practicability” not where the facts are disputed, since convening a Full Court, even on an expedited basis, took weeks and required judges to stop all their other work. Macleod noted that if review were to be decided upon, it should be by a Court and not the Executive. Herbert and Wingfield of the Colonial Office, agreed with the judges’ objections that it was too difficult to assemble a Full Court as one Puisne Judge was always on leave. Lord Kimberly, decided that it would be inopportune to alter the jury system at that time.56

Despite the views of a majority of the judges, the Governors of the Gold Coast continued to echo complaints, primarily from Europeans as the operation of the jury system. In June, 1891, Governor Griffith, Sr., reported complaints from local Europeans as to, inter alia, “the abuse of trial by jury” and “defects in the law and practice of the jury system.” Francis Smith, then the Acting Chief Justice, denied for himself and his colleagues the charge of showing “indifference” in selecting juries “irrespective of their fitness or relationship to prisoners to be tried.” Smith said that the complainant was ignorant of the provisions of the Criminal Procedure Ordinance relating to juries and their qualifications, that jury lists of people to serve for one year were prepared by the District Commissioners, were publicly posted and revised if necessary in accordance with any objections to any of the individuals listed. He went on to note that panels and petit juries were both drawn blindly. In the one case specified in the main complaint to Griffith, Sr., the relationship by marriage of a juror to the accused in the case was not brought to his attention until almost the end of the trial when he could do little or nothing except to direct a mistrial and order a new trial, which he had done. Smith, responding to a further complaint about the inability of jurors to understand the proceedings, said that illiteracy was not a basis for disqualifying a

56 GNA ADM 1/1/56, No. 700, 5.28.1882.
juror, because the natives are “shrewd and not lacking in common sense, and, in these particulars, they compare favourably with the so-called educated gentlemen.” Whether because Judge Smith convinced Governor Griffith, Sr., and the Colonial Office that Africans made more than adequate jurors or because of the inertia so often displayed by the Colonial Office in London as well as officials in Accra, no changes were made to the jury system in response to any of the complaints then made as to its alleged inadequacy.

Determined to reduce the number of acquittals in cases of felony, in 1896 the new Governor, William Maxwell, submitted a proposed amendment to the Criminal Procedure Ordinance to reduce the number of jurors from twelve to seven. Despite the seeming simplicity in the amendment, it took two years to push it through the Legislative Council, in part because, the Acting Governor, Frederick Hodgson, subsequently explained, Chief Justice Griffith, Jr., objected to the draftsmanship of almost every clause in the Bill resulting in a totally revised draft and the withdrawal of the Bill and submission of a totally new bill prepared by the Attorney General, Nicoll. It was finally passed and sent to the Colonial Office as Number 37 of 1898 in January of that year.

Issues relating to the operation of the jury system inevitably became enmeshed with questions as to different treatment of Europeans and Africans. In a letter sent by the Chief Justice to the Colonial Office, Griffith, Jr., made an effort to deal with such questions, pointing out that no one, white or black, might be tried by assessors alone, whom, it was

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57 BNA CO 96/217, No. 213, 6.27.1891.

58 At least some complaints related to the treatment of the jurors themselves. Thus, a leading article in the Gold Coast Chronicle, Accra, 1.27.1897, 2, objected to a judicial ruling requiring jurors claiming illness to get a medical certificate, despite the great cost to the juror, or be fined. It went on to complain as well about the failure to pay jurors a *per diem* for their service.

59 BNA CO 96/310, Confidential 1.19.1898 and particularly the minute of W. Brandford Griffith to the Governor 12.11.1897

-432-
feared would be biased against the former and in favor of the latter, but only by assessors with a judge who could and often did override decision of assessors. Yes, the Chief Justice admitted, white men could from time to time be tried by a black jury, e.g. at Accra where there were no Europeans on the jury list, and might have been wrongly convicted. Griffith, Jr. said that he knew of one European convicted by a black jury, who, he believed would have been acquitted had he been black, although it must be said one cannot tell whether such a conviction or any hypothetical acquittal would result from prejudice or the evidence before the jury. That problem could be cured if the Attorney General were to arrange “that no white man be tried at any place where it is not practicable to obtain a reasonable number of white men on the panel” 60 He went on to recommend that defendants should be allowed to elect trial by the Court and assessors at the time they were called upon to plead rather then when arraigned before a Magistrate. Indeed, he permitted a defendant to choose his method of trial even where he had previously stated a preference before the Magistrate for a trial by the Court and Assessors. The Chief Justice expressed his disagreement with Mr. Justice Gough’s suggestion that Judges should not be permitted to order a jury trial in cases usually tried with Assessors. Finally, he noted that he opposed the view of the Attorney General that such official should have the right to require a trial by the Court and Assessors. Much to the apparent displeasure of the Gold Coast Administration, the Secretary of State, Lord Crewe, told Governor John Rodger, that he agreed with Chief Justice Griffith and, once again, that the current system would be continued without change. 61

Still concerned with the prevalence of acquittals, in 1915 the Colonial Governor, Hugh Clifford, proposed an amendment to the Criminal Procedure Ordinance providing as

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60 BNA CO 96/491, Enclosure to Confidential, 9.18.1909;
61 GNA ADM 12/1/32.
requested by the Colonial Office, for majority, rather than unanimous, verdicts in all criminal cases triable by jury except for capital cases. However, Governor Clifford reported, as an additional safeguard against “improper” acquittals, his Chief Justice, Philip C. Smyly, and Attorney General proposed that any acquittal by a majority verdict as provided for in the proposed amendment to the Criminal Procedure Law should be contingent on the judge’s concurrence. Such a condition would make jury trials no different from those conducted by the Court with Assessors where the judge could overrule an Assessors’ verdict of not guilty. This fact seemed apparent to the Colonial Office Legal Advisor, Risley, who expressed his “grave doubts” that the judge should have a right to approve a majority verdict of acquittal. Risley noted that the Straits Settlement law which was a model for the proposed amendment provided that a majority verdict of acquittal was to be final, and that requiring the Court to concur in a verdict, strained the whole principle of jury trials. But the opinion of others in the Colonial Office differed. While E. W. Flood did not want the judge to be involved in any manner without “overwhelming evidence of chronic perversity on the part of Gold Coast juries,” W. D. Ellis disagreed with Flood and Legal Advisor Risley and agreed with Chief Justice Smyly. Risley reposted at length and, ultimately, Secretary of State Harcourt agreed with him so that the dispatch sent to Governor Clifford agreed to the proposed Amendment and said that it was “right and proper in the interests of justice to require the Judge’s concurrence in a majority verdict of ‘guilty’” but not so with a majority verdict of “not guilty.” Such an acquittal, Harcourt said, should be “absolute and final.”

Nor, Harcourt wrote the next month, was he prepared to accept a provision that would allow the Attorney General to require a trial by a Judge and Assessors if the Attorney General thought that such a trial would be fairer to the defendant, stating that it was not the

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62 BNA CO 96/566, Confidential, 3.1.1915.
role of the Attorney General to limit a defendant’s options. He asked Clifford to provide him with the opinions of all the judges on that point. He stated that he was very reluctant to interfere with the jury system where it was widely being used as in the Gold Coast, but would consider a 5-2 majority verdict to prevent a “failure of justice” due to bias, but only if unanimity could not be reached after a specified period (he suggested two hours) of deliberation, and even then only in non-capital cases.\textsuperscript{63}

In October, Clifford reported as to the opinions of the judges sought by Harcourt to the new Secretary of State, Andrew Bonar Law, as to whether or not the Attorney General should be authorized to seek a trial by Assessors in lieu of a jury trial.\textsuperscript{64} Chief Justice Smyly and Judge Gough opposed any such restriction on trial by jury, while Judges Hawtayne and Watson favored trial by the Court or the Court with Assessors because they believed that there were too many “perverse” jury verdicts. Judge King Farlow Nettleton (only appointed in February 1915) changed his opinion from opposing restriction to favoring it because, he said, of his recent experience with “glaringly perverse verdicts” “entirely against the weight of the evidence.”\textsuperscript{65} Governor Clifford added that he was convinced that juries were unreliable (as, he also said, were Assessors) because in part of “tribal hostility” toward strangers (e.g. against Ashantis and other Africans from outside the Gold Coast) and feeling in favor of local men. In a December dispatch, Bonar Law said that he would approve the proposed Amendment only if it was explicitly made clear that jury trial must be available in capital cases. He also acknowledged the opinions of the judges who differed as to trial by Assessors, saying that he would accept such a trial only if so requested by the defendant, not the Attorney General, or if the judge had discretion to require a jury. He asked that the

\textsuperscript{63} GNA ADM 12/1/37, 4.16.19.5; GNA ADM 12/3/100.

\textsuperscript{64} BNA CO 96/560, Confidential 10.11.1915.

\textsuperscript{65} \textit{Ibid.}
proposed amendment be redrafted because as written it appeared to apply to capital cases. As to a 5-2 verdict to convict that would be acceptable if the Court agreed, otherwise there would have to be a new trial with another jury. 66

The amendment as passed (Criminal Procedure Amendment Ordinance No. 12 of 1916) demonstrates again the inconsistency and frequent changes of policy in both the Colonial Office and the Gold Coast Administration. Whereas Bonar Law had disapproved the concept of the Attorney General being able to seek non jury trials, he now accepted an Amended Ordinance that permitted the Attorney General to move the Court to order a trial by Assessors rather than a jury if the prosecution believed that “a more fair and impartial trial” could be had, that is to say one which would more likely to convict a defendant than would be the case with potentially hostile juries. The Amendment permitted the information, the pleading setting forth the allegations as to the facts of the offence, to be amended by the Court at any time and authorized the Court to waive irregularities in “form, procedure and substance” (emphasis mine)” provided that the prosecution could show that there was no prejudice to the defendant. As had been thoroughly discussed, It provided for jury verdicts in non-capital cases by a 5-2 majority, but allowed the judge to refuse to accept a majority guilty verdict and to direct a new trial. The Amendment authorized a retrial after a hung jury, a provision that one would think to be vital but that had never before been part of the Ordinance. Finally, provision was made for applications by the Government to dismiss an appeal despite errors in law or reception or non-reception of evidence or in jury instructions if the Full Court was satisfied that “no substantial miscarriage of justice has actually occurred,” a very subjective standard that satisfied once again the Administration’s desire for more convictions. Even in the event that the Full Court determined that the

66 Ibid, 12.18.1915.
standard had been met, it was obliged, except in the case of errors of law, to order a new trial.\(^\text{67}\)

Two years after enactment of the Ordinance, Chief Justice Smyly reported on behalf of the judges as to the manner in which the 1916 Amendment was working. He told the Government that no non-capital case at the six Assizes the judges held in 1917 that were triable by jury were tried with Assessors, only one case had a majority verdict, a 6-1 conviction with which the judge agreed. The Acting Attorney General also reported that no applications had been made by the Attorney General for trial by Assessors.\(^\text{68}\) Thus after months of lobbying for strengthening the Government’s position viz à vis criminal defendants, the result was little if any more advantageous to the Government than if nothing had been done.

The system created by the 1916 Amendment Ordinance continued essentially unchanged until 1932 when it was again amended in a manner to secure juries more favorable to the Government’s position. It authorized Government officials to sit on juries. Nana Sir Ofori Atta, a long time unofficial member of the Legislative Council complained bitterly about the Government’s transparent attempt to load the dice against defendants.\(^\text{69}\) The Acting Governor, Geoffrey Northcotte, blandly and quite weakly denied Atta’s accusations, saying that Government officials sat on juries throughout the Empire and that he was sure that the performance of Gold Coast officials on juries would prove such accusations to be wrong. He was supported by his Attorney General who asserted that by

\(^{67}\) GNA ADM 6/54, 1250 \textit{et seq.}

\(^{68}\) GNA ADM 12/3/29, Enclosure 1 to confidential 2.21.1918, 1.7.1918; Enclosure 2, 1.14.1918.

increasing the number of “intelligent and responsible” individuals on jury panels, the administration of justice would be improved.\textsuperscript{70}

The issue of the availability of jury trials remained contested even into the 1930’s. In 1934, writing as to jury trials in Ashanti and the Northern Territories, Woolhouse Bannerman, the Acting Circuit Judge, minuted opposing jury trials because there were too few literates and those few were mainly foreigners.\textsuperscript{71} Nevertheless, in 1935, the Criminal Procedure Code was once again amended in connection with the Courts Ordinance of that year to extend the system of criminal trials by jury or the Court with Assessors to the entirety of the Gold Coast including Ashanti and the Northern Territories.\textsuperscript{72} Capital cases were to be tried by juries and the Governor in Council was authorized to specify which non-capital cases might be tried by juries. At the same time, it provided three peremptory challenges for each defendant and for the prosecution as to potential jurors but not as to Assessors. In trials with the latter, the judge continued to have the final say and was not bound by findings of the Assessors notwithstanding the decision of the WACA in 1933 holding that a unanimous verdict of not guilty by the Assessors in a murder trial constituted conclusive evidence of the existence of reasonable doubt requiring reversal of the Court’s judgment of conviction.\textsuperscript{73} In so holding, the WACA effectively stripped the trial court of its unfettered discretion to ignore the Assessors’ verdict without touching the terms of the Criminal Procedure Code that embodied such discretion.

\textsuperscript{70} \textit{Ibid.}
\textsuperscript{71} \textit{Ibid.}, Minute, Number 16A, 7.31.1933.
\textsuperscript{72} Criminal Procedure Amendment Ordinance No. 10 OF 1935: (BNA CO 97/11 4.27.1935 \textit{Rex v. Marfu.} [1933] 3 West Africa Court of Appeal 77.
\textsuperscript{73}
Perhaps to encourage defendants to opt for trial by Assessors, the Criminal Procedure Amendment Ordinance (No. 21) of 1936 expanded the universe of potential Assessors to include all males between the ages of twenty and sixty and directed the Sheriffs to prepare panels of potential Assessors to serve when called upon in the same manner as they prepared panels of potential jurors.\textsuperscript{74}

In 1938, the Gold Coast Government reopened its attack on the jury system. The Acting Governor Northcotte sent the Colonial Office a memorandum dated 8.21.37 from Attorney General Blackall in support of a Bill to reform the jury system. Blackall noted that jury trials were not inevitable even in England, but were suspended from time to time where local conditions required (\textit{e.g.} when agrarian crime broke out in Ireland in the 1880's) and were not universal in the colonies. He grudgingly acknowledged that in the Gold Coast the system worked “tolerably well” unless the accused could, he asserted, corrupt the jury, the case is a party feud, the accused had a relative on the jury or was someone who knew a juror. Thus, he said, “trial by jury often degenerates into a solemn farce; an Accra defendant charged in front of an Accra jury “would be very unlucky if he found himself convicted by such a body,” and no member of the Aborigines Rights Protection Society would be convicted by a Cape Coast jury.\textsuperscript{75} Nevertheless, he wanted authority to change the venue of trials without the necessity of an overwhelming showing of prejudice as had previously been required. Blackall said that he had received a number of suggestions from Puisne Judge Savary, among which were to disqualify anyone convicted of any crime involving dishonesty and not just serious felonies. He asked to be permitted to introduce a property qualification because, he said, a person of means is more likely to be impartial although he put forth no

\textsuperscript{74} GNA ADM 4/1/65, 3.25.1936.

\textsuperscript{75} BNA CO 96/782/7, Minute No. 1.
evidence for this conclusion. Blackall went on to assert that the preparation of jury lists was slipshod and omitted many possible good jurors, in part because the qualifications of proposed jurors was not investigated by the District Commissioners and that too many people of means, both European and African were exempted. In a rather radical proposal for the time, he suggested that European and educated African women should be called to serve on equal terms with the men. He went on to argue for the elimination of peremptory challenges in favor of having questionable jurors “stand by” until the entire panel was exhausted, because, he asserted, accuseds challenged as many Europeans as they could, and, since each accused had three challenges, most Europeans in cases of multiple accuseds were removed. If challenges were to be kept, he proposed to preclude defendants from challenging jurors of a race other than that of the accused. He asserted the need to have the authority to require a trial by the Court with assessors in lieu of a jury rather than to leave that determination to the discretion of the court. Blackall argued that cases to be tried without juries should be specified in the Ordinance or by rule and not be subject to the Governor’s determination.76

While on leave in London, Blackall met with the Colonial Office legal advisor, Bushe and Jones, his assistant. Bushe expressed his opposition to making trial by Judge and assessors mandatory on the Attorney General’s application as this would be seen as an attack on the jury system. It would be better to leave such determination to the Court’s discretion. Blackall told Bushe that he would not pursue qualification of women as jurors for the time being. Finally, Bushe told Blackall that he would recommend against eliminating peremptory challenges but would suggest that both sides be limited to the same number no

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matter how many defendants there were, effectively giving the Government an advantage in
the prosecution of multiple defendants.

Seeking more and more control, Blackall now pressed for an amendment permitting
him to set in the venue of a trial to any part of the Gold Coast that he chose or, once having
set it, to seek a change if he believed that his chosen venue would not afford the
Government a fair trial. In addition, he proposed disqualifying from jury service anyone
convicted of an offense, misdemeanor or serious felony of any sort and raising the age for
jury service to twenty five. His proposals were enacted as The Criminal Procedure
Amendment Ordinance (No. 42) of 1939.77

Later in 1940, the Government, following up on Blackall’s 1938 memorandum,
proposed another Amendment to take away the right to challenge jurors peremptorily in
capital cases.78 The abolition of peremptory challenges would apply to the prosecution as
well as to the defense, but in non-capital cases would apply only to the prosecution which
would rely on its common law right to “stand by” or wait until the entire panel was seated
and then accept or reject the entire panel.79

In 1944, the Administration was making the same complaints about the jury system
that it had been making since the foundation of the Colony in 1874. Recalling Blackall’s
faint praise for juries and specific complaints raised in his 1938 memorandum, Governor
Burns recommended that jury trials be restricted to capital cases and some cases
punishable by life in prison, all others to be tried by the court with or without assessors at

77 BNA CO 96/766/15, 1.22.1940.
78 Criminal Procedure Amendment Bill, GNA ADM 12/3/70, Confidential, 2.1.1940,
Enclosure 1. 1.22.1940 from Attorney General Blackall.
the judge’s discretion. The Chief Justice, Harrigan, supported the Governor, saying that the consensus of opinion overwhelmingly condemned the jury system: “In the Colonies often everyone of those engaged in a case are known (perhaps intimately) to each other and the idea that independent fair-minded unbiased judgments can be give is a myth.” Attorney General Arthur Lewey added that in the colonies, corruption, partiality and bias were difficult to root out so that the jury system should be severely limited. It is very hard, he went on, to find impartial, intelligent jurors and, moreover, juries waste time and money and lower the prestige of the court. Pointing out that the unsatisfactory state of the jury system is not a new issue, has been considered several times previously and has never been changed because of political considerations, a Colonial Office official recommended doing nothing because the same political considerations still prevailed. Although he agreed with the Governor’s recommendations the Secretary of State declined to authorize implementation of those recommendations, saying they should be deferred until the war is over when they may be revisited. 

This survey of the history of the jury system in the Gold Coast clearly evidences some of the inconsistencies of colonial governance and a rare instance of the Colonial Office refusing to go along with the recommendation of its principal agent on the scene. Thus, despite repeated criticisms of juries by the Gold Coast administration, some justified but most not, and efforts to restrict an accused’s right to trial by jury, the Secretaries of State and the principal policy makers in the Colonial Office refused to accede to the views

80 BNA CO 96/782/7, Confidential 8.6.1944.
81 Ibid., Enclosure 1, 7.4.1944.
82 Ibid., Enclosure 2, 6.29.1944.
83 Ibid., Minute from H. D., 9.29.1944.
84 Ibid., Minute from the Secretary of State, 1.3.1945.
of the Governors in Accra to take the final step to eliminate what had come to be seen as one of the British subject’s most basic rights. In so doing, the Colonial Office appears to have ignored claims by the administration of corruption among jurors, to which Governors in the Gold Coast attributed so many refusals to convict where the evidence in their view appeared to be overwhelming. I submit that the archival evidence shows that the jury system in criminal cases worked exceedingly well and that administrative complaints about improper acquittals were too often mere whining. The Colonial Office’s insistence on preserving the right to jury trials confirmed Vogler’s view that British imperialism led to the spread of jury trials and prevented its local administrations, at least in the Gold Coast, from eliminating what the latter deemed to be endemic corruption. If British colonialism had any residuary positive effect, it was in passing on to Ghana the system of trial by jury.

**Criminal Appeals**

In my earlier discussion of the creation of a WACA, I wrote of the problems arising in dealing with criminal appeals in the different member states. Insofar as the Gold Coast was concerned, these problems were of long standing. As early as the last decade of the nineteenth century, local barristers and particularly John Mensah Sarbah were expressing their objections to the often arbitrary and illegal actions of the District Commissioners, actions that the Attorney-General defended because of the necessity to maintain British prestige. Sarbah proposed permitting defendants to appeal to the Full Court from the Divisional Court’s affirmance of a District Commissioner’s conviction and to permit the Full Court to require Divisional Courts to refer cases to it where the District Commissioner had sought advice from the Divisional Judge, because, Sarbah argued, no judge should hear a
case in which he had given advice. As might be expected, the Government rejected Sarbah’s proposals on the stated grounds of expediency.85

Until the late 1920’s, criminal appeals from the judgments of the Divisional Courts rendered during Assizes to the Full Court were permitted only by leave and then only on questions of law. In connection with the negotiations for the creation of the West Africa Court of Appeal, the representatives of Sierra Leone pushed for the Court to have complete criminal jurisdiction, a proposal that the Gold Coast representatives resisted until almost the end of the negotiations. Then, in early 1929 Governor Slater advised the Colonial Office that he had receded from his prior views and agreed that the West Africa Court of Appeal should have jurisdiction over criminal appeals from the Gold Coast Supreme Court on the same terms as specified in the English Criminal Appeals Act of 1907 (7 Edw. VII c. 23 [1907]. That is, appeals as of right as to questions of law and by leave of the Divisional Courts of the appellate court as to questions of fact or mixed questions of law and fact.86

Slater’s views as to the extent appeals should be available were embodied in the Criminal Procedure Code Amendment Ordinance of 1929 that provided for appeals from the District Commissioner to the Divisional Courts on a case stated, that is, on questions of law. If the District Commissioner refused to state a case, to set forth the question of law to be considered, he could be ordered to do so by the Divisional Court. The Divisional Court could decide the question of law or refer it to the Full Court which could decide it or reserve it for the West Africa Court of Appeal, but in the hopes of precluding unworthy appeals, the

85 Crabbe, John Mensah Sarbah, 1864-1910 (His Life and Works), 43-45 GNA ADM
Divisional Court was given authority to dismiss an appeal even if error below was established if “no substantial miscarriage of justice has actually occurred.”

In late 1931 and early 1932, Grattan Bushe, the Colonial Office Legal Advisor, made a tour of the British West Africa colonies to examine into the administration of justice, and particularly criminal justice. He made a number of recommendations, one of which, Number Five, pertained to criminal appellate jurisdiction. In the summer of 1932, the Secretary of State sent Bushe’s report to the Acting Governor Northcotte. Bushe concluded that appeals from the courts of summary jurisdiction, *i.e.* the Police Magistrates’ and District Commissioners’ Courts, should not be limited to questions of law on a case stated because to state a case (and thus pose a question of law) is not easy, particularly for a non-lawyer, as were most of the District Commissioners. He recommended adoption of the so-called East African System of appeals which permitted appeals alleging errors of fact, law and/or in the sentence with the safeguard of summary dismissal if the appellate court felt that there was no reasonable ground shown for the appeal.

Later that year, the Assistant Colonial Secretary reported to the Gold Coast Colonial Secretary and Acting Governor Northcotte, summarizing Bushe’s appellate jurisdiction recommendation. He noted that the existing scheme on appeals from the assize court permitted appeals as of right on the facts, the law and the sentence, but only on the law on a case stated from the courts of summary jurisdiction, *i.e.* those of Police Magistrates and District Commissioners, a distinction that the Assistant Colonial Secretary said was “illogical.” Bushe had recommended that appeals from Police Magistrates’ and District Commissioners’ courts be on the same basis as those from assize courts with the Appellate

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87 BNA CO 96/693/5.
88 GNA ADM 1/80, Confidential (A), 7.8.1932 (Enclosure).
Courts being authorized to dismiss frivolous appeals summarily, the so-called African or Kenyan system. Chief Justice Deane said that he preferred the “Trinidad” system where the prosecutor could appeal from a failure to convict, there would be no appeal from a guilty plea, no appeal from a fine of less than £5 but an appeal as of right on all grounds from any sentence of imprisonment. The Appellate Court would be authorized to increase the sentence in order to deter frivolous appeals and would require a costs bond. The Attorney General noted his agreement with Bushe’s proposals as well as some, but not all of the Chief Justice’s recommendations. Of the four Puisne Judges, the Attorney General reported that Michelin and Sawrey Cookson concurred with Deane, Howe would permit appeals by the Attorney General only, and Yates wanted a “judicious blending” of both the two systems but no costs bond requirement. Attorney General Abrahams minuted that he was not afraid of frivolous appeals and would not permit summary dismissal or require a costs bond, saying that “I do not believe in administering justice as if it were a concession to the public,” but that the Attorney General should be able to appeal a failure to convict, an anathema to those trained in American law and criminal procedure. Abrahams urged that the Divisional Court Judges should be given the authority to examine the proceedings before any Police Magistrate on their own initiative to “satisfy himself as to the correctness, legality or propriety of any judgment or sentence,” but such powers of revision should be exercised only in cases of “manifest injustice” and not without hearing both sides. He recommended that appeals from courts of summary jurisdiction be permitted on all grounds even from fines of less than £5, but that the Attorney General should be authorized to appeal from a failure to convict and that the Appellate Court be permitted to increase the penalty that had been imposed below as a deterrence to unnecessary appeals. Finally,

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89 GNA ADM 1/78, 1.12.1932.
Abrahams would also give a general power of revision to the Supreme Court with respect to all matters in the courts of summary jurisdiction. There was time to consider these proposals, Abrahams noted, as they would require.90

The new Governor, Shelton Thomas, told the Secretary of State that he accepted Bushe’s recommendations to permit appeals from judgments in summary criminal proceedings in Magistrates Courts to the Supreme Court on the same basis as from the Supreme Court to the West Africa Court of Appeal. He reported that all his advisors were in favor although the judges disagreed with the Attorney General and one Puisne Judge on the procedure to be followed. Governor Thomas said that Abrahams, the Attorney General, wanted a free appeal in all cases where a fine £5 or more was imposed and the right to appeal an acquittal. In addition, in order to deter frivolous appeals, he wanted the appellate court to be able to increase the punishment, ideas with which the Governor said that he agreed.91 Chief Justice Deane, in his letter to the Governor, agreed that a complainant (private or public) should be able to appeal a refusal to convict but he wanted bail pending appeal to be conditioned on a bond of at least £25 and he concurred with Abrahams that the Supreme Court should be able to increase the penalty.92 As noted above, Attorney General Abrahams opposed a bond requirement for costs as a condition for appeal as, he contended, it would discourage valid appeals and work against the poor. Summary dismissal, he argued, was sufficient to deter frivolous appeals.93 Bushe minuted that he agreed with Abrahams as did the Secretary of State who also concurred in Abrahams’ view that the matter could be deferred until a new Criminal Procedure Ordinance was drafted in

90 Ibid.
91 BNA CO 96/708/11, Confidential, 1.19.1933. Ibid., 11.4.1932.
92 Ibid.
93 Ibid.
In late 1932, perhaps in response to the widespread opposition of the farmers in the cocoa boycott of the prior year, the Gold Coast Government began working on an Amendment to the Criminal Procedure Code that provided, *inter alia*, for arrest without warrant if the Police knew of “a design to commit any indictable offense” and commission of the crime could not be otherwise prevented, retrial of a defendant on any offense would have been the basis for a separate charge at the former trial. It should be noted that United States law provides that Jeopardy attaches to any charge arising from the same facts. The proposed amendment confirmed that all trials were to be by jury, by the Court with Assessors or by a Judge alone and that the Governor-in-Council could Specify non-capital cases that would be triable by jury. It authorized the Attorney General, if he believed that a fairer trial could be had by Assessors, to move the Court for such a trial, although whether or not to grant the motion seemed to remain within the Court’s discretion. All cases not specified to be triable by jury were to be tried with Assessors unless the Judge ordered a jury trial; all capital cases were to be tried by seven “special” jurors, men with special qualifications, such a superior education and language abilities, *i.e.*, people that Americans would consider to be “blue ribbon” jurors, including educated Chiefs with a good reputation, to be marked by the Registrars as being suitable to be “special jurors. Despite the trauma of the Knowles case, there would still be no juries in any case in Ashanti or the Northern Territories.  

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Territories. The Attorney General could authorize an appeal from a Magistrate’s or District Commissioner’s refusal to convict. A defendant convicted by a court of summary jurisdiction where the sentence was imprisonment or the fine was more than £5 could appeal on the facts as well as the law and on the sentence. On any such appeal, the Divisional Court could hear additional evidence to direct the Magistrate or District Commissioner to hear additional evidence, but appeals from an Assize Court to the West Africa Court of Appeal were to be on questions of law only.95

Supporting the Bill, The Attorney General wrote to the Legislative Council that the 1876 Code was out of date and “hopelessly inadequate in certain respects.” He said that the proposed Amendment followed those of former Attorney General Abrahams’ recommendations with respect to appeals that Bushe had approved. He acknowledged that the Bill made no provision for jury trials in Ashanti or the Northern Territories but suggested that the Council should so provide in capital cases “to save the Government from the odium which results from trials such as that of Doctor Knowles.”96

Michelin, then acting as Chief Justice, minuted that he wanted to retain a right of revision to enable the Divisional Courts to monitor the decisions of the Magistrates and District Commissioners based on the monthly reports that they had been submitting since the early days of the Colony, because these summary magistrates were still too inexperienced.97 Chief Justice Deane minuted his agreement with Michelin against the provision authorizing the Court to decide whether or not, after a mistrial because of a hung jury, a defendant should be retried. It should be a law officer, not the Judge who should make that decision since it would be “inconsistent with a judicial role if he has to preside at

95 GNA CSO 4/1/220.
96 Ibid., Number 1A, 7.10.1933. Ibid.,
97 Minute, No. 19, 8.10.1933.
a trial he has himself ordered.” On March 27, 1934, after an extended debate and a number of amendments responsive to the comments made by the Attorney General and the Judges, the Amendment Bill was passed and sent on to the Colonial office.

Blackall, the new Gold Coast Attorney General, wrote to Bushe complaining about delays in hearing capital appeals and slovenly granting of applications for leave to appeal in criminal cases by the West Africa Court of Appeal without, he said, adequate consideration being given to the substance of the appeal and requiring the Attorney General and his staff to waste time dealing with frivolous appeals. Bushe replied, essentially telling Blackall to moderate his criticism of the Court and of the judges, that the delays were unavoidable and that Donald Kingdon, Nigeria Chief Justice and West Africa Court of Appeal President, told him that he had taken steps to eliminate delays and suggested that criminal appeals could be expedited if heard by all three Chief Justices to insure as far as possible uniformity of decisions on the same or similar issues.

In March 1938, Governor Hodson proposed an amendment to the Criminal Procedure Code doing away with the right of juvenile offenders to appeal a sentence of whipping. In his dispatch to the Colonial Office, he wrote that the Chief Justice had written to him saying that preserving an appeal from a sentence of whipping compelled the judges to sentence juveniles to fines or imprisonment, although why that should be so or should be any different from a sentence of fine or imprisonment was not explained. “[W]hipping,” said the Chief Justice, “is a wholesome deterrent to potential young African criminals,” but the delays associated with appeals vitiates the effect of the sentence. Again why the effect of a

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98 Ibid., Number 45, 12.6.1933
99 Ibid., Number 63, 3.29.1934.
100 BNA CO 544/107/4, Memorandum Blackall to Bushe, 7.9.1937. Ibid., Bushe to Blackall, 10.22.1937.
penalty of fine or imprisonment should be affected by delays in the appellate process any more or less than one of whipping was not explained; there is no archival evidence of an increase in juvenile delinquency or urban disorder among youths, nor was whipping unknown to traditional law as administered in the Native Tribunals. Nevertheless, the Hodson agreed with the former Chief Justice Deane that whipping was better than imprisonment and if appeals were allowed, courts would have to free or jail the convicted accused pending the outcome. The Colonial Office accepted the recommendation of Governor Hodson and former Chief Justice Deane, but asked Hodson to redraft the amendment to keep the right to appeal but to provide for execution of the sentence before the expiration of the ten day appeal window if no notice of appeal filed (as in the Northern Rhodesia Ordinance), effectively reducing the time to appeal to a single day or two. After agreeing to an amendment permitting a stay of execution upon the posting of a bond, the Amendment was enacted, No. 30 of 1938, but approval was denied at Bushe’s behest, ostensibly because he thought the amendment was poorly drafted.

Complaints about the efficacy of the appellate procedure and the need to deter frivolous appeals continued into the 1940’s. As with similar complaints about the jury system, the Government tried to deal with the issues by repeated amendments to the Criminal Procedure Code. The last during the period under consideration here added to the time of any sentence the period during the pendency of an appeal, even if the defendant was not on bail. This stringent provision not only would affect so called frivolous appeals but all appeals, so that even if the Court were to grant an appeal and reduce a sentence,

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102 BNA CO 96/747/5, No. 183, 3.15.1938.
103 Ibid., No. 275, 5.13.1938, Secretary of State of Governor. Ibid.,
104 Attorney General’s Minute, 10.8.1938.
the time during which the appeal was being considered would be added to the reduced sentence.

During the period under study, British enforcement of criminal law became both more stringent and, at the same time, professedly closer to the standards enforced in the metropolis. However, the deference granted to the concept of trial by jury was often offset by a proclivity toward trial by assessors where the court could, and often did, overrule the opinions of the assessors. More offenses were added to the list of those triable by jury and the assistance of counsel became more available. At the same time, albeit theoretically universal, appeals of convictions were deterred by provisions adding the time during which an appeal was pending to the sentence where an appeal was denied. That regulation together with the cost of appeal deterred not only appeals that the colonial administration deemed to be frivolous but undoubtedly many that were substantive and valid. In sum, the British formulated rules of criminal procedure that reinforced their concepts of order far more strenuously than were to be found in the metropole.105

105 GNA ADM 1/2/263, No. 198, 7.9.1941 Enclosure No. 3, Attorney General’s Report, 7.2.1941
CHAPTER XI - MARRIAGE AND DESCENT OF PROPERTY

In this chapter, I use the issue of marriage and the descent of property to evidence the inconsistency of British policy. I discuss the origins of the Marriage Ordinance, its failure to achieve the level of popularity among the people that the British envisioned and hoped for, the agitation extending over twenty years to amend it to accord traditional families the right to participate in the estates of intestates and treatment of children born within customary unions later regularized under the Marriage Ordinance.

The issue of whether and how marriage should be regulated by British law roiled the indigenous coastal community of the Gold Coast for about thirty years at the end of the nineteenth century and at the beginning of the twentieth century and exposed the differing approaches to property distribution and treatment of children between British missionaries, the colonial authorities and many of their Gold Coast subjects. The former, as might be expected, favored monogamous marriage and property distribution as was provided for by English law, that is, to surviving spouses and the issue of a marriage, while most of the latter adhered to traditional polygamous marriage and a matrilineal system of inheritance whereby the decedent’s property descended to his or her matrilineal siblings and/or his or her nephews and nieces leaving the surviving spouse, most often the wife, dependent for support on her blood relations. Moreover, English law treated children born to couples who subsequently converted to Christianity as illegitimate. Christine Oppong contends that discontent with matrilineal inheritance was widespread among the coastal elite and such discontent was a factor leading to a Marriage Ordinance under which inheritance would be
Shirley Zabel argues that the purpose of regulating marriage and inheritance was to replace as soon as possible the provisions of customary law unsatisfactory to the British while avoiding social upheaval, that is agitation and possible violence among the indigenous population whose patrilineal customs extended back for millennia. At the same time the intention was to promote succession rights of wives that were unavailable to them under customary law except through their patrilineal families.

By contrast, Kofi Awusabo-Asere contends that regulation of marriage by ordinance was necessitated by the rejection by members of the extended family of marriages celebrated according to Christian rites without the consent of the families. Marriage regulation, according to Martin Chanock, enabled courts to control both the parties and the property they wished to distribute rather than leaving it to customary law. John Luluaki argues that the Marriage Ordinance inferentially recognized customary marriage and customary property distribution by differentiating it from the regime prescribed under the statute. Kwame Opoku takes the position that the assumption underlying creation of a Marriage Ordinance was the “inferiority of traditional marriage and the need for its replacement by a system inspired by European law.” This last view is not supported by the facts; had the British wished to replace traditional law, they would have legislated an

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1 Christine Oppong, Middle Class African Marriage, London: George Allen & Unwin, 1981, 42-43. She also notes that Ordinance marriage led to strains between the conjugal family and the patrilineal kin. Ibid., 12.


ordinance that did away with traditional marriage entirely. Rather, the archival evidence tends to support Zabel in part, but only with respect to those Gold Coasters who chose to accept English law to govern their familial relationships. Chanock's thesis is not supported by the archival evidence in the Gold Coast.

Moreover, the vast majority of the people chose to marry according to traditional custom and law. I demonstrate that the coastal elites while accepting British determination to accord surviving spouses a definite share of the property of their deceased spouses, insisted on maintenance of the traditional forms of marriage and succession that had an intestate's property pass to his matrilineal relations.⁷ They ultimately succeeded in ameliorating what they claimed to be the negative effects on the matrilineal family of deceased husbands and wives of having all property pass to his or her spouse and children by convincing the Government to amend the law to provide for a division of an intestate's property between the spouse and the matrilineal family. The debates concerning regulation of marriage were almost entirely limited to those in the coastal communities who had been educated in England or in English schools on the Gold Coast and who engaged in the professions or mercantile endeavors and who constituted an elite. Many of these people were Christians but whose inheritance rights were governed by customary law.

With few exceptions, such as among the Ga people of Accra and portions of eastern coastal regions of the Gold Coast, the indigenous population of the Gold Coast followed a matrilineal system. A person belonged to his or her mother's family and remained part of that family throughout his or her life. Succession to chiefdoms came through the chief's

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⁷ Awusabo-Asare points out that in 1969 eighty five years after enactment of the Gold Coast Marriage Ordinance, only three per cent of marriages celebrated in the Gold Coast were under the Ordinance while 81.7% were customary marriages. Kofi Awusabo-Asare, "Matriliney and the New Intestate Succession Law of Ghana," 4, Table 1. Kenneth Little attributes the paucity of Ordinance marriages to the high costs associated with them. Kenneth Little, "Some Urban Patterns of Marriage and Domesticity in West Africa," The Sociological Review, Vol. 7, No. 1 (July 1959), 67-82, 79.
mother’s family, so that usually, the eldest son of the chief’s eldest sister succeeded him on the stool. Similarly, as briefly noted above, upon the death of a man, his property, unless he had made an enforceable testament, passed to his mother’s family, the assumption being that his wife and his children would be cared for by the wife’s family. This system fit will with existing customs of polygamy, the children of each wife being considered part of that wife’s family. Thus the father could pass his property to his mother’s family and not have to be concerned about his multiple wives and children. Of course these customs were deemed to be anathema to Europeans in general and Christians in particular whose lives were based on patrilineal and monogamous traditions and who abhorred the idea that the welfare of a widow and her children would depend on collateral relatives. Thus Christian missionaries, if not always the converts themselves, lobbied to legislation that would subject Christians and any others who might be convinced to do so to provisions of English law governing marriage and property distribution. However, polygamy was never prohibited nor was it deemed to be repugnant.

This chapter discusses the regulation of marriage and the descent of property by English law among the small minority of those who entered into monogamous marriages.

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8 The Basel Mission insisted that its converts pass their property to their wives and children in accordance with English practice. Stephen F. Miescher, “Of Documents and Litigants: Disputes on Inheritance in Abetifi, a Town in Colonial Ghana,” Journal of Legal Pluralism, No. 39 (1997): 81-119, 94. The Basel Mission, a group of German and Swiss Protestants, came to the Gold Coast in 1828 having been active since 1815 in Russia and having trained both British and Dutch missionaries. Their original mission was in Christianborg, now a section of Accra, under Danish control. They created the first school system on the Gold Coast including elementary, secondary and teacher training institutions. Seth Quartey, Missionary Practices on the Gold Coast, 1832-1895: Discourse, Gaze and Gender in the Basel Mission in Pre-Colonial West Africa, Youngstown, N.Y.: Cambria Press, 2007. See also Miescher, , 94. The Basel Mission imposed rules on its converts as to monogamy and succession of property similar to those subsequently ordained by the 1884 Marriage Ordinance. Ibid., 85.

9 Despite evidence to the contrary, as to which see note 3, infra. H. F. Morris argues, however, that it was not the missionaries’ desire to eliminate polygamy that produced the Marriage Ordinance. Indeed, he argues, many missionaries opposed statutory regulation lest it deter Africans from Christian marriage. Rather, he contends, the Ordinance resulted from the desire of administrators to resolve problems arising from marriages between non-Africans who were not British subjects. H. F. Morris, “The Development of Statutory Marriage Law in Twentieth Century British Colonial Africa,” Journal of African Law, Vol. 23, No. 1 (Spring 1979):37-64, 37.
Until several years after creation of the Gold Coast colony, marriage was totally unregulated by the colonial authorities. Pressure from missionaries for legislation legally requiring monogamy among their converts as well as questions dealing with marriage among foreigners led in 1884 to a Marriage Ordinance that its proponents hoped would promote marriage along European lines. This hope was not realized. Moreover, agitation began to amend the ordinance to permit the matrilineal families of those married pursuant to its terms to share in the estates of intestate decedents. In 1905 a special legislative committee reviewed the claims of traditional families and proposed a compromise that satisfied both those agitating for change as well as the colonial government. In addition, the suggested amendment provided for legitimizing the offspring of parents who married under the Ordinance after their births. This latter amendment delayed enactment of an amending ordinance until the opposition from Secretary of State, Lord Elgin, was overcome. Unlike most other pieces of colonial legislation, the Marriage Ordinance as amended in 1908 remained in force, without substantial change until today, thus my discussion of the issue ends in that year.
Missionary Pressure and the 1884 Marriage Ordinance

Legislation regulating marriage in the Gold Coast had its origin in agitation by Protestant missionaries seeking to encourage Christian marriage. In 1878, in response to a question from the Colonial Office, David Chalmers, then Chief Justice of the Gold Coast Supreme Court, told the Governor that no law then dealt with Christian marriage in the Gold Coast and that an Ordinance would be necessary to deal with issues such as civil marriage. Indeed, up to that point, only Church of England clerics had been authorized to celebrate marriages. The following year, the Colonial Secretary, Michael Hicks-Beach, asked the Governor to have one of his Puisne Judges, Thomas W. Jackson, draft such an Ordinance for his consideration, using the Hong Kong Ordinance as a model. Jackson’s draft was circulated among the missionary and merchant communities and comments were collected.

This 1879 draft regularized all Christian marriages and made all ministers registrars for purposes of certifying marriages, thus achieving one of the Basel Missionaries most important objectives. Further, in order to encourage religious marriage, the 1879 draft, which was approved by Chief Justice Sir James Marshall, required celebration by an ordained minister as being the essence of marriage because a mere civil rite would damage, so it was thought, Christian marriage among the Africans. However, the Colonial

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10 BNA CO 96/143, No. 441, 9.18.1882, an official of the Colonial Office, Edward Wingfield, minuted that the Swiss German Basel Mission that had been among the first missionaries on the Gold coast and that had been active in the interior for many years, had pushed the Lieutenant Governor to initiate such legislation.

11 BNA CO 879/20/3 12.5.1878. The Supreme Court subsequently held that the English Marriage Act was not applicable in Africa. Des Bordes v. Des Bordes, [1884] F. C. L. 267 (Div. Ct.).


13 BNA CO 96/143, No. 441, 9.18.1882, Wingfield Minute.

Office rejected this provision, because Colonial Office policy expressed in 1863 was that marriage should be civil with religious celebration to be optional.\textsuperscript{15} When the Queen’s Advocate, John Woodcock, expressed his doubts as to the advisability of enacting such an Ordinance at that time, the matter was temporarily dropped.\textsuperscript{16}

In May, 1882, the Governor sent a draft of a Marriage Ordinance Bill to the Colonial Office that Jackson, had revised.\textsuperscript{17} Chief Justice Marshall attacked the proposed ordinance because it would have legitimate children inherit per customary law, thus, he said, destroying the principal benefit of the ordinance since under native law children do not inherit from the fathers, rather nieces and nephews do.\textsuperscript{18} Governor Rowe strongly objected to Marshall’s use of the word “illegitimate” with respect to children of native marriages, since, he said, one of the main purposes of the proposed Ordinance is to afford children a right of succession.\textsuperscript{19} Hector Bailey, Acting Chief Justice since Marshall’s retirement, also criticized Jackson’s draft because it ignored the issue of succession in native marriages; he thought that the English Statute of Distribution should apply to personalty and that all real property should go to the eldest son with dower payments made annually to the widow and younger children. He acknowledged the disadvantage of it creating two systems of succession, but, he said, he expected natives to flock to Ordinance marriages to obtain a better deal for their children.

The issue of the succession to real property of decedents’ marriage under the proposed Ordinance became the centerpiece of discussions in the Colonial Office, all other


\textsuperscript{16} \textit{Ibid.}

\textsuperscript{17} BNA CO 879/20, No. 200, 5.23.1882.

\textsuperscript{18} \textit{Ibid.}, 7.6.1882.

\textsuperscript{19} GNA ADM 1/1/59, 8.1.1882, 449-450.

-459-
matters being considered as merely technical. In September, 1882, Moloney, the Administrator of the Gold Coast Colony sent another revision of the Marriage Bill to the Secretary of State with a dispatch saying that his main concern was the retroactive effect of the bill on Christian marriages already celebrated because the Bill would affect native law now governing descent of property of intestates. He explained that the intent of the Bill was to permit property of an intestate Christian to pass to his children rather than to his sister’s sons as would be required by native law. Indeed, it would be good to strengthen parent-child relations in all marriages by requiring descent of property to the decedent’s children, but it would not be prudent to make such change to customary law in native marriages at present. Thus the new Secretary of State, Lord Derby, expressed his preference for real property to descend per customary law if it were family property and per the Marriage Ordinance if it were individual property.

The Ordinance as passed by the Legislative Council in November 1884 provided that it would extend to the entire Colony as well as to the protectorates. The only role of the courts would be to determine the validity of any objections (“caveats”) to a marriage. The determination of the Supreme Court would be final. This provision giving the judiciary the final word rather than the Executive was inserted at the request of native barristers and demonstrated once again the unwillingness of the Administration to challenge the people’s affinity for judicial rather than executive decisions. In a nod toward traditional custom, Section 32 permitted a widower to marry the sister or niece of his dead wife, but otherwise English law of affinity would govern, and no marriage would be allowed if either party was still married to another person under customary law. In what became the most crucial

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20 GNA ADM 1/2/27, No. 441, 9.18.82, 252, 258
21 Ibid., 256, 257, 258.
22 GNA ADM 1/1/59, No. 122, 3.23.1883.
provision of the Ordinance, Section 41 provided that the moveable property of an intestate decedent as well as such of the real estate that was within the power of the decedent to bequeath would descend according to English law, that is to his or her spouse in its entirety if there were no children or one third to a surviving spouse and two thirds to surviving children, except that land that could not under native law be alienated by will would descend according to the rules of customary law, that is to the decedent’s matrilineal line.  

Despite having required the Legislative Council to pass the Marriage Ordinance, the Governor expressed uncertainty as to the various local customs relating to marriage, something he clearly should have investigated during the five years that such an Ordinance was under consideration, and requested that the Colonial Office delay seeking the Queen’s assent to the Ordinance until he could collect and forward to the Secretary of State the desired information. Edward Wingfield of the Colonial Office responding to Governor Young’s objections to the property succession sections of the Marriage Ordinance that Young felt would arouse objections among the indigenous population, said that he saw nothing in the reports submitted by Young as to native custom to support the Governor’s objections and that the property disposition section should be left as written. The Secretary of State said that he would not advise disallowance.  

Passage of the Marriage Ordinances led to unforeseen consequences insofar as customary law was concerned. Thus, the Supreme Court ruled that oral wills, the most common way in which indigenous people transferred property to the next generation were

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23 Ordinance No. 14 of 1884, GNA ADM 4/1/7, 11.17.1884
24 GNA ADM 1/2/37, No. 521, 12.18.1884.
25 BNA CO 96/165, No. 120, 4.21.1885
26 Customary law afforded an adult the right to dispose of self acquired property, that is non-family property, inter vivos by gift or sale or by testament. N. A. Ollennu, "The Law of Succession," , 300. Consequences for customary law followed from Christian as well as Ordinance marriage. Ashon v Eduah [1908] Renner’s Reports 480 (Div. Ct.) held that after a Christian marriage even if marriage were not under the Marriage Ordinance, to apply customary law to issues of inheritance, would be repugnant.
invalid where made by people married under the Ordinance because such nuncupative dispositions were illegal under English law.  

Much confusion initially occurred with respect to the status of persons married to each other under customary law who subsequently entered into a marriage under the Ordinance. If they had recorded their customary marriage under Section 36 of the Ordinance, Colonial Office policy, albeit one not ruled upon by the courts, prohibited a subsequent marriage, neither party could marry another person under the Ordinance until the death of one party or a divorce that would be valid under English law. There was difficulty even as to a subsequent marriage between two people who were already married to each other pursuant to customary law. In _Re Isaac Ammetifi_ [1889] Redwar’s Comments, 157, the Supreme Court held that subsequent Christian marriage (equated by the Court to an Ordinance marriage) by natives previously married to each other pursuant to customary rites prior to the effective date of the Marriage Ordinance did not change the status of the parties and the estate of the deceased husband passed in accordance with customary law. Four years later, Francis Smith, then the Acting Chief Justice, reversed prior law that had held that Christian marriage was deemed to be merely a blessing and could not affect a prior marriage between the same couple, holding that under the Marriage Ordinance, a couple previously united under customary law could validly remarry pursuant to the Ordinance and thus agree to have their personal and property relations governed by English law and that a Christian marriage entered into prior to the effective date of the Ordinance

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27 _Re Anaman, [ 1894] F. C. L. 221, Estate of Otoo, [1927] Gold Coast Law Reports 1926-27, 146, held that those married under the Ordinance or Christian rites must strictly comply with the English Statute of Will or be deemed to have died intestate as under English law probate was denied to any form of will, written or oral, that was unwatched.

28 _Zabel III, 17_. A divorce under English law was extremely difficult to obtain, since, under the 1857 English Matrimonial Causes Act, it was allowed only upon stringent and overwhelming proof of adultery, a situation that was not ameliorated until the 1923 revision of that Act. Roger Gocking, “British Justice and the Native Tribunals of the Southern Gold Coast Colony,” _Journal of African History_, Vol. 34 (1993): 93-113, 109.
conferred the same rights and obligations.29 Indeed, in Cole v. Cole,30 the Court held that Christian marriage gave the parties and their children a status unknown to customary law and it would be repugnant to equity and natural justice, and thus illegal, to apply customary law to the succession to the property of a deceased party to such a marriage.

**Married Women’s Property 1890-1908**

T. C. McCaskie points out that the status of women, particularly in Ashanti, related primarily to their economic value as evidenced by the amount of damages awarded to their husbands in cases of the wife’s adultery. He argues that marriage was a “factor of privilege, ideology and differentiation.”31 The question of succession to a woman’s property did not cause problems because under customary law, particularly in areas and among those with matrilineal rules, a woman’s property passed in the same manner as a man’s. Prior to 1870, a married woman in England had no control over her property which passed to her husband upon marriage. Equity provided some relief for the apparent injustice of this common law rule by imposing a constructive trust upon the husband for the wife’s benefit in appropriate cases such as his abandonment of his spouse.32 Reform of the English common law as embodied in the Married Women’s Property Act of 1870 (33 &34 Vict. c. 93) was only partial, applying only to wages earned after passage of the Act and only to money deposited into savings banks, etc. and even then only if she applied to have registered as

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29 Ackah v Arina [1893] 2 Fanti Law Reports 79 (Divisional Court, F. Smith, Acting C. J.); Rex v. Menahs, [1922] Judgments of the Full Court 1922, 61, held that entering into a monogamous Christian marriage, even if not under the Marriage Ordinance, made bigamous a subsequent marriage under customary law. This ruling in effect raised Christian marriage to a level far superior to that of customary marriage and gave it a statutory effect.


hers. This statute was not considered one of general application because it was not embodied in Gold Coast law under the Reception provision of the Supreme Court Ordinance and was never applied to Gold Coast marriages under either customary or English law. However, unlike the situation in the United Kingdom prior to the enactment of the Married Women’s Property Acts, 1870 and its 1874 amendment (37 & 38 Vict. c. 50) or its 1882 successor (45 & 46 Vict. c. 75), a woman’s property among the Akan was customarily considered to be hers and passed to her successors in the same manner as did a man’s. Moreover, she was entitled under customary law to own property in her own name, to contract and to sue for debt. She was liable for her debts as well.

To remedy the disparate treatment of married women under customary and English law, the Gold Coast Legislative Council enacted a Married Women’s Property Ordinance, No. 6 of 1890, enacting for the Gold Coast all of the essential provisions of the English Married Women’s Property Act of 1882. The Ordinance, consisting of only three substantive sections, confirmed that a woman’s wages and earnings from any gainful employment carried out apart from that of her husband along with any investments of those earnings were hers alone. It authorized her to sue and be sued in her own name to recover

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33 Ibid., 178-180.

34 Sir Kenneth Roberts-Wray argues that statutes of general application were those not related to matters “peculiar to local conditions in England and not adapted to circumstances in the African territories.” Sir Kenneth Roberts-Wray, “The Adaptation of Imported Law in Africa,” The Journal of African Law, Vol. 4, No. 2 (Summer 1960), 66-78, 71.


earnings and wages, chattels, and real property and to obtain specific relief and damages in such actions.

The rush of Christian converts and others to marry under the Ordinance hoped for by Gold Coast missionaries did not come about. Indeed, in 1890 the Methodist missions complained to the Governor of the paucity of such marriages, only 268 in the five years since the Ordinance came into effect.\(^{38}\) This seeming unwillingness of people to marry under English law was attributed to the property disposition provisions of the Ordinance which disinherited the matrilineal relations of decedents and agitation to amend those provisions soon arose.\(^{39}\)

After almost twenty years of pressure, primarily from the respected Cape Coast barrister, John Mensah Sarbah, who had become an unofficial member of the Legislative Council and who regularly spoke in Council meetings of the need to amend the Marriage Ordinance distribution provisions, the Administration responded. In February 1905, the Acting Gold Coast Colonial Secretary suggested the appointment of a Commission of Enquiry to look into questions affecting the Marriage Ordinance, particularly those relating to the descent of property of intestate decedents and the legitimation of children born to parents in a customary marriage before they remarried under the Ordinance, whose status had always been seen as illegitimate although they were the full siblings of those born after

\(^{38}\)BNA CO 96/212, No. 264, 11.3.1890. See also Miescher, , 94, note 43.

\(^{39}\)In a decision rendered by a customary chief, Nana Ofori Atta, he held that a father had no right to require his son-in-law to marry his daughter under the Marriage Ordinance when both daughter and son-in-law chose to marry under customary law. Mensah v. Dakwa, [1915] Cases in Akan Law 167, B50 (Native Tribunal of Nana Ofori Atta). Atta’s rationale had less to do with the respective merits of customary succession or common law succession than the limits on control of adult children by their parents. This ruling, it should be noted, came eight years after the marriage law amendment, discussed below, that provided for distribution of a portion of an intestate decedent’s property according to customary law and demonstrates and aversion of the customary chiefs to Ordinance marriage and English property distribution rules. Miescher, citing Basel Mission records, agrees that the reluctance of people to marry under the Ordinance was a consequence of the succession provisions that disinherited the matrilineal family. Miescher, , 93-94, note 42.
their parents’ Ordinance marriage. The Chief Justice, W. Brandford Griffith Jr., was to Chair
the Commission and Sarbah and three others would be members.

In a letter dated January 20, 1905, Sarbah wrote to the Gold Coast Colonial
Secretary asserting without any specification of evidence that few marriages were
contracted under the Ordinance in part because of the existing rules of intestate
succession; despite churches’ influence and education, the feeling generally was that
“family” means one’s maternal family. He said that the Ordinance caused serious ruptures
between the wife and children on the one hand and the deceased’s mother who depended
on her son for support and gets nothing.40

Shortly thereafter, the Gold Coast Attorney General, presumably expressing the
Administration’s views, wrote to the Secretary of the Commission agreeing with Sarbah’
views and arguing that the overwhelming evidence demonstrated that the succession
provision of the Ordinance deterred marriage. He reported that there were about 17,000
adult Christians in the Colony but in 1903 only 176 of them married under the Ordinance,
because monogamy was contrary to tradition (an unacceptable reason, it seems, since
monogamy was enforced by the churches); divorce was too difficult under the Ordinance
and the succession rules ran counter to “tradition of family on which the whole social fabric
of Coast natives is constructed and tend to cause family problems between family [meaning
the matrilineal family]” and the surviving spouse and children. Nevertheless, he said, no
“case has been made out for a general condemnation of Section 39 on this ground.” No
universal law of succession, he went on, was “feasible”or “desirable.” It is unclear what the
Attorney General meant by the words “universal law of succession.” He did not explain, so
that we can only speculate that he referred to the English law of succession and its

40 BNA CO 96/446, Enclosure to No. 546, 11.8.1906.
applicability in the Gold Coast Colony and Protectorates. In any case, he recommended that Section 39 be amended so that the matrilineal family could share, one third to the spouse, one third to the children and one third to the matrilineal heirs. If there were no children, the share of the matrilineal family should be two thirds. In addition, he recommended that provisions should be added legitimating children born to the couple prior to their Ordinance marriage so that they would be treated on the same basis as those born after Ordinance marriage. Finally, he expressed the Administration view opposing any legislation easing divorce for those married under the Ordinance.41

The Commission delivered its report in May 1905. It concluded that the Ordinance was unpopular because of the expense and difficulties with complying with the statutory requirements of registering marriages for people living far from the Registry offices, obstacles in obtaining a divorce and primarily because, as Sarbah had been arguing, of the succession provisions that were contrary to the traditions of family law and custom. It proposed amending §39 of the Ordinance to permit the maternal family to share in the estate of an intestate in accordance with customary law. Although concurring in the Commission’s recommendations, Griffith was only lukewarm as to those proposing a division of the intestate’s property between his lineal and matrilineal families. He said (in a separate statement) that most people who have property knew how to make a will and could provide for its disposition as they wished and the burden of making such determination shouldn’t fall on the State. Such opinion is difficult to understand, as it ignores the fact that English law assumes such a burden and allocates the shares of an intestate’s property between a surviving spouse and children in the same way as did the provisions of the original Ordinance. Nevertheless, Griffith, stating that he did so in the

41 GNA ADM 15/23, 2.18.1905.
interests of comity and promptness, signed the report.\textsuperscript{42} Perhaps anticipating Griffith's view concerning testamentary dispositions, Osborne, the Attorney General had previously argued that most people die intestate in the Gold Coast as they practice of making wills, even oral testaments under native law, was exceedingly rare, probably because so many people married under the Ordinance were illiterate.\textsuperscript{43}

In November 1906, the Governor recommended acceptance of the Report of the Commission as to division of intestate estates. He was, he said, “strongly of the opinion that effect should be given to native law and custom” as to issues regarding descent of property. Responding to Griffith’s statement that “‘we must advance a step in civilization toward individualism,’” Governor Rodger said that “it may well be questioned whether, in the best interests of civilization, unbounded individualism is not rather a step in retrogression than one in advance.” Regrettably this expression of sympathy with the collective nature of indigenous society was a singular exception and did not reflect British policy.\textsuperscript{44} Moreover, he urged the legitimation of children born to parents who married under customary law before they remarried under the Ordinance as was, he argued, the case in Scotland, Queensland and Ceylon and, indeed, practically everywhere except in England. Governor Rodger reported that he would soon submit to the Legislative Council rules drafted by the Chief Justice relating to divorce and as soon as the Colonial Office approved the principles to be embodied in the bill, he would have an Ordinance prepared.\textsuperscript{45} The Secretary of State, Lord Elgin, advised the Governor that despite his doubts as to the distribution proposals, he was willing to approve them since opinion both within the Colonial Office and the Gold Coast

\textsuperscript{42} GNA ADM 15/23, 2.13.1905.
\textsuperscript{43} GNA ADM 15/23, 2.18.1905.
\textsuperscript{44} Indeed, in Nigeria, the estate of those married under the Nigerian Marriage Ordinance dying intestate continued to pass entirely under English law. N. A. Ollennu, “The Law of Succession in Ghana,” , 303.
\textsuperscript{45} GNA ADM 1/2/66, 11.02.06. 
seemed to be for such an amendment. However despite the unanimous recommendation of the Commission, he was unwilling to accept legitimation of children born prior to an Ordinance marriage as being unjustified except in monogamous communities and not from polygamous unions in which the Gold Coast natives engage. Indeed, he explained, his predecessor had rejected just such provisions proposed in Sierra Leone.\(^{46}\)

As may be seen, it took two more years before the Secretary of State agreed to permit amendment of Section 39 in the manner that the Commission had recommended but he once again declined to authorize adding provisions to legitimate children born prior to an Ordinance marriage.\(^{47}\) Responding to the Governor’s request for comment on the Secretary of State’s decision, Griffith told the Governor that he could not understand the Secretary of State’s objections, so that he could not respond properly but that he believed that a Marriage Ordinance without a legitimation amendment to be very unfair to children born prior to their parents’ Ordinance marriage.

Still trying to change Lord Elgin’s mind, Governor Rodger sent him a resolution of the bishops of the Church of England in West Africa supporting the proposed legitimation provisions, stating that their resolution was concurred in by the representatives of the other Christian denominations.\(^{48}\) Despite this strong evidence of religious feeling, Elgin maintained his refusal to accept legitimation.

Rodger asked Elgin to reconsider his views on legitimation and, in September 1907, the latter agreed.\(^{49}\) Roger had sent the Secretary of State letters from Sarbah, Griffith,

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\(^{46}\) BNA CO 879/20/3, No. 45, 2.1.07; GNA ADM 1/1/167, No. 48, 2.6.07

\(^{47}\) *Ibid.* In this refusal, he was supported by the Colonial Office Legal Assistant, Cox, who minuted that Christian marriage standards should not be lowered but legislation should seek to raise Africans to “the higher standard of Christian marriage, although he did accept the necessity for revising the intestate succession provisions to provide a portion for the matrilineal family. *Ibid.*

\(^{48}\) BNA CO 96/455, No. 46, 2.22.1907.

\(^{49}\) BNA CO 96/460, 9.7.1907.
Puisne Judge Francis Smith and Attorney General Osborne, all seeking to provide support for the Governor’s efforts to change Elgin’s mind. Sarbah wrote arguing that the Supreme Court had ruled well before passage of the Ordinance that children born prior to conversion to Christianity were to be considered as legitimate.\(^{50}\) Not to treat such innocents as being legitimate, Sarbah urged, could prevent further Ordinance marriages. The others expressed similar views. Osborne reminded his correspondents that the Supreme Court Ordinance required the British courts to apply customary law in marriage cases. He noted that the Anglican Diocese of West Africa recognized customary marriages and their offspring as legitimate. Griffith wrote that he could not understand the opposition of the Colonial Office to legitimation of offspring of a legal, moral albeit polygamous marriage and if children born after an Ordinance marriage refused to share the property of their late parent with their older siblings, it would strike “a serious blow to Christian marriage.”\(^{51}\) Now opinion within the Colonial Office began to change, the Legal Assistants, Cox and his assistant, Risley, argued that since conversion to Christianity and Ordinance Marriage meant a new start, children born prior to conversion or Ordinance marriage should be given the benefit of such actions. Cox reported a conversation with Francis Smith, P. J., in which the latter told him that before a man could remarry a wife under the Ordinance, he had to divorce all polygamous native wives but that their children were still to be considered to be legitimate under customary law. The only stigma, according to Smith, came from European ideas.

Elgin asked Governor Rodger to pose certain questions to his Attorney General who responded in April 1908 that the diversity of the people on the Gold Coast made impossible any hard and fast rule of customary law so he had asked Francis Smith and other Puisne

\(^{50}\) *Des Bordes v Des Bordes*, [1884] F. C. L. 248 (Div. Ct.).

\(^{51}\) BNA CO 96/457, Enclosures, 3.6.07, 3.20.07, 5.9.07.
Judges for their opinions. He said that he agreed with Judge Smith and Sarbah that in Akan society the status of children was unaffected by the divorce or remarriage of their parents under customary law as the child belonged to the mother’s family and not the father’s. In Accra, among the Ga, Osborne opined, the father’s son got his self acquired property but family property and that which he inherited went to the father’s maternal collaterals, According to Sarbah, a son lost any right in his father’s property by divorce and remarriage, but the Attorney General doubted that divorce or remarriage rendered children illegitimate. Indeed, Osborne said, he couldn’t see how one born legitimate could be made illegitimate. Since children born before the Ordinance marriage of their parents were recognized by the community as being legitimate, they remained legitimate after that marriage. All agreed that Section 39 of the Marriage Ordinance as it now stood excluded children born before an Ordinance marriage from taking in intestacy. The draft amendment altered Section 39 to provide for a division of the intestate’s property between his spouse and children and his maternal family and that children born prior to the Ordinance marriage should take an equal share with their younger siblings as if they, too, had been born after the Ordinance marriage.

On August 21, 1908, the Secretary of State communicated his agreement that children born both before and after Ordinance marriage should inherit on the same basis and should be treated “on the same footing” and that he would consider a Bill providing for legitimation of children born prior to an Ordinance marriage. A bill that had been read for the second time and submitted to the Committee of the Whole for clause by clause

53 BNA CO 96/468, Confidential Dispatch 5.2.1908, Enclosure 4.24.1908
54 BNA CO 96/469, 8.21.1908.
consideration, was now recommitted for amendment to provide for legitimation of children born prior to an Ordinance marriage and passed as Ordinance No. 2 of 1909.\textsuperscript{55}

The odyssey of the Marriage Ordinance and its Amendment evidences the repeated irresolution demonstrated by the Colonial Office, its inability to come to a conclusion as to colonial policy without extended consideration, intense and prolonged pressure by indigenous actors as well as local officials and, ultimately, the willingness, albeit often reluctant, to give in to the demands of the colonial government.

Passage of the Marriage Ordinance Amendment did not mean that those who had not married under the provisions of the Marriage Ordinance would be treated as equal to those who had. Thus, for example, the English common law privilege preventing one spouse from testifying against the other was only applied to those married under the Marriage Ordinance and/or pursuant to Christian rites.\textsuperscript{56} Responding to a dispatch from Governor Rodger, the Secretary of State drew a distinction between European and native marriage, the latter not being considered by him to be a marriage at all. However, he said, Muslim marriage should be considered in such a light as to require that the spousal privilege be applied to it. Thus, with this exception, he approved the Ordinance compelling spousal testimony previously sent to him.\textsuperscript{57}

The passage of the Marriage Ordinance and, more particularly, its amended version, exemplify the manner in which the colonial authorities responded to pressure from different constituents, the missionaries in the first instance and the indigenous leadership in the

\textsuperscript{55} GNA ADM 14/1/7.

\textsuperscript{56} Crabbe, John Mensah Sarbah, 1864-1910 (His Life and Works), 46. This discriminatory rule dated to 1906 when the Secretary of State suggested the passage of an Ordinance permitting spouses of Muslim and indigenous defendants to be compelled to testify against one another under oath. The Governor had such an Ordinance prepared and sent to the Colonial Office with the imprimatur of Chief Justice Griffith. GNA ADM 1/2/66, No. 590, 11.30. 1906

\textsuperscript{57} GNA ADM 1/1/16, No. 62, 2.15.1907; GNA ADM 1/2/68, No. 7, 1.19.1908. This discriminatory rule lasted until 1930. Crabbe, John Mensah Sarbah, 1864-1910 (His Life and Works), 49.
second. They were not absolutists but demonstrated a willingness to listen and respond when it became apparent to them that a positive response would lead to calm among the population, even if only a small segment of that population. As we shall see in the next chapters, British formulation of a land policy and their response to challenges to that policy were neither firm nor consistent.
CHAPTER XII - LAND TENURE: THE ROLE OF JUDGES

Colonial regimes throughout the world gave particular attention to land tenure. In French West Africa, French policy was to recognize customary tenure as to all transactions involving land owned by indigenous people, a policy formalized by decrees handed down in 1900. At the same time, the French colonial state claimed land not then having been in use for a defined period as belonging to the State which could be granted to individuals for private use. The Dutch recognized indigenous land tenure in Indonesia which was, as in the Gold Coast, essentially communal with individuals having rights to use land but not to alienate it. However, the colonial authorities maintained the right to declare land unencumbered by indigenous rights, a vague term never adequately defined, to be “Crown land” that might be leased to outsiders for commercial development. In Surinam as well, the Dutch respected communal land tenure. By contrast, the Portuguese claimed title to all the land by virtue of a 1901 statute of the Portuguese parliament turning the African inhabitants into squatters or tenants whose land could be alienated from under them. Finally, in German Southwest Africa, the Government tolerated alienation of agricultural

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1 Salacuse, 55.
land by the chiefs to private German interests and then, in 1905, expropriated the remaining land requiring indigenous farmers to obtain permission of the Governor to farm their land.6

British land policy was similar throughout its African dependencies. Similarly to those of the Dutch and unlike those of the French, Portuguese and Germans, Britain favored customary tenure and opposed individualization of title. Indeed, in 1889, in the aftermath of the Berlin Conference, the Colonial Office advised the Foreign Office that the crown made no claim to land ownership anywhere in Africa.7 Moreover Chanock reports three decisions of the Privy Council in 1919, 1921 and 1926 upholding customary tenure in Southern Rhodesia, Nigeria and generally wherever in the Empire it may have been the rule.8

Scholars have debated what if any impact traditional land law had on the economic development of the Gold Coast without any of them making a compelling case. Polly Hill argues that neither traditional rules of land tenure nor social organization impeded commercial agricultural development but permitted economic organization that actually intensified such development.9 Samuel S. K. Asante, pointed to inconsistent British policy as to collective tenure, arguing that initially British courts, that, Asante asserts, were acting politically, encouraged commercialization and commodification of land before the colonial authority changed course because the gradual Anglicization of land policy was undermining

the chiefs through whom the British wished to rule. Austin and Sugihara point out that communal tenure empowered local and regional lenders because European banks were too frequently unwilling to lend on the insecure collateral of land held under indigenous tenure whereas the former were prepared to make short term loans to peasant producers on the basis of traditional security, the nature of which is discussed below.

By contrast, J. M. Lee urges that social and political advance seemed to be impossible while dual systems of land tenure and law for natives and Europeans existed and that the problem for the British was to find a way to introduce individual land tenure and English law without alienating the indigenous population. Kimble contends that customary land law was “too uncertain and localized” to provide a legal framework for a commercial economy. Gordon Woodman, contrary to Hill’s view, argues that access to land and resources was a central theme in Gold Coast history and that the failure of the British to impose their view of proper land tenure impeded the economic development of the colony and was a mark of the inconsistency of British colonial policy. Grove and Falola argue that the disputes as to control of the land actually represented a fight to retain control over

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12 J. M. Lee, *Colonial Development and Good Government*, Oxford: Clarendon Press, 1967. If, indeed, this view ever prevailed, it changed over the years, as we shall see, to one favoring traditional tenure because, as Samuel Asante shows, the encouragement of individual tenure was increasingly undermining the authority of the traditional chiefs. Asante, *Property Law and Social Goals in Ghana, 1894-1966*, 41.


“commercial potential and incoming capital.”\textsuperscript{15} Finally, Lord Hailey, in his monumental study of the British sub-Saharan territories, concluded that lack of clear land titles militated against the development of commercial agriculture, discouraged agricultural credit with consequent very high interest rates.\textsuperscript{16}

British inconsistencies in its land policies, particularly in its inability or refusal to move toward individual land titles prevented the diversification of agricultural production as European investors were unwilling to put their money into land when title was collectively held except for mining concessions. Also, to the extent that special legislation was necessary to protect the cocoa crop upon which the well being of most of the rural population depended, it was forest legislation to keep and develop reserves and prevent dessication of the land on which cocoa was planted, yet such legislation only came late and without the control of professional foresters that these experts thought was required.

These inconsistencies were not resolved during the period under study. It is true that large scale commercial agriculture was discouraged because of native tenure, but such development was consistent with colonial policy of encouraging small holders, perhaps because such policy advantaged European buyers of cocoa and other commercial agricultural products in dealing with indigenous producers. Given the paucity of local capital to enable Gold Coasters to engage in large scale exploitation of agricultural and other

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\begin{flushleft}\textsuperscript{16} Hailey, Native Administration in the British African Territories, Volume 3, 223. However, in a subsequent study, Lord Hailey pointed out that the commodification of land led to more and more alienation of agricultural land accompanied by a widespread adoption of English forms of transfer without a negative effect on an expanding production of cocoa. William Malcolm Lord Hailey, An African Survey, A Study of Problems Arising in Africa South of the Sahara, Rev. 1956, Oxford: Oxford University Press, 1957, 733.
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resources, the uncertainty of title did prevent most Gold Coast land from falling into the hands of Europeans.\footnote{It is interesting to note that the dispute continues to this day as evidenced by an article appearing in the \textit{Daily Graphic of Accra} on July 24, 2013 reporting that the World Bank had found that farmers’ inability to prove clear title continues to impede development because of legal disputes. Generations of division and subdivision of families, the article went on, caused confusion as to who owned what. It is also interesting that rather than recommend elimination of traditional tenure, the World Bank suggested satellite surveys to define holdings to create secure tenure. \textit{Daily Graphic}, No. 19210, 7.24.2013, 5.}

In this chapter, I demonstrate that the British were never able to settle on a single approach to dealing with native tenure. From the attempt in the 1890’s to gain control of native lands, an attempt that the Colonial Secretary, Joseph Chamberlain vetoed at the behest of representatives of the newly formed ARPS, through several commissions and committees that studied customary law and made recommendations to adopt a specific approach, which recommendations were ignored, through abortive efforts in the 1920’s to create a registration system supported by a statute of limitations, nothing substantive was done to alter customary tenure. This policy, if it can be called that, of inertia supports Woodman’s view that in this critical area, the British failed to use law to encourage economic development beyond that necessary to support exploitation of the country’s natural resources.

Antony Allott specifies the six principal characteristics of African land tenure, and particularly Gold Coast land tenure, as follows: land was allocated by political or social unites, e.g. the kingdom or chiefdom and or family units; land was usually sued for shifting cultivation because of the abundance of uncleared land the relative poverty of the soil; land was most usually used for subsistence farming; the was a general vagueness in the definition of boundaries; there was the absence of commercial transactions in land, again because land was plentiful and thus there was little or no need to purchase or lease; and
land had religious significance: it was said to belong to the tribal or family ancestors as well as the current occupants.\textsuperscript{18} Each of these criteria are discussed in more detail below.

Arguably, the issue of land tenure affords the best example of the manner in which justice was administered by the British in the Gold Coast as well as of the continuing struggle between the executive and the judiciary of the Gold Coast colonial government as well as the inconsistent attitude of the Colonial Office toward Gold Coast administration. However, it must be pointed out that the dispute just mentioned was not one between individual officers of the executive and judicial branches, but was between administrators who viewed the judicial process as obstructing control over an important issue of colonial administration and the indigens who saw the judges as their main line of defense against what they perceived to be British desire to appropriate their land. I show how the British courts created a customary common law by interpreting traditional rules without reference to the manner in which the Native Tribunals of the Gold Coast chiefs expressed and enforced those rules.

The initial context of the struggle to impose British control over land use involved the manner in which the chiefs granted to Europeans the rights to exploit surface assets such as palm oil as well as sub-surface rights to mine minerals such as gold and bauxite. Seeing uncontrolled disposition of such concessions as a threat to expanding food and, later, cocoa production as well as depriving the Colonial government of a source of revenue, it first sought control through enactment of legislation, the Land Bills of 1895 and 1897. Having failed to achieve its objective through these proposals, the Colonial government passed a Concessions Ordinance that, while extending a measure of regulation to the disposition of

real assets, placed most of such regulation in the hands of the judiciary, a result strenuously opposed by the executive authorities.

As shown above, customary tenure was collective, but until well into the twentieth century, the British courts on the Gold Coast altered a number of customary rules to introduce European concepts alien to traditional law, such as prescriptive rights after a long period of occupation. In addition, the colonial administration in the 1890's attempted to gain control of the disposition of land by traditional authorities through two land bills, the first of which would have given title to unused land to the sovereign and the second of which would have placed management of such unused land in the hands of the Government while ostensibly permitting the traditional owners to retain title. When both these efforts failed because of widespread and well organized opposition led by the newly formed Aboriginal Rights Protection Society (“ARPS”), a Concessions Ordinance was enacted which controlled the manner in which traditional land was alienated to mining interests.

This Concessions Ordinance introduced another dispute, this one between different elements of the colonial administration: who was to control the concessions process, the executive or the judiciary. The original Ordinance responding to local pressure gave control over approval of concessions to the Supreme Court. Over time European interests and the executive became disenchanted with the manner in which the courts handled concession applications. A special commissioner, H. Conway Belfield, and the draft report of a committee of the Colonial Office both recommended transfer of control of approval of concessions to the executive, but these recommendations were never carried out. Indeed, Governor Thornton and his successor, Hugh Clifford, objected to pressure from the Colonial Office to effect some or all of those recommendations.
Land Tenure on the Gold Coast in the Nineteenth Century and Beyond

In this section, I describe in some detail the nature of customary land tenure on the Gold Coast as well as the manner in which the British courts interpreted the customary rules, in many instances altering them to accord with European concepts of property tenure.

In West Africa, and particularly on the Gold Coast, almost all of the land was held communally.\(^{19}\) Tenure was said to derive from an ancestral trust for the benefit of the living and those yet to be born.\(^{20}\) Chiefs and family heads were more than trustees, they were arbiters and rulers and governors with the final say; they controlled but did not own the property, ownership and the right to beneficial use remaining in the stool or family. The British courts would not overrule the decision of the stool or family head concerning land made with appropriate consent unless it involved a “flagrant abuse of fiduciary powers.”\(^{21}\) Custom provided that the stool should allocate land to any adherent of the stool on his request for land to cultivate, but British courts converted the normative into a mandatory requirement that stools allocate land on terms no more onerous than what the British court held should have been the case. Whatever these terms were could not be changed

\(^{19}\) Allott indicates six indices of indigenous land tenure: the land is allocated by a political or social unit; the land is used primarily for shifting cultivation because land was abundant and the soil relatively impoverished; the land was used principally for subsistence; there was a vagueness in defining boundaries, usually by reference to some natural feature; there is generally an absence of commercial transactions in land but it is plentiful and there is little need to lease or purchase it; and land had a religious significance and was said to belong to the tribal or family ancestors as well as to the current occupants. Anthony N. Allott, “Modern Changes in African Land Tenure,” in E. Coltran and N. N. Rubin, eds., Readings in African Law, 2 Vols., New York: Africana Publishing Corporation, 1969, Vol. 1, 237-242, 237-238.

\(^{20}\) As Kwaku Nti points out, land in the Gold Coast was not merely nor solely an economic resource or political issue. It was equally a cultural and religious matter. Kwaku Nti, “This is Our Land: Land, Policy, Resistance, and Everyday Life in Colonial Southern Ghana, 1894-7,” Journal of Asian and African Studies, Vol. 49, No. 1 (2012): 3-15, 3, 11.

\(^{21}\) Samuel S. K. B. Asante, “Fiduciary Principles in Anglo-American Law and the Customary Law of Ghana: A Comparative Study,” The International and Comparative Law Quarterly, Vol. 14, No. 4 (October 1965): 1144-1188, 1145, 1151. It is useful to repeat what was discussed above in connection with the Supreme Court Ordinance of 1876 as to the obligation of the British courts to apply customary law in matters relating to land. Because of this requirement, these courts created a species of customary common law that often differed from that enforced in the Native Tribunals.
unilaterally and courts would not permit dispossession except in strictly limited cases such as nonpayment of agreed rent, more accurately tribute, or denial of owner’s title.22

The term “communal tenure” often meant different things to different indigenous groups. Most commonly it was used to signify “group control, reflecting some group interest over land that is apportioned for the relatively exclusive use of individuals or families of the group.” 28-29 Traditional land tenure changed often with migration, conquest or population or climate change.23

Although there is evidence of substantial sales of land by chiefs in the 1860’s, most such sales were to other chiefs.24 While not entirely unheard of, sales to individuals were uncommon and generally limited to home sites in towns and appurtenant grounds.25 Indeed, in the first decade of the twentieth century, less than four per cent of the land in the Gold Coast colony and only a little more than one and one half per cent of the land in the Ashanti protectorate was held in fee simple.26 In Ashanti, and in most of the Fanti kingdoms, the King was the “owner” of all the land. He was the living embodiment of the state, the corporation of all souls, living, dead and yet-to-be.27 But such ownership rights did not vest in the King or chief as an individual, but, more accurately, in his office, the Stool.

26 H. Conway Belfield, Report on the Legislation Governing the Alienation of Native Lands in the Gold Coast Colony and Ashanti, BNA CO 96/908, Confidential, 9.17.1911, ¶ 27; ¶ 39; ¶ 54, 15. Fee simple is the Anglo-American form of absolute ownership of land.
He held the land as “a trustee or steward for the nation.”\textsuperscript{28} All land belonged to the King and any member of the nation had the right to cultivate unoccupied, uncultivated or unreserved land. Each stool subject had the right to occupy vacant land owned by the stool and to use it free of charge so long as he used it personally or through an agent by farming it or building on it. Cultivation of the land had to be regular and sustained to preserve the usufructory right of the cultivator, but natural produce, such as coconuts, that were not cultivated, firewood, game, timber and minerals belonged to the community and might be taken by anyone. A usufructory right could be lost if the usufructory possessor denied the title of the overlord or stool unless the acts constituting denial did not seriously infringe upon title.\textsuperscript{29}

Customary law protected the product of one’s right to cultivate land almost in perpetuity. Such a right was transferable, but only to another member of the family or the community. A stranger might obtain cultivation rights from the family or chief, but only with the consent of members of the family and the heads of the community, the chief’s senior councillors. Concomitantly, the Stool (\textit{i.e.} the chiefly authority) could not evict the occupant or alienate the usufruct without the occupant’s consent. But the Stool retained all subsurface rights, rights that were to become very contentious in the last decade of the nineteenth century.\textsuperscript{30} The King had the right, indeed the duty, to defend the land and to grant rights in the land to his chiefs and sub-chiefs for further distribution to the members of


the community so that they might till the soil and provide for themselves and their families.\textsuperscript{31} Land had religious, political and social significance as much as or more so than economic. Thus, no one, not even the King or Head Chief, could dispose of the land or grant it to someone outside the community without the consent of the most senior person (headman, chief or king) as well that the senior person’s council.\textsuperscript{32} However sale of land often took place and was permitted if it was conducted in accordance with customary ritual involving the presence of witnesses to payment of consideration, the formal placement of the purchaser in possession, the marking boundaries and the giving of notice of the transaction to the community.\textsuperscript{33} These rites, often called “Guaha” in Akan, were necessary to placate the ancestors whose spirits would have to leave the land when it was sold.\textsuperscript{34}

All land acquired with family resources such as money, materials and labor owned or contributed by family members, was considered to be family land.\textsuperscript{35} Where property is acquired by multiple members of a family, there was an almost conclusive presumption that

\textsuperscript{31} Ibid.


\textsuperscript{33} Amankwah, Land Law and Land Use Control in Ghana: The Development of a National Land Tenure and Land Use System in a Developing Nation, 254-255. Although usually a sale was not considered to be valid until all ceremonies had been performed, the Courts in the Basel Mission Factory Case, [1899] F. L. R. 99, and again in Adjuah v. Wilson, [1927] F. Ct. ‘26-’29, 260 (Full Ct.), held that the sales in dispute were valid despite fact that not all ceremonies had been held, requiring only public notice and payment of consideration.

\textsuperscript{34} Asante, Property Law and Social Goals in Ghana, 1894-1966, 37.

\textsuperscript{35} Woodman, “The Acquisition of Family Land in Ghana,” Journal of African Law, Vol. 7, No. 3 (Autumn 1963):136-151, 138. See also Dadzie v Dadzie aka Amissah, [1938] Div Ct (Lands) ’38-’47, 15. Citing Sarbah Fanti Customary Laws, 61, the Court held that joint or family property is presumed and one claiming it to be individual property bears the burden to prove an individual title.
the property is family property, not merely that of the family members in whose name the property is acquired, particularly where the property is purchased with monies derived from other concededly family properties and such presumption is almost impossible to rebut.\textsuperscript{36}

The British courts interpreted these customs to hold that family land belonged not just to the nuclear family but to the entire lineage claiming descent from a common ancestor.\textsuperscript{37} Such land was indivisible and inalienable except by the head of the family with the consent or concurrence of the principal members. The Court made it a part of the hybrid Gold Coast common law that members of the family had full rights to use their allocated portion of the land, which rights were descendable to their heirs, and to alienate the produce of the land as well as the buildings they had constructed on the land, but not the land itself. Alienation of family land required the consent of the family elders.\textsuperscript{38} So, too, the British courts, applying customary law, ruled that if land were used to secure a family debt, such use had to be with family consent because a creditor might sell the land.\textsuperscript{39} Such consent had to be expressed by the head and the principal members of the family given at

\textsuperscript{36} Tswtsewa v. Acquah [1941] 7 WACA 216. But see Cjoc v Kwatchey [1935] 2 WACA 371, where the Court held that the fact that a sister conducted a petty trading business on her brother’s land was in itself insufficient to prove that the brother’s personal land was family land, citing Okai v Asere, [1935] Div Ct, 6.18.35 (Deane, C. J.); nor does permission from one relative to allow members of his family to use or occupy his individual land make it family land. Donald Kingdon, C. J. of Nigeria, concurring, said that the presumption of family or community land is not as strong then as it was previously thought to be.

\textsuperscript{37} Abbacan v Bubuzooni, [1883] F. C. L. 213 (Div. Ct).

\textsuperscript{38} In Tijani v. The Secretary, Southern Nigeria, [1921] 2 WACA 399 (Privy Council), their Lordships held that the chief or head of the family “is to some extent in the position of a trustee, and as such holds the land for the use of the community or family . . . He cannot make any important disposition of the land without consulting the elders of the community or family, and their consent must in all cases be given before a grant can be made to a stranger.” J. E. Casely Hayford argued, however, that the chief or family head is not a trustee as that term is used in English law because a trustee controls the cestui qui trust completely whereas a chief and a family head cannot deal with the trust property without the consent of the councillors or family elders. J. E. Casely Hayford, The Truth About the West African Land Question, New York: Negro Universities Press, 1969 [1915], 54.

a family meeting provided that the proceeds were used to benefit the entire family. A minority would not be permitted to obstruct alienation so approved so long as the meeting represented the entire family.\textsuperscript{40} It must be emphasized that such unapproved sales were not void, but voidable, requiring prompt action by the stool or family to set the sale aside and then only in circumstances that permitted the stool council or family to argue successfully that it did not know and could not reasonably have known of the sale and that the buyer could be restored to his previous position.\textsuperscript{41}

Tenure was not immutable and could and did change. Thus even where tenure was held by an individual, upon his death intestate it would descend to his heirs, his brothers and nephews in matrilineal societies or his sons and daughters in patrilineal society and thereby become family land.\textsuperscript{42}

From the creation of the Supreme Court in 1876, litigation between natives and Europeans as well as between natives and natives as to title and occupation of land constituted the majority of cases in the new court. The increasing number of cases gave pause to the Governor who expressed to the Colonial Office his concern that an increasing backlog of land litigation in the Western Province, at that point one year in arrears, constituted a serious problem because, “if unsettled they lead to local disturbances.”\textsuperscript{43}

\textsuperscript{40} \textit{Awortehie v Essian}, [1872] F. C. L, 170 (Div. Ct.). The head of the family supported only by a minority of the family could not alienate the land and such a sale was voidable, as was a sale made only by the head of the family. \textit{Inslea v Simons}, . But even if everyone else approved, a sale was voidable if the head of the family did not consent. \textit{Bayadee v Mensah}, [1878] F. C. L. 171, Renner’s Reports 45 (D. Ct.). In \textit{Mackov v. Bonzo} [1936] 3 WACA 62, the West African Court of Appeal held that sale of family land without consent is not void but voidable and any claim to set such a sale aside must be timely so that the purchaser may be restored to his pre sale position, citing \textit{Bayadee v Mensah}, F. C. L. 150 (Full Court).

\textsuperscript{41} \textit{Mako v Benso}, [1936] 3 WACA 62; \textit{Bayadee v Mensah}, [1876] F. C. L. 171 (D. Ct.).

\textsuperscript{42} H. W. Hays Redwar, \textit{Comments On Some Ordinances of the Gold Coast Colony}, London: Sweet & Maxwell Ltd., 1909, 80..

\textsuperscript{43} BNA CO 96/127, No. 192, 8.5.1879,
In many of the cases brought before the Supreme Court dealing with land titles, the Court was obliged to deal with the effect of prescriptive rights to title by reason of continuous occupation of the land. The reader should once again be reminded that the Supreme Court Ordinance required British judges to apply customary law in land cases, but permitted those judges to determine for themselves what that customary law was. In so doing, the British courts transformed pragmatic, situational customary rules into rigid common law ones.\(^{44}\)

Although customary law lacked any doctrine of prescriptive rights, in the early years of the Colony, some British courts indirectly gave credence to such a doctrine via the twin concepts of estoppel and acquiescence, deciding that those concepts were part of the customary law. In 1890, the Court held that Fanti custom forbade one who had alienated land to another from recovering such land after inducing the acquiring party to obtain the land under the belief that he was obtaining absolute title and not merely a possessory right.\(^{45}\) Similarly, the Full Court ruled that, as a matter of Fanti custom, permitting one in possession of property to remain in possession while he believed himself to be the owner without the claimant asserting a contrary claim for an unreasonable period of time amounted to the claimant’s acquiescence in the possessor’s claim of ownership.\(^{46}\)

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\(^{44}\) Asante, Property Law and Social Goals in Ghana, 1894-1966, 41.

\(^{45}\) Assraido v Dadzie, [1890] F. C. L. 578 (Div. Ct.). Since the Native Tribunals that rendered decisions based exclusively on customary law did not do so in writing, there was no way that the British courts could establish with any precision what customary law was. See the discussion of determination of customary law in Chapter IV, ..

\(^{46}\) Stephens v Bray, [1910] Renner’s Reports 578 (F. Ct.). See also Bokitsi’s Case, [1902] F. L. R. 154, Renner’s Reports 239 (Div. Ct.); Tsibu v Kyai, [1922] F. Ct. 1922, 14; Aduwah v Ninson, [1927] F. Ct. 1926-1929, 465. See also Daddie v Queateabah [1894] F. C. L. 173; Ado v. Wusu, [1938] 4 WACA 96, 99 holds that strict native law will not be “invoked where the effect is, in equity, unjust,” relying on the dictum of Morgan, P. J. in Bokitsi’s Case, F. L. R. 159, 160 [1902], that land occupied under such circumstances . . . as would cause them to believe themselves to be owners of the land and to incur pecuniary responsibilities in consequence of that belief as, e.g. spending to improve the land or to defend rights to it.” Bokitsi was also followed in Nkoom v. Etsiaku, [1922] F. Ct. ‘22, 1,5 (Full Court) (Smyly, C. J.). Compare Miller v. Kwayisi, where Chief Justice Smyly found, there was only “slight” evidence of assertion of rights adverse to the stool’s title and strong evidence that plaintiff’s family never objected to

(continued...)
Concomitantly, where the owner asserts rights of ownership, such as entering into the property and demanding payment from the occupier, a mere possessor was estopped from denying the owner’s title. But something more definite than a mere oral claim of use and occupancy of an indefinite tract had to be shown to establish title. What that something could be was indicated in *Kodedja v. Tekpo*, D. C. ’29-’31 [1931] 45 (G. C. Deane, C. J.). An execution creditor attached land claimed to belong to the stool to satisfy a stool debt. The long time occupant of the land argued that the land belonged to him and not the stool, saying that he had possessed and occupied the land for more than thirty years and that it had been given to him by his father. The execution creditor asserted that land had been in the father’s possession only as a trustee for the stool. The claimant proved that he had openly occupied and farmed the land full time during the reign of three chiefs and used it as his own for thirty three years. Relying on *Lokke v. Kanklofi*, Renner’s Reports 450, affirmed by the Full Court, Chief Justice W. B. Griffith, Jr. held that stool allowed the land to become the private property of the claimant by not asserting stool title, i.e. the various stool occupants consented to ownership passing to the claimant by permitting undisturbed and exclusive possession for thirty years during which the claimant made improvements to the land and cultivated permanent crops. In order to establish title, possession, even long possession had to be under a claim adverse to the title of the stool.

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46(...continued)

assertion by the stool of its rights. The West African Court of Appeal reversed, noting that a former Omahene had denied that the land was stool land and therefor acquiesced in plaintiff’s family’s claim to ownership. Thus, since stool was estopped from claiming title, so was the purchaser of the rights of the stool’s judgment creditor. *Miller v. Kwaysi*, [1930] 1 WACA 7.


48 *Kuma v. Kuma*, [1938] Privy Council No. 21/1936, reversing 2 WACA 178, held that long occupation without payment of tribute or conscious performance of acts of fealty was insufficient to establish conclusively that land was not stool land when the stool proved that it was traditional not to impose tribute or interfere unless the possessor sought to sell or behaved badly, and in the case at bar, the stool’s objection to proposed sales in 1899 and 1926 was strong evidence of stool title; *Agyeman v Yarmoah* [1915] D.C. and F.C. ’11-’15 (Div. Ct.) 56.
Thus non-adverse possession for four generations was insufficient to oust the stool from
title to the land in issue.\textsuperscript{49} In sum, while absolute alienation is not to be presumed, rather
there is a strong presumption against alienation, that presumption can be overcome by long
time adverse possession under circumstances that would make it inequitable to require the
long time occupant to return the land so that mere usufructory rights could ripen into
freehold rights.\textsuperscript{50}

Another issue in judicial dealings with land transactions was whether or not
customary law applied at all.\textsuperscript{51} British courts were inconsistent as to whether writings in
connection with a land transaction oust native customary law and jurisdiction. When
customary ceremonies were carried out, courts have held that writings may merely be
evidentiary.\textsuperscript{52} But where several documents were involved and decision of the case
required construction of the documents, it was considered that the matter was “quite
unsuitable for decision by a Native Tribunal.”\textsuperscript{53}

\textsuperscript{49} In Re Land at Nkwantamang, Owusu v Manche of Labadi, [1933] 1 WACA 278.

\textsuperscript{50} Summonu v Disu Raphael, AC 811 (PC 1927); Sam v Tham, [1924] D.C. '21-'25, 63; Kodadja v Tepko, [1931] D.C. '29-'31, 45.

\textsuperscript{51} Amankwah, 265. Ada Sei v Ofari [1926] F. Ct. '26-'29 87, Noh v Gbademah [1929] F. Ct. '26-'29 395 held that if the pledgee was given possession of the pledged property until the debt was repaid, it was a customary pledge to be governed by customary law; conversely if the pledgor remained in possession, it was a common law mortgage governed by English law. See also Wetting v Bessabara, [1906] Renner's Reports 249 held that inclusion of a power of sale in an agreement to secure a loan subjected the agreement to English law and once subject to English law, the land was always to be subject to English law.


\textsuperscript{53} Richard v Eshun, [1940] 6 WACA 141; Quartey v Akoa, [1895] Renner's Reports 138. See also Aradzia v Yandor, [1922] F. Ct. '22, 9. However not every use of a writing was to be considered as
evidencing an intent to use English law. Hughes v Davies, [1909] Renner's Reports 550 (Div. Ct.), 556 (F. Ct.). Early in the life of the Colony, the British courts held that resolution of this question rested on the
intent of the parties. If the parties to a land transaction were literate and the transaction was documented
with a writing such as a deed, they were presumed to have intended that English law apply to their
dealings because they would know what obligations documents imposed and because educated people
were thought more likely to want to have English law govern their transactions. Moreover, use of terms in
writings foreign to customary law such as “fee simple,” “to hold forever,” “heirs and assigns,” were seen as
evidence of an intent to be governed by English law.
The consequences of this determination were significant. Thus the availability of the remedy of specific performance of a contract depended on whether or not the parties intended to have customary law govern their relations because specific performance was not a remedy available under customary law.\textsuperscript{54} Determination of the parties’ intent was not easily made, particularly where intent was contested. The mere fact that an agreement was not under seal was not conclusive of intent to be governed by customary law. Other evidence, such as a writing in English form or that included a provision for English remedies upon breach, was required.\textsuperscript{55} Over the course of the twentieth century African and European merchants and lenders more and more began to insist on writings as means of conveyances and to create security interest, with consequent increasing application of English law. This, in turn, Asante argues, lead to increasing and “inordinate accumulation of property,” absentee ownership and tenantry, a cleavage between ownership and use and damage to soil fertility.\textsuperscript{56} Moreover, such concentration of ownership threatened Government policy encouraging small holders and the creation of a landless proletariat.

Efforts to Change Land Tenure Through Legislation

In the late 19\textsuperscript{th} century, cocoa farming became common on the Gold Coast and brought with it a modernizing economy where agriculture was in transition from subsistence farming to commercial production. As noted above, a weak effort at plantation production was discouraged by the colonial government so that small producer holdings became the

\textsuperscript{54} Pappoe v Duncan [1918] F. Ct. ‘19, 21.

\textsuperscript{55} Azzu v Dadoe [1913] Renner’s Reports 680. Thus, inclusion of a power of sale in a mortgage agreement was said to evidence an intent to create a common law mortgage and consequently impose upon the mortgagee the obligation to account to the mortgagor once the former has taken possession of the property. Woodman, “Developments in Pledges of Land in Ghanaian Customary Law,” Journal of African Law, Vol. 11, No. 1 (Spring 1967): 8-26, 21-22. By contrast, a customary pledgee took possession immediately, remained in possession until the debt was paid and had no duty to account, the profits of the land being seen as interest due on the debt. Increama v Mormon [1882] F. Ct. L. 157, Abaka v Daker [1927] F. Ct. ’26-’29, 264.

\textsuperscript{56} Asante, Property Law and Social Goals, , 37,75.
rule. This commercialization of agriculture encouraged a change in the traditional land tenure system as newcomers sought to obtain land for cocoa production and Europeans sought concessions for timber and mineral exploitation. European investors wanted security in the identity of an owner who could grant rights to use the land or could convey secure title.

Evidence was accumulating of improper alienation without necessary consent by sale and lease of stool lands and the granting of mining concessions primarily to Europeans upon payments to the chiefs that found their way only into these grandees’ pockets. At the same time, litigation was increasing between chiefs of adjoining territories over concessions claimed by one or the other to be on his land because of uncertainty as to boundaries and as to what had already been granted. The Gold Coast Government proposed to send a circular dispatch to District Commissioners giving notice to chiefs as to the best way to deal with agreements for the lease or sale of land that had been prepared by Europeans. Acting Governor Hogdson said that it was necessary to take steps to see that the chiefs “are treated with fairness and not imposed upon.” Chiefs would be told to apply to the District Commissioners if they had any doubts or questions as to the papers presented to them by would be lessees, but that any decision they would make would be their own and “entirely at your own risk.”

Over the course of the last decade of the nineteenth century, Governor Griffith caused studies to be made of the land tenure issue and draft legislation to be prepared to

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57 Hill, The Migrant Cocoa-Farmers of Southern Ghana, 963. Woodman argues that tendencies toward individualization of land tenure during this period resulted not from the influence of English law, but the commodification of land accompanying commercial agriculture. Woodman in Our Laws, Their Lands: Land Laws and Land Use in Modern Colonial Societies, 18-19


59 BNA CO 96/219, Confidential, 8.24.1891.
deal with that issue. His successor, William E. Maxwell, pushed for legislation that would place control of most of the land of the colony in the hands of the Government. His initial effort, which would have placed title to all land not then in cultivation in the Sovereign, raised such opposition by both the educated elite, and the traditional chiefs that it was withdrawn before consideration by the legislative council. A second effort that permitted title of unused land to remain with its traditional owners but would have permitted the Government to administer such land, including leasing it to third parties on such terms as the Government desired with only small compensation being paid to the traditional owners passed the Legislative Council but, after a meeting of an African delegation with Secretary of State Joseph Chamberlain, failed to obtain Royal Consent. As a consequence of that meeting, a Concessions Ordinance that was intended to limit alienation of indigenous lands and to prevent fraud on the chiefs was enacted. At the behest of the same elements of Gold Coast society that successfully defeated the second Lands Bill, control of the concession approval process was placed in the hands of the judiciary.

In 1891, the Governor, William Brandford Griffith, Sr., asked Chief Justice Joseph Hutchinson for a memorandum proposing a solution to the problem posed by uncertain and insecure land titles. Hutchinson proposed legislation that would not interfere with existing rights that were not “permanently abandoned,” rights to land not under cultivation or otherwise being used that he called “‘waste lands’” as to which the Crown would take “immediate possession” and would “assume the ultimate Lordship of all of the land in the Colony and Protectorate.” He told the Governor that he believed that “all of the land in the Colony and the Protectorate, whether occupied or not, has according to Native law an owner. Some of it is stool land, some family land, and a very small part is private property.”

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60 BNA CO 879/46/513, Confidential, 4.7.1891 (Enclosure to Governor Griffith’s dispatch to Lord Ripon, BNA CO 96/247, Confidential, 8.29.1894, ¶3.}
Land, he went on, was alienable absolutely but only for particular purposes such as paying off stool or family debt but generally only conditionally for occupation and cultivation by stool adherents in return for a rent or a portion of the crops with a reversion to stool or family when no longer occupied for this purpose. Discussing the benefits of expropriating “waste land,” Hutchinson noted that revenue to the Government derived from sales and leases could be used for public purposes and would benefit the community through creation of indisputable titles. Since all land, even “waste” land, was owned, he assumed that compensation for land expropriated pursuant to his proposed legislation would be paid in an amount, that, if generous enough, might “reconcile” the chiefs and family heads to the loss of their land, but would probably not yield a profit to the Government. Creating definite and indefeasible titles would be “a great benefit to the community” in making credit easier, since at present would-be lenders had a hard time determining who owned land offered as security and what the extent of the land being offered as security actually was and complete surveys were much too expensive to conduct. However, expropriation would permanently “lower the dignity and importance, and therefore the power of the Chiefs and heads of families” as they would no longer have power to make grants or receive rents and tribute from expropriated land. “This consideration alone would, in my opinion, be enough to make us reject the proposed legislation, unless the reasons in favour of it are overwhelmingly strong.” Thus, the Chief Justice concluded, on balance, any gain from expropriation would be “doubtful” and negative consequences to prestige and power of traditional authorities as well as the likelihood that a “sense of injustice and consequent hostility to the Government”

61 Ibid., ¶15.
62 Ibid., ¶12.
63 Ibid., ¶13.
64 Ibid., ¶14.
65 Ibid., ¶15.
that would be raised “outweigh any probable gain that could accrue to the Government from it.”

Nevertheless, Government should take control of minerals and of the unoccupied and unused forest lands which afford no revenues to most of the chiefs or their people and so would be unlikely to engender hostility to the Government if taken for public benefit.

In the same dispatch to the Colonial Office, Governor Griffith enclosed an 1892 memorandum prepared by his son, William Brandford Griffith, Jr., later to become Chief Justice of the Gold Coast, written in Jamaica where Griffith, Jr. was serving as a judge in that colony. Griffith, Jr. told his father that the land did not belong to the government but to the people albeit “[a]s to the vast majority of the land the claims of ownership are to say the least very difficult to fix.” “I think it may safely be said that all the land is held jointly or in common and that it belongs generally to classes of natives but to no individual in particular.” He opined in terms similar to those expressed by Chief Justice Hutchinson that it obviously would be better if land were owned by “particular and definite owners,” but that while “it would be a policy of injustice and spoliation for the Crown to endeavour to dispossess the natives of their undoubted rights and take the land without compensation,” it would not be unjust if the land were taken for the benefit of all the people of the Colony and Protectorates to be used for the benefit of the Gold Coast and the revenue went to the natives.

He suggested that the policy might be carried out by imposition of a tax on land, which land would be forfeited if the tax were not paid in a specified time. This would force claims to land to be formulated and fixed. Proceeds from the tax could be used to survey the land. Chiefs who paid the tax would be seen as the principal owners with the power to dispose of the freehold or rights in the freehold. Of course difficulties would arise but better “that the present wretched system of land tenure should be got rid of as soon as practicable and

\[66\] Ibid., ¶¶ 16-17.

\[67\] BNA CO 96/247, Confidential 8.29.1894, Enclosure 2.
before a mixed application of English land and native custom gets things into an inextricable
tangle.” A law such as he proposed should first be applied only to the coastal lands
constituting the Colony and only later to the Protectorates. It would operate, he said, as “a
gigantic partition suit gradually working itself out with little friction.” Contrary to Hutchinson’s
suggestion, Griffith, Jr. proposed that waste land would not be paid for and would gradually
fall into Government hands.68

The First Lands Bill

Until 1894, the Colonial Office was unwilling to press for control of land alienation by
means of timber and mining concessions primarily for fear of violent resistance. In January
1894, the Secretary of State finally gave in and advised the Governor that “the time had
now arrived when the Colonial Government should seriously consider what are the best
means to be adopted for regulating the mining and timber industries.”69 He suggested that
the Governor issue a Notice to chiefs and concessionaires that no concession would be
recognized unless approved by the Government within one year of the grant.70

Since such a notice was of dubious legality, Governor Griffith requested Chief Justice
Hutchinson to draft a Crown Lands Ordinance that would vest all unoccupied land, forests
and mineral rights, described as “waste lands” in the Crown.71 The Governor said that he
had been thinking for three years about how to acquire such waste lands. Having consulted
the Secretary of State and obtained his approval, Griffith gave Hutchinson the go ahead.72

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68 Ibid. Puisne Judge, Hays Redwar, had drafted such an Ordinance but it had never been enacted.
69 GNA ADM 12/1/ 28, 1.2.1894; BNA CO 96/247, 8.29.1894, 478-479.
70 Ibid., 3.1.94, 480.
71 Gold Coast Government Gazette, January 31, 1895, 42 et seq., ¶ 3.
72 GNA ADM 14/1/6, 11.14.1894.
Hutchinson saw it as the object of the bill to control the forests and minerals without imposing any hardship on the indigenous population.\(^73\) One of the benefits of the Bill would be to permit the Government to create indisputable title to the lands coming under its control.\(^74\)

Governor Griffith sent Hutchinson’s draft bill to the Colonial Office in August 1894 where it received favorable attention.\(^75\) One official noted in a minute that it was “very desirable” that the Government be in a position to regulate concessions and said that Hutchinson’s draft bill is a “fair and reasonable way of doing so.”\(^76\) A senior official also approved the draft, noting in a congratulatory manner that Hutchinson had got around the issue of all land being owned by providing that land not cultivated or otherwise used for thirty years was waste land, implying that ownership rights were lost by such lack of use and therefore vested in the Government.\(^77\) The London bureaucrats suggested several changes one of which would increase the Governor’s discretion to make grants or have them registered under certain conditions and concluded that the Gold Coast Government should be authorized to pass the bill, but that it should be Gazetted for three months first to allow for consideration of public opinion in the Colony. The Secretary of State, Lord Ripon, approved and the Bill was first read in the Legislative Council in January, 1895.

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\(^73\) BNA CO 96/247, 8.29.1894, 481. Governor Griffith had often discussed whether the Crown should take possession of unoccupied land with his son, then the Gold Coast Queen’s Advocate. The written opinion, discussed above, that Griffith, Jr. gave to his father in January, 1892 became the basis for the Chief Justice’s draft bill. Ibid., 484.

\(^74\) Ibid., 492.

\(^75\) BNA CO 96/247, Confidential. 8.29.1894.

\(^76\) Ibid., minute dated 9.27.1894.

\(^77\) Ibid., minute dated 9.16.1894.
The Bill defined “waste lands” as those lands which had not been cultivated, inhabited or had been used to collect or store water for a period of thirty years preceding the effective date of the proposed ordinance. The Governor was authorized to dispose of such lands, as well as forest lands and the minerals underlying them, as he saw fit on such conditions as he in his sole discretion imposed, except as to those lands and forests already being used by natives or which had already been granted by the chiefs and families claiming them. No provision was made for payment to the indigenous claimants for land not in actual use or cultivation, but they would be permitted to cultivate, cut timber and mine lands not yet granted by the Governor. Concessions would thus be made by the colonial executive subject to royalty payments to the Government which, in turn, would use them for whatever purposes it chose. Disputes over priority of grants or whether or not the land was, in fact, “waste land,” would be decided by the judges of the Supreme Court with the claimant bearing the burden of proof.

The Lands Bill was based on the proposition that land not used land for the prescribed period had been abandoned, belonged to nobody and thus should belong to the Crown. This proposition ignored the fact that most of the Gold Coast lands subjected to British rule were not part of the Colony but were situated in protectorates over which the indigenous chiefs properly exercised sovereignty. Moreover, Hutchinson himself had expressed the opinion as far back as 1891 that all of the land, even that which was

78 GNA ADM 6/21, Gold Coast Government Gazette, January 31, 1895, 42 et seq., ¶ 1.
79 Ibid., 43, ¶¶ 6-7.
80 Ibid., 43, ¶ 8.
81 Ibid., 4-5, ¶¶ 14, 18.
82 BNA CO 96/247, 8.29.1894, 478, 496, 497.
unoccupied was owned by some stool or family, an opinion in which the younger Griffith had joined. Moreover, most of the witnesses before a Government Committee created to consider land issues testified that all the land, even so-called waste land was owned.

The almost unanimous opposition to the Land Bill from both traditional and European-educated Africans was immediate and vociferous and seemed to justify Hutchinson’s warning. Thus, in a petition drafted by John Mensah Sarbah on behalf of the chiefs and townspeople of the Central Province, the petitioners took the position, one to which they adhered during the entire period of British colonialism, that every inch of land on the Gold Coast was owned, whether or not it was being cultivated, by the stools, or chiefdoms or was family land into which cultivation could be expanded as required by increased population or the necessity of allowing existing cultivated land to lie fallow. They reminded the Colonial Office that in 1887 that it had communicated to the people of the Gold Coast that “the soil being in the hands of the natives under jurisdiction of the native chiefs,” there was no British claim to the land. Every member of a tribe, family or company had “an indefeasible right to a portion of said land in each year for the purposes of cultivation paying therefor a small tribute to the head of his tribe, family or clan . . . .” The Petitioners argued that non-use did not portend abandonment. Rather, because of shifting


84 GNA ADM 5/3/9. The Committee received letters from eleven District and Traveling Commissioners, the Acting Chief Justice, Hutchinson having retired early in 1895 and Hindle, the Attorney General. All noted that all land was owned, a position consistent with that previously expressed by W. Brandford Griffith, Jr. and former Chief Justice Hutchinson, but which was contrary to the view of the new Governor Maxwell. Hindle, on June 23 pointed out that native rights and customs were in constant litigation and “almost as constantly have been recognized and upheld by the courts. Francis Smith, the Acting Chief Justice, on July 24 also said that all land was owned.

85 Petitions from chiefs of indigenous states as well as from the coastal elite poured into the Government and were transmitted to the Colonial Office. BNA CO 96/257, No. 140, 4.6.1895, 231, 232, 234. See also the *Gold Coast Chronicle*, 3.25.1895, 3 (the Bill is a “blunder): 6.30.1896, 3 (“iniquitous”).
cultivation and the necessity to allow for an expanding population, there was no so-called “waste land” as all land would be cultivated sooner or later. The proposed Ordinance, the petitioners argued, would deprive the people of their “‘immemorial and hitherto undisputed position as owners of the Soil of their Native Country and reduce them to that of mere squatters at and during the good will of the Governor.’” The Government’s proposal, they argued, constituted expropriation, out and out theft.86 James Hutton Brew, a solicitor and editor of an English language newspaper, the Western Echo, wrote to the Colonial Secretary, Lord Ripon, emphasizing that the people of the Gold Coast were able to manage their own land, all of which, cultivated and uncultivated, they alone owned, and that they did not need or desire British involvement in such management.87

Governor Griffith’s successor, William E. Maxwell, vigorously contested the indigenous argument. Branney argues that Governor Maxwell wanted to discourage shifting cultivation and to encourage more permanent cultivation of commercial crops so he wanted people who worked the land to own it free of customary law.88 Moreover, Maxwell objected to the role of the courts in dealing with land, saying that Supreme Court recognition that customary law governs would “imperil the working of any system [of land regulation] by making it liable to be modified at any time by any proposition or doctrine accepted by a Judge as ‘native law.’”89 Chiefs, he went on to say, should not be permitted to deal with land

86 GNA ADM 11/1/1505, 4.9.1895.
87 BNA CO 96/267, 3.22.1895, 3.
89 GNA ADM 1/2/49, No. 187, 4.12.1895.
without Government approval since the latter, as Protecting Power, had rights of sovereignty which chiefs should not be permitted to contravene.\(^90\)

Maxwell advised the Colonial Office that the opponents of the Bill should be told that the Bill would not affect any rights to land in use but that “Native Chiefs are entitled to the protection which they receive only so long as they accept and act upon the advice of the Controlling power” or else suffer removal from office.\(^91\) Colonial Office minutes reveal an intense debate between those officials who supported Maxwell's view as “sound and logical” and those who saw the Bill as an effective but unauthorized annexation of the land of the protected states. The more influential officials feared the vehemence of the native opposition and directed Maxwell to hold things in place while they considered the issue.\(^92\) In the end, Maxwell was told to withdraw the Bill while the Colonial Office sought the opinion of the law officers and considered all of the potential consequences.\(^93\) Maxwell decided not to dispute this directive, but rather, to withdraw the Bill and redraft it in accordance with his own ideas.\(^94\)

In the interim, in accordance with the Secretary of State’s order, he directed his District Commissioners to conduct a survey of land tenure in their districts.\(^95\) Attorney

\(^90\) Ibid. Moreover, Maxwell told the Legislative Council, since the British had protected the chiefs against Ashanti imperialism, the latter owed the British control of the land to pay for British rule. Nti, “This is Our Land: Land, Policy, Resistance, and Everyday Life in Colonial Southern Ghana, 1894-7,” 7.

\(^91\) BNA CO 96/257/No. 196/5.11.1895/155 et seq.,

\(^92\) GNA ADM 11/1/1505, 271.

\(^93\) Ibid. The Law Officers opined that despite any expressed contrary view, the Crown had the right to “assume whatever jurisdiction [including ownership of unused land] over all persons that may be needed for its] effectual exercise.” BNA CO 96/263/2.1418.96, 620, 622.

\(^94\) GNA ADM 1/2/49, 10.12.1895.

\(^95\) In 1899, the Secretary of State suggested that yet another survey of tenure in all of West Africa be conducted. The Governor of Lagos strongly discouraged such a survey and proposed another inquiry by District Commissioners. Such a survey, asking questions proposed by Governor MacGregor of Lagos was (continued...)

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General Hindle warned the Governor and Colonial Office not to place too much reliance on the returns as respondents were often reticent or misleading as to their customs regarding land tenure. He noted that the testimony of “expert” witnesses in cases before the Supreme Court as to applicable custom “differs markedly" so that the decisions of the Court as to customary rules of tenure were often just “leaps in the dark.” Hindle conceded that all land was attached to a stool or a family,96 and Acting Chief Justice Smith pointed out that despite their differences as experts on customary law, all those who testified before him agreed that all land was owned by some stool or family, so that there was no such thing as “waste land.”97

The Second Lands Bill

In early 1896, Hindle drafted a new Lands Bill that provided for the Government to administer on behalf of the native owners the lands defined as waste lands in the earlier proposed legislation and to require Government approval of any concession to be granted by a chief. Indeed, all new concessions were to be negotiated by the Government acting along with the chief. The Government was to be authorized to grant monopoly rights on conceded land but the chiefs were to receive only such consideration as the Government were to decide, but no concession would be permitted to interfere with native holdings on customary tenure of twenty acres or less.98 In acknowledging a report of recent concessions

96 (...continued)
carried out in the Gold Coast, but the results merely confirmed prior knowledge and had no effect on land policy. GNA ADM 12/5/172A, 8.1.1899.
96 GNA ADM 11/1/1707, 6.25.1895.
97 Ibid., 7.25.1895.
98 BNA CO 96/272, No. 149, 4.17.1896.
covering over 9,600 acres, the Secretary of State said that the quantity of land now under concession underlined the necessity to “get on with the Lands Bill.”

In November 1896, Governor Maxwell had said that legislation was necessary to “render impermissible” concessions except on terms to insure payment to the government of substantial fees to be shared with the chiefs. In order to calm growing public unrest, in March 1897 he made public provisions of the proposed bill. He said that Government had given up on the idea of vesting title to “public land” in the Crown, but insisted that such land had to be administered for the general advantage. The “Paramount protecting power,” he asserted, had to guarantee all public rights and exercise all authority on behalf of chiefs and people as necessary to prevent “improvidently” created private rights on public land. The indigenous occupants, he continued, would retain all rights to farm, fish, hunt and gather forest produce and to mine (“in the native manner”) and would be better off because they would be entitled to get a Land Certificate that would give them a “permanent, heritable and transferable right of proprietorship.” The chiefs would still be able to allocate “Public Land” and would continue to exercise their traditional allotment power, albeit concurrently with the Government. The latter would consult the chiefs before creating private rights on stool land.

In order to prevent impropriety in the concession process, he told his listeners, direct native-European dealings as to concessions would be forbidden. Maxwell promoted his project, and his ill concealed desire to convert tenure in the colony to European freehold tenure by providing for Land Certificates that would be subject to English law making title far more marketable. He would deal with family land by giving the Supreme Court authority to partition such land to protect third party rights, e.g. those of judgment creditors. An

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99 Ibid., No. 135, 4.15.1896.
administrative concessions court would be created, the only appeal from which would be to the Privy Council and as to any matters within its purview, the Supreme Court would have no jurisdiction. A new bill introduced into the colonial Legislature in 1897 embodied these provisions and Maxwell’s view that title in the Crown was not necessary as long as the principle was established that waste land was public land and might be administered by the Government for the public good. Thus, as can be seen above, the new Bill conceded what its opponents claimed to be the chief’s primordial right to ownership, but gave the government the right to administer unused land purportedly on the owners’ behalf. Accordingly, this concession did not concede much, since the Government reserved to itself the power to determine what share of the revenue to be derived from such administration was to be paid to the owners. Most importantly, It also provided that anyone who held a right of occupancy of land continuously cultivated or worked would receive heritable and transferable title. The Bill contained provisions creating a Concessions Court that would have authority to modify terms, conditions and scope of grants “to impose equitable limitations, restrictions, and conditions” will appeals only to Privy Council to be allowed.

Maxwell addressed the Legislative Council on the provisions of the proposed Ordinance and particularly with respect to the proposed Concessions Court that would be composed not of judges but of Commissioners appointed by the Government who would conduct proceedings “on the model of those of the Supreme Court” to decide if the grantor “really had any right to grant land or make concessions,” if concession was made with the

100 GNA ADM 6/22, 3.10.1897, 57-90.
101 BNA CO 96/286, 9.28.1896, 594, 595.
102 Ibid., 596-7.
103 BNA CO 96/290, No.92, 3.11.1897, 140, 154.
express consent or concurrence of the Chief’s councillors, if it had been made with adequate compensation and without fraud, if grantor understood the terms of the grant, and if these terms had been performed.\textsuperscript{104} One can see the Governor back peddling from his prior insistence that Government be part of the negotiation process since there would be no need for review of terms that the Government had itself negotiated.

In April 1897, Joseph Chamberlain, the Secretary of State for the Colonies, told Maxwell that he generally approved of the Bill because it substituted “a regular and defined system of law for the vague and uncertain native customs, while at the same time protecting the interests and rights of individual natives.” As we shall see, within four months he moved 180 degrees from this position.

Meanwhile, opposition to the second Lands Bill mushroomed throughout the Colony. According to Nti, “intellectuals” in Cape Coast had obtained a copy of the draft bill that had been submitted to the Legislative Council and organized against it, an opposition that soon spread to other communities on the coast as well as to many of the traditional authorities of the interior. This, Nti says, was the origin of the ARPS founded in Cape Coast whose purpose to oppose the Lands Bill was published in the \textit{Gold Coast Express} and the \textit{Gold Coast Independent}.\textsuperscript{105}

\textsuperscript{104} BNA CO 879/49/531, 3.10.1897, Enclosure to Confidential, 3.11.1897.

\textsuperscript{105} Nti, “This is Our Land: Land, Policy, Resistance, and Everyday Life in Colonial Southern Ghana, 1894-7, 9. Maxwell accused the members of the ARPS of opposing the bill and manipulating the chiefs merely to support their own commercial interests. BNA CO 96/295, No. 169, 5.4.1897, 3. Nti contends that the chiefs preferred to have the coastal “intellectuals” rather than government officials negotiate concessions on their behalf. Nti, \textit{ibid.}, 10.
Chamberlain and the Lands Bill

Chamberlain’s principal comment as to the draft Bill related to appeals from the Concession Court. Clearly relaying advice received from his legal advisor, he told Maxwell that the Gold Coast Legislative Council had no power to provide for appeals to the Privy Council, as that power could only be granted by an Imperial Order-in-Council. However, if it chose to do so, the Council could permit appeals from the Concessions Court to the Full Court of the Supreme Court from which Court appeals would lie to the Privy Council.

Subject to these comments, Chamberlain said, the Bill could proceed “if [emphasis mine] no appeals or protests against it have been received or sent home for consideration.” As in fact we shall see that they were.

The Bill received very rough handling from the Unofficial Members, of the Legislative Council, that is those not holding any Government Office but who were appointed to represent various segments of the community. Initially, the unofficial African members moved to refuse leave to introduce the Lands Bill. Of course this proposal was rejected.\footnote{106} In an effort to mollify the opposition, three extraordinary members were appointed to the Council, only one of whom was an African. At the same time the Council received a petition from a number of chiefs against the proposed Bill.\footnote{107} On June 1, 1897 the Council agreed to hear counsel representing chiefs at its Bar. The minutes noted that J. M. Sarbah opened his argument reiteration the contention that the Chiefs and families owned all the land in the entire country not owned by individuals as representatives of their tribes and family members. He listed the occasions on which the British acknowledged such

\footnote{106}{GNA ADM 14/1/6, 3.10.1897, 679.}

\footnote{107}{\textit{Ibid.}, 6.1.1897, 696.}
ownership and urged that the rights of the stools and families could not be destroyed by the transparent ploy of acknowledging ownership but seizing control of administration, the prime characteristic of ownership.  

Sarbah was followed by his co-counsel, Peter A. Renner and C. J. Bannerman. The Bill was then read for a second time and moved into the Committee of the Whole in which the African members futilely opposed passage of each section and in which every one of their proposed amendments was defeated, including one to provide for a civil cause of action for violation of the Ordinance. However, the royalties provision was amended at the behest of the Mining Member to reduce royalties to 2 1/2% of gross value from 5%.  

Continuing to ride roughshod over the native minority, a motion by the African members to record their objections was defeated by the official majority, although on the next day, the Council received more petitions against the Bill. While under consideration by the Legislative Council, Maxwell had reported to the Colonial Office concerning the increasing opposition to the Lands Bill. He said that it was “much exaggerated” and was focused on Cape Coast, Elmina and Axim in the Central Province where the population included many educated Africans who were, he reminded the Secretary of State, usually opposed Government initiatives and where natives who worked with English speculators were based. There had been much wilful misrepresentation on the part of “interested persons,” he claimed. People

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108 Ibid., 6.4.1897, 704; GNA ADM 6/22, 6.4.1897, 290-301.

109 The mining industry exercised substantial influence over the colonial administration as was evidenced by the fact that a representative of that industry was appointed to sit on the Legislative Council. Eighty two companies were registered to do business in the Gold Coast between 1880 and 1904. They were supported by metropolitan entities such as the Manchester Chamber of Commerce in advancing the interests of mining enterprises in the Gold Coast. Edward Ashmead, “Twenty Five Years of Mining,” The Mining Journal, Vol. LXXXIV, No. 3815 (October 17, 1908):484. Nancy Clark attributes the arrival of so many companies to exploit the gold fields to the “duplicitous” conduct of the British authorities. The government restricted ownership of mining equipment and mercury, necessary to refining gold, to Europeans. Nancy L. Clark, “The Economy: Gold,” in Ghana: A Country Study, edited by LaVerle Berry, 3rd ed., Washington: Library of Congress, 1995, 169.

110 GNA ADM 14/1/7, 12.12.1897, 2; 12.13.1897, 25.
were being told that their lands were to be taken from them but that as the Secretary of State knew, that was not so and there was no reason to fear disturbances." Of course as the Secretary of State well knew that was exactly the effect the Lands Bill would have as it would tightly restrict the manner in which the indigenous owners could deal with their land to the point of taking the principal criterion of ownership from them. Oddly, just a month previously, Maxwell had reported that he thought that opposition was too strong to permit the Bill to be implemented but that it had to be passed in order to protect the prestige of the Colonial Government and if it was necessary to prevent violence, the Secretary of State could use his veto. The manner in which the Lands Bill was presented and managed through the legislative process evidences yet again the inconsistency of British policy and the weakness of the Colonial Government.

At the end of 1897 Governor Maxwell left the Colony for London planning to meet with the Secretary of State to finalize plans for passage and implementation of the Lands Bill. Three days later came the shocking news of his death while at sea en route to England and the Council adjourned without taking any further action on the Bill for the moment. Frederick M. Hodgson, now Governor since Maxwell’s death, reported to Chamberlain that nothing had been done as to pressing for a third reading and passage of the Lands Bill. He said that he had spoken with W. Brandford Griffith, Jr., the Chief Justice since September 1895, about the Bill and that the Judge was anxious that it be amended to do away with what he said were “‘insignificant looking ambiguities, small slips, petty inconsistencies and inaccuracies and inattention’” that make a judge’s job almost impossible in trying to

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111 GNA ADM 12/3/7, Confidential, 7.1.1897.
112 BNA CO 96/294, Confidential, 6.5.1897.
construe a statute. Hodgson continued that he had referred Griffith’s proposals to his Attorney General, William Nicoll, who prepared an amended Bill that the Governor now wanted authorization to recommit to the Committee of the Whole for consideration of the new amendments. Finally, he told the Secretary of State, Griffith had said that with one more Puisne Judge, he could arrange for all the work of the proposed Concessions Court, that the Government agreed to be manned by judges rather than executive officers, to be done without interfering with the Supreme Court’s usual work.113

Despite opposition to this revised ordinance only slightly less vehement than that to its predecessor, the Bill was permitted to be enacted, but was not placed into effect pending further study by the Colonial Office.114 In June 1898, the Governor transmitted a petition from five chiefs against the Lands Bill. While reporting that the chiefs accepted that part of the Bill dealing with concessions and the Concessions Court, he said that it would be difficult to convince the natives that the changes the Bill made would “necessarily be extremely gradual” and that “no interference with existing arrangements is, for some time, at any rate, likely to occur to any appreciable extent. However, the veiled threat of violence that the Governor saw in the petition was, in his view, without substance.115

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113 GNA ADM 1/2/51, No.147, 4.9.1898, 284-286. As a sop to the Colonial Office’s constantly expressed concern for the cost of colonial government, the Governor suggested appointing the extra Puisne Judge on “special service” for three years only until the initial rush of concession work was completed.

114 E.g., Gold Coast Chronicle, 3.29.1897, 3 (Under this bill the people will “become squatters on your own soil and ... forever afterward you become hewers of wood and drawers of water.”). Opposition also came from the European community which feared violence because people would see the proposed ordinance as a government land grab. Letter of James Irvine of the Liverpool Chamber of Commerce, BNA CO 96/308, 5.4.1897. The newly formed Aboriginal Rights Protection Society (“ARPS”) argued that the ordinance would have the effect of turning indigenous rights into mere permissions. BNA CO 96/306, 6.21.1897. The issue of native land tenure and the need to protect native rights to ownership occupied the ARPS from its founding in 1895 on – see The Gold Coast Aborigine, various issues and, e.g., the Gold Coast Nation, 4.4.1912, 8.22.1912, 11.7.1912, in connection with the 1912 Forests Bill.

115 GNA ADM 12/3/7, Confidential, 6.3.1898.
At the behest of the newly formed ARPS, Secretary of State Chamberlain agreed to meet a deputation of Gold Coast native leaders to discuss the Lands Bill. The deputation, consisting of three Africans, a Solicitor, and C. Grant, a Barrister, for whom Sarbah had prepared a compelling brief, arranged to meet with Chamberlain. The meeting took place on August 15, 1898 and was also attended by the Parliamentary Undersecretary, Edward Wingfield, the Permanent Undersecretary, and Reginald Antrobus, Assistant Undersecretary. Thomas Cochrane, a Liberal member of Parliament sympathetic to the Africans' cause, also attended. Grant presented the Africans' objections, reminding Chamberlain that there was no waste land in the Gold Coast, that British courts as well as colonial officials had repeatedly recognized this fact and that such an ordinance would destroy not only the power of the traditional authorities but would lead to communal and family strife. He strongly urged that land transfer matters, primarily those involving concessions to Europeans should be handled by judges in whom the people reposed considerable trust rather than executive officers. He also argued forcefully in favor of treating land subject to the proposed Land Certificates according to customary rather than English law. Chamberlain noted that Government’s intention was to protect native against speculators and it wanted the interests of the whole tribe, not just those of the chiefs, to be considered in making concessions. The Government was willing to work with the chiefs to secure these objectives and the mechanics should be ones that would satisfy the chiefs and the people. In response to British concerns over the granting of concessions by corrupt chiefs, the African delegation proposed the creation of a special court to be manned by Supreme Court judges to consider and approve, pursuant to customary law, all concessions made by chiefs. Chamberlain expressed concern with the Supreme Court’s ability to deal
with customary law if it were to be the concessions venue, but Grant pointed out that the Supreme Court had been dealing with customary law for years. Grant said that the Court should deal with every concession. Chamberlain said that the Court Grant was proposing would have “immense” discretion to decide if concessions were validly made, however he expressed the view that there should be no problem meeting the Deputation’s objections, that utilization of a judicial court applying customary law rather than an executive officer could be provided for, but that landowners would have to contribute to the cost of administration through direct taxation. When asked whether the chiefs would consider such taxation, the deputation deflected the inquiry.116

Shortly after the conclusion of the meeting, the Governor sent to the Colonial Office a memorandum prepared at Antrobus’ request by the judges as to land tenure that confirmed the Africans’ position that all land was owned by the natives who were “very jealous of their rights of ownership” whether the land was cultivated or uncultivated, occupied or unoccupied. Hogdson noted that the late Governor Maxwell steadfastly refused to accept this principle despite all the authorities including Court decisions, but the issue was not in doubt. The judges noted that the exact requirements for consent to sell land were vague because the expert testimony they’d heard showed that native customs were neither definite nor stable. However, since land was the basis of all property, Hogdson emphasized, the more tribal land that was turned into individually held land, the more would the chiefs’ influence be weakened.”117

116 BNA CO 879/118/1048; GNA ADM 5/3/10. The Diary of the West African Department noted that the claims of natives of the Gold Coast with respect to their opposition to the 1897 Lands Bill are “considered to be well founded.” University of Birmingham, Joseph Chamberlain Papers, 9/1/1/4, 61.

117 BNA CO 96/334, Confidential, 9.7.1898.
Chamberlain’s agreement with the African petitioners to reject the second Lands Bill caused extreme annoyance to colonial administrators in Accra as it left their lands policy in a shambles.\textsuperscript{118} Olufemi Omosini contends that Chamberlain’s decision not to allow the 1897 Lands Bill to go into effect determined a policy turning the Government towards indirect rule and peasant agricultural production, a decision dictated by widespread resistance in the Gold Coast to both land bills.\textsuperscript{119} Whether for fear of violence, as occurred in Sierra Leone when the Government there attempted to impose a hut tax, or, as George Padmore argues, because Chamberlain did not wish to court violence in West Africa where there was little or no British settlement when far more substantial trouble was brewing in South Africa, Chamberlain’s decision was almost a death blow to any substantial extension of English tenure and set the tone for British land policy in the twentieth century favoring peasant occupation on traditional tenure.\textsuperscript{120} The successful assault on the Lands Bill is explained at least in part by the unity of the coastal educated elites and the traditional authorities thus denying the colonial administration the opportunity to set one group against the other.\textsuperscript{121}

\textsuperscript{118} Phillips, \textit{The Enigma of Colonialism},., p. 61.


\textsuperscript{120} Padmore, \textit{The Gold Coast Revolution}, 58; Keith Hart, \textit{The Political Economy of West African Agriculture}, Cambridge: Cambridge University Press, 1982, 85; Beverly Grier attributes Chamberlain’s actions to fear of proletarianization of small farmers at the hands of Africans who could afford to accumulate land. Grier, “Contradiction, Crisis and Class Conflict: The State and Capitalism Development in Ghana Prior to 1948,” 35. Certainly preserving a large number of small cultivators of cocoa and other commercial crops would advantage the large British buyers of such crops who could conduct trade on terms favorable to themselves.

\textsuperscript{121} One might think that the ARPS could constitute the basis for a political party. It did not and, indeed, there were no political parties in the Gold Coast until after World War II. Perhaps this was because no one, not even the few European merchants and mining employees in the Colony, had the right to vote. Members of the Legislative Council were all appointed until 1925 when some were selected by the Provincial Council of Chiefs subject to Government approval.

\textsuperscript{511-}
Administration of the Concessions Ordinance

The Land Ordinance was withdrawn. A Concessions Bill was drafted and redrafted embodying the principles set forth in a December 1899 dispatch from the Secretary of State. Chamberlain said that he had considered the views of the deputation expressed during his meeting with them, that it was necessary to supervise land grants to protect against fraud and misrepresentation but that he did not want to make any “fundamental alteration in the rights of the natives” such as the deputation said they feared and that he had abandoned the idea of vesting control over unoccupied land in the Government. He said that the natives would be able to make any deal they wished subject to conditions the Government might impose on a grantee, that the term of a grant should be limited to ninety nine years and the area of a grant to five square miles for mining and twenty square miles for timber, rubber or forest products grants and that the number of grants to any one concessionaire had to be limited. He asked that Chief Justice Griffith prepare a memorandum on whatever revisions to the Concessions provisions he proposed to be sent to the Governor and the Legislative Council which had to maintain the principles of the Bill but would have a free hand as to details.\footnote{122}{BNA CO 879/118/1048), No. 532, 12.22.1899.} A Concessions Bill based on Grant’s proposal at the conference with Chamberlain was drafted in the Colonial Office by H. B. Cox and William Mercer of the West African Department.\footnote{123}{BNA CO 739/117/104.} It was repeatedly revised as much for the purpose of securing he rights of foreign concessionaires as for protecting indigenous chiefs.
As was typical of important Gold Coast legislation which rarely satisfied everyone or got it correct the first time, the Concession Bill introduced in 1898 was withdrawn and a new completely redrafted Bill read for the first time in early 1900. At a meeting of the Legislative Council on February 26, 1900, the Attorney General moved the second reading which motion Mensah Sarbah seconded, a signal that the Government had negotiated with and obtained the approval of the African leaders. The scheme of administration provided by the Bill required that every concession be submitted to a Concession Court comprised of Supreme Court judges for approval to be signified by a Certificate of Validity.

In the Committee of the Whole the next day, Sarbah moved an amendment to Section Twelve of the Bill requiring the Court to be satisfied before granting a Certificate of Validity that native rights with respect to shifting cultivation, collection of firewood and hunting and snaring game were protected. The amendment was rejected. At the next session, he moved another amendment to give grantors a right to reenter after a certain period of nonpayment of rent or other violation of the terms of the concession, to permit distress for rent and to terminate a concession in substantial breach of its material terms, which amendment was also rejected. However another amendment moved by Sarbah authorizing the Court to cancel a Certificate of Validity on the application of the grantor for breach of the Lease was accepted, probably because the Unofficial Member representing the mining industry co-sponsored the amendment. The Bill was reported out but recommitted to Committee at the next session to permit an amendment, such as Sarbah had previously moved, to require as a condition of granting the Certificate of Validity that
native rights to shifting cultivation, collection of firewood and hunting and snaring game be protected.\textsuperscript{124}

The Ordinance was passed as No.14 of 1900 in March 1900, but it was not until November 16\textsuperscript{th} that rules for Concession Court procedure made by the Chief Justice and Stanley Morgan, P. J. and mimicking those of the Supreme Court were submitted to the Legislative Council. Then, in December an Amendment Ordinance was introduced because no provision had been made in the original Ordinance for appeals from Concession Court judgments. In addition, at the instance of the Chief Justice and the Attorney General a provision was added to provide for Court approval of surveys that should be made by concessionaires with the imprimatur of the Government surveyors.\textsuperscript{125}

The Concessions Ordinance thus gave legislative recognition to ownership of all land by traditional authorities, while providing for the colonial government to have a supervisory role over non-agricultural exploitation of the land through the Supreme Court that would determine questions of ownership and boundaries by customary law and give final approval to all concessions.\textsuperscript{126} This would assure that grants by the stools were limited in area and duration and would not interfere with the Africans' traditional rights to shifting

\textsuperscript{124} GNA ADM 1/2/53, No. 95, 3.5.1900. Ordinance No. 14 of 1900. Sarbah most often voted to strengthen the rights of the Gold Coast land owners but was throughout his tenure on the Legislative Council loyal to the colonial administration. His writings evidence such loyalty although he was not loath to criticize colonial policies.

\textsuperscript{125} The Mining Member objected to what he said was the Government's intention to get the Colony surveyed at mining companies' expense, to which the Chief Justice responded that the Court had discretion to permit private surveys or to order a Government survey and he thinks that the Judges will require certification of private surveys because so many of them are badly done, so this provision will not in fact increase the expense of the Certificate of Validity process. The Amendment Bill was passed on December 24, 1901. GNA ADM 14/1/7, 136-281.

\textsuperscript{126} However, this legislation applied only to mining and forest, but not to agricultural concessions. An Order-in-Council made under Section 3 of the Ordinance excluded agricultural concessions of less than one square mile entirely and made those for larger quantities of land subject only to approval by the Governor. Belfield, \textit{Report on the Legislation Governing the Alienation of Native Lands in the Gold Coast Colony and Ashanti}, ¶ 57, p. 16.
cultivation, hunting and fishing. The Ordinance provided that rents and royalties would be shared with the Colonial Government and would be used to benefit the community as well as the individual king or chief.

Despite those of its provisions seemingly designed to protect the chiefs from exploitation by European interests, the Colonial Government’s capitulation to native demands that British Supreme Court judges approve all concessions and the insertion of provisions designed to protect traditional use of the land, the Ordinance did not receive unalloyed support from the chiefs. They resented what they deemed to be interference with disposition of land within their control as well as the amount of concession fees taken by the Government.\textsuperscript{127} Nor were the concessionaires happy with the expense and delay involved in obtaining the required surveys of the concession properties and the expense and delay of litigation arising from numerous disputes as to ownership of conceded property.\textsuperscript{128} Indeed, by 1902, Chief Justice Griffith was complaining to Governor Nathan that concession work was overwhelming the judges and cases were repeatedly being adjourned -- only six of twenty on his docket were ready for hearing. He reported that six hundred cases had been filed and two hundred noticed for hearing in accordance with the Concessions Ordinance.

\textsuperscript{127} See, e.g. the \textit{Gold Coast Leader}, 9.6.1902, 3, leading article reasserting that all land belongs to the Africans and quoting Sarbah’s \textit{Fanti Customary Laws}, 55-56, to this effect, reminding its readers that the British never conquered the Fanti and other peoples of the southern Gold Coast and thus the “authorities have no right to interfere with our lands.” “[y]et this is the very thing that the Government has been and is still seeking to do.”

\textsuperscript{128} See, e.g., BNA CO 96/354, 11.2.1899, in which officials of the Colonial Office reviewed and discussed objections received from European interests. See also BNA CO 96/370, letter dated 12.28.1900 from Ashanti Consols Ltd. and BNA CO 96/1051, 1.8.1901, 634-636, letter from solicitors for Gold Coast Exploration and Trading Co., Ltd.
He told the judges he would try to get them help for which he now applied to the Governor, but no immediate help was forthcoming.\textsuperscript{129}

Griffith indeed sought additional help but not additional judges. In early 1902 he told Governor Nathan in response to his inquiry as to whether there were sufficient judges and staff to handle the concession work that there were an adequate number of judges and clerks but was needed were more surveyors. Over one hundred cases were awaiting survey. Only three of those were opposed but the judges dealt with those cases as well as the ninety seven unopposed cases more quickly than the surveyors did. He pointed out to the Governor that surveys were vital because of the “complete ignorance of a native land owner as to where his land ends and his neighbour’s begins,” so that the Judges had decided to require a survey in every case, not just opposed ones as a condition to granting a Certificate of Validity. This requirement, Griffith added, would also deter most of those applications which were never seriously meant to be pursued. The Government should not complain about how long the process takes, he concluded, nor be upset by complaints from concessionaires, since it was the policy of the Colonial Office to require Court approval to protect native rights and such approval is dependent on proper surveys.\textsuperscript{130}

Throughout the first decade of the twentieth century, the colonial administration sought ways to improve the operation of the Concessions Ordinance in order to expedite

\textsuperscript{129} Oxford University Libraries Rhodes House MS Nathan 307, Letter from Griffith, Jr, 2.1.1902, to Governor Nathan. The following month, Griffith, said that the District Commissioner in the Central Province, “decent,” hard working and steady, reported an increasing number of concession claims filed at Axim and Cape Coast, five to six times as many as at Accra. The civil dockets at Cape Coast, Axim and Accra were almost current so that the judges’ attention could be turned to concession work. He told the Governor that the judges had yet to make any binding interpretations of the Concession Ordinance, only \textit{obiter dicta}, but said that the Ordinance insofar as Certificates of Validity were concerned was clear. Oxford University Libraries Rhodes House, MS Nathan 307, 27, 2.17.1901; 32, 3.9.1901.

\textsuperscript{130} GNA SCT 2/1/9, 1.13.1902, 55-59, 55.
the approval of concession applications. Most suggestions involved limiting the jurisdiction of the courts and increasing the authority of the Executive. Faced with criticism that the judges were approving applications for Certificates of Validity without conditioning the granting of such Certificates on the required respect for native rights, even Chief Justice Griffith argued that it was the obligation of the Executive, not the Judiciary, to determine if a particular concession did not comply with the statute. This was a peculiar and clearly erroneous interpretation of the statute that the Chief Justice and his colleagues had been administering for almost ten years. Moreover, as much as it may have desired more administrative involvement, the Colonial Office regarded that obligation to be one for the Judiciary not the Executive, albeit one that in London’s view was being laxly discharged.

Governor John Rodger wrote to the Colonial Office in 1908 reminding the officials there of the failure to obtain approval of an ordinance that would confide administration of unoccupied lands to the Government for the general benefit of the community and that he considered it to be futile to try now to reopen the issue. He enclosed a Minute from his Acting Attorney General, F. H. Gough, saying that courts had recognized that all lands were owned by native stools and/or families or individuals, citing Obi v. Solomon, Full Court [1905], a Minute from his Acting Colonial Secretary, noting that Obi had confirmed the right of a Paramount Chief to dispose of unoccupied land for purposes of cultivation and a long memorandum from Chief Justice Griffith opining that the Concessions Ordinance implied

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131 One of the few proposals to be enacted was Ordinance No. 6 of 1905 authorizing the Supreme Court, at the behest of any party to a land litigation, including Concession Enquiries, to fix boundaries where they were disputed between adjoining landowners, where they were in doubt or where boundaries had never been fixed. BNA CO 96/430, No. 290, 6.15.1905.


recognition of ownership of native lands by the stools, reciting the history of British-native relationships as to land, the payment of rent by the British to the stools for occupation of the forts, a practice that existed from the outset of British trading on the Gold Coast until 1826 when Britain and the Fantis defeated the Ashantis, noting recognition by various British Governors and other authorities of the rights of Paramount Chiefs; opining that the Public Lands Ordinance implied that the Crown had no rights to native land generally but only for specific governmental purposes and that the Concessions Ordinance acknowledged the Chiefs’ claims to title, albeit “to the great detriment of the country.”134 One would think that these seemingly authoritative statements would lay to rest the issue of land ownership on the Gold Coast, but, in fact, such issue was always close to the surface whenever discussion of land rights took place and would be brought up again and again.

For example, repeated attempts by Gold Coast officials to obtain Colonial Office approval for permission to amend the Ordinance to permit District Commissioners to assure that concessions provided for enforcement of customary rights failed in the face of indigenous opposition based on the belief that more administrative control was merely the camel’s nose under the tent in depriving the chiefs and families of their property. Had the populace at large known that officials in the Colonial Office had expressed their principal motive for Government’s desire for more effective enforcement to be to minimize the influence of native lawyers and to assure that “a reasonable field should be offered for European enterprise,” its skepticism as to the good faith of its colonial overlords would surely have been enhanced.135 Indeed, throughout the period under consideration here, the

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134 BNA CO 96/472, Confidential, 9.25.1908
colonial authorities, both in Accra and London frequently expressed their disdain for lawyers in general and African lawyers in particular attributing to them the litigiousness of the indigenous population and the immense cost of litigation.

Colonial administrators continuously complained about the quantity and cost of litigation related to land transfers, both as to concessions to Europeans as well as transfers between and among indigenous peoples. In an effort to limit litigation, the Attorney General recommended to the Governor the appointment of a Commissioner of Lands who would keep a record of all land in the Gold Coast, whether Government, stool or private, and would act as a Registrar of Deeds. Any action in the Supreme Court or a Native Tribunal relating to land would be reported to him and noted on the record. He could act as a referee or arbitrator, taking evidence and fixing boundaries. All court decisions about land would be reported to him and recorded, and after the time for all appeals had run, he could issue a certificate with respect to boundaries that would amount to a Certificate of Title.\textsuperscript{136} The submitted proposals were not well received. The Governor said that it would cost too much money and require too much legislation, the enactment of which would generate considerable opposition by both chiefs and educated Africans for what Secretary for Native Affairs Francis Crowther described as only a “tentative” step to limit litigation. Until detailed surveys were completed, it would not be a good idea to try to put them into effect, an opinion in which the Governor concurred.\textsuperscript{137}

Until mid-1910, the Colonial Office staunchly resisted the Gold Coast Government’s demands for a change in policy as to control of the concessions process, only agreeing to

\textsuperscript{136} BNA CO 879/109/977, 8.11.1909.

\textsuperscript{137} \textit{Ibid.}, 9.25.1909, 9.27.1909.
relatively insignificant amendments to the Concession Ordinance designed to increase government revenues and expedite approval of concessions without taking from the courts the jurisdiction to approve concessions. Then the Secretary of State expressed concern as to alienation of native land and asked the Governor to recommend whatever amendments to the Concession Ordinance he thought desirable, including whether approval of concessions should be handled by an Executive Officer rather than by a Supreme Court Judge or whether it could be dealt with by the appointment of a dedicated Judge. In addition he asked the Governor’s opinion as to whether law officers should appear on all concession inquiries, opposed or unopposed to assure that the rights of the natives were protected.138

Responding to the Colonial Office’s invitation for his opinion, the Governor suggested that in order to protect native rights, judges “should be invited to standardize their requirements and that the District Commissioners should be directed to enforce them.” But the Governor felt that the judges would never agree on a standard definition of “reasonably protected” as that term was used in §11(6) of the Concessions Ordinance. John Anderson of the Colonial Office minuted that the late Governor, Rodger said that elsewhere the question of approval of concessions was dealt with by an Executive and standards developed. Anderson wanted a good land officer to examine into and report on the working of the present arrangements and to make recommendations for the future.139

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138 GNA ADM 12/1/32, Confidential, 7.11.1910.
139 BNA CO 96/508), Confidential, 7.17.1911.
Studying the Land Tenure Question

Between 1912 and 1914, the Colonial Office caused two extensive studies of land tenure in the Gold Coast to be undertaken, the first by a Commissioner, H. Conway Belfield, and the second by a departmental committee. Belfield recommended removal of the judiciary from the concession approval process and the appointment of an executive Commissioner of Lands to deal with concessions. Rather than implement this recommendation, the Colonial Office appointed a committee to look into tenure issues not only on the Gold Coast but in all of the West African dependencies. At the conclusion of the taking of evidence, a subcommittee prepared a draft report that, perhaps because of the onset of World War One, was never considered or approved by the full committee, but that had some influence on Colonial Office thinking nonetheless. It, too, recommended making the concession approval process administrative rather than judicial, but, once again, nothing was done to amend the Concessions Ordinance to remove the judges from their role in the approval process. Rather, the next amendment was designed to redress the problem found by the Privy Council in its 1914 decision holding that leases did not fall within the definition of concessions in the Ordinance. A short amendment included leases and rentals within the definition of concessions.

In May 1911, the Colonial Office sent a Circular Dispatch to the Governors of each of the West African colonies detailing a Parliamentary request for particulars as to area, ownership and restriction on alienation of land in their colonies.\footnote{GNA ADM 15/29, 5.13.1911.} Perhaps with the intention to preempt any unfriendly inquiry by members of Parliament, Secretary of State Harcourt advised the new Governor, James Thorburn, that he thought it to be desirable to
get a report on how the Concessions Ordinance was working and about the alienation of property by chiefs from someone “who has had experience of similar problems in other parts of the world.” He said that he had chosen H. Conway Belfield who had had much experience in land questions in Malaya. He continued that he didn’t think that Belfield would need to take evidence under oath, that he’d come to the Gold Coast in January 1912. He said that Charles P. Lucas, a senior official, wrote to Belfield in September and laid out what he, the Secretary of State wanted, a report on the extent of alienation and its effect on subsistence farming by the natives, whether it helped the natives by introducing them to new industries and higher wages, was control by the Supreme Court satisfactory or should it be transferred to the Executive, were chiefs consulting with their people before entering into concessions, was the consideration for concessions adequate and was that consideration being spent for the benefit of the people.\footnote{GNA ADM 1/1/33, Confidential, 9.25.1911; .BNA CO 879/109, 9.12.1911.}

Shortly thereafter, Lucas wrote the Governor that Belfield had accepted the position and would take evidence in London of officers on leave in the United Kingdom, but that he didn’t think that W. B. Griffith, Jr., the former Chief Justice would be very pleased to learn of the inquiry since he had been largely responsible for the working of the Ordinance, however W. D. Ellis of the West Africa division requested that Griffith meet with Belfield anyway.

Belfield heard a number of witnesses on each of the issues presented to him. As to the role of the judiciary, the Chief Commissioner of Ashanti and now Puisne Judge Gough both testified that regulation of alienation should be in the hands of the Executive, not the Judiciary. F. C. Fuller, the Ashanti Chief Commissioner said that the Concession Ordinance was too “legalistic” and rigid. Such regulation required elasticity which could not be found in
treatment by judges. Moreover, he continued, the judicial process resulted in too much delay and, in his opinion, was unfair to concessionaires. Gough said that the process would be more expeditious if it were in the hands of the Executive and that it was placed within the jurisdiction of the Court for political reasons because the judges were more popular and the people trusted had confidence in the decisions of the Court. To the contrary, the President and First Vice President of the ARPS, J. P. Brown and T. F. E. Jones, testified that the judges were most able to determine concession issues and that the District Commissioners who were the executive officials who were proposed to handle the issues were incompetent to decide these issues and whose role should be limited to offering advice to chiefs on how to negotiate concessions.\footnote{Ibid., Evidence, 88, ¶¶ 10-13.}

Belfield delivered his report in June 1912.\footnote{BNA CO 96/525, 6.18.1912. The Colonial Office directed that it be published, sent to Parliament and to a newly appointed departmental Committee to look into land issues in the West African dependencies.} He concluded that the crown had no ownership rights except as to land taken for public use despite having extended “its protective authority to all places and persons in the Colony. . . . and any endeavour to extend these rights otherwise than by legal process of acquisition would amount to a breach of faith with the people.”\footnote{Belfield, Report on the Legislation Governing the Alienation of Native Lands in the Gold Coast Colony and Ashanti, 8, ¶23.} He found that “in consequence of their own ignorance, and the reluctance of the tribe to press their elders unduly, concessions have been granted upon terms which are unfavourable to the people.” Moreover, he went on, the chiefs had no real idea as to how much land was being granted so that overlapping grants were often made

\footnote{Ibid., Evidence, 88, ¶¶ 10-13.}
\footnote{BNA CO 96/525, 6.18.1912. The Colonial Office directed that it be published, sent to Parliament and to a newly appointed departmental Committee to look into land issues in the West African dependencies.}
\footnote{Belfield, Report on the Legislation Governing the Alienation of Native Lands in the Gold Coast Colony and Ashanti, 8, ¶23.}
and concessions granted in which the grantor had no rights.\textsuperscript{145} Thus, he felt that the lack of
government control and involvement in negotiations opened the chiefs and other grantors to
exploitation since they often fail to understand the terms of the proposed concession until
“matters have progressed too far for alteration.” Natives should never be left alone to
negotiate but should be given official advice and representation.\textsuperscript{146}

As to the vital issue of administration of the Ordinance by the judiciary, Belfield found
that the judges were not given any standard by which to measure adequacy and fairness of
consideration as they were required to do and no evidence was required or usually taken on
such issue, yet despite such lack of standards, the court were authorized to modify in any
way they choose the terms of the concession.\textsuperscript{147} He pointed to the Ashanti Ordinance
where the Provincial and District Commissioners acted as both judge and executive offered
a better result.\textsuperscript{148} Belfield claimed that no reasons had been stated to him for involvement of
the judiciary, an involvement, he asserted, that was unique in the Empire. However,
adverting to the testimony of Mr. Justice Gough, he conjectured, that their involvement
derived from popular pressure because the people had greater confidence in the judges

\textsuperscript{145} \textit{Ibid.}, 9, ¶¶ 29-31.

\textsuperscript{146} \textit{Ibid.}, 17, ¶62. Implementation of this recommendation was subsequently found to be indeed
necessary in light of the decision in \textit{Buako v African Union Co.} [1922] F. Ct. ‘22, 71 that held that where
the Chief and his councillors had the proposed lease read and interpreted to them before it was executed
and the consideration was paid, the Chief complained that the executed lease was not in accord with what
he and his people were told or with his intent, the Chief tendered back the consideration which was
refused by the lessee but the lease was revised in accordance with the Chief’s demands and re-executed
and the revised consideration paid, the lease is good as against the Chief’s complaints that he and his
councillors were duped. Clearly involvement of a nonpartisan advisor from the outset would have made
such litigation unnecessary.

\textsuperscript{147} \textit{Ibid.}, 19, ¶70.

\textsuperscript{148} \textit{Ibid.}. 

-524-
than in executive officers.\textsuperscript{149} He concluded that the system of concession validation by the judges was unduly expensive and dilatory and did not assist the grantors’ needs in negotiating concessions. He recommended that a Commissioner of Lands be appointed and given the responsibility, along with the Provincial and District Commissioners, of advising the grantors as to the fairness of the proposed concessions. No appeals to the Supreme Court from the Concession Court, he recommended, should be permitted.\textsuperscript{150}

On June 26, 1912, shortly after receipt of Belfield’s Report and before it could be published or even given anything more than a cursory review, Lewis Harcourt, the Secretary of State determined, at the behest of E. D. Morel, so Casely Hayford says, to appoint a Committee to examine into issues of land tenure and alienation in all of West Africa. The Committee on the Tenure of Land in the West African Colonies and Protectorates (hereinafter referred to as the “WALC”), was to be chaired by Sir Kenelm E. Digby and consisted of Sir F. M. Hogdson, former Governor of the Gold Coast, a Labor member of Parliament, Josiah C. Wedgwood, Morel, Sir W. Taylor and three officials of the Colonial Office, C. Strachey, Ellis and R. E. Stubbs.\textsuperscript{151} In so doing, the Secretary of State utterly rejected the work and the report of his chosen delegate and opened anew all of the issues Belfield had investigated. The record does not disclose Harcourt’s motives or reasoning for rejecting the report of his chosen commissioner or for initiating yet another investigation of

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\textsuperscript{149} Belfield, Report on the Legislation Governing the Alienation of Native Lands in the Gold Coast Colony and Ashanti, 16, ¶56.  \\
\textsuperscript{150} Ibid.  \\
\textsuperscript{151} BNA CO 879/117/1046, viii. Hayford, The Truth About the West African Land Question, 76, 82. However, Wedgwood’s biographer, Paul Mulvey, asserts that Wedgwood convinced Harcourt to appoint the Committee, albeit with the assistance of Morel, a political ally. Paul Mulvey, The Political Life of Josiah C. Wedgwood: Land, Liberty and Empire, 1872-1943, Woodbridge, Suffolk: The Boydell Press, 2010, 45. On October 12, 1912. Stubbs was replaced by Sir Walter Napier, a former Attorney General of Singapore.
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land issues. Yet, given some of the evidence heard by Belfield as to the confidence placed by the people of the Gold Coast in the judges, one can readily conclude that he was looking for further support to removing the judiciary from the process while fearful of the uproar such a move might bring about.

Shortly after the WALC’s hearings began, Acting Governor Bryan reported to the Colonial Office that statistics as to land alienation confirmed his view that the procedure by which land alienation was handled under the Concessions Ordinance should be transferred from the judiciary to the executive. London responded with an inquiry as to how soon the Court might be expected to act on applications for validations, noting that E. D. Morel, a member of the WALC, was pressing for an immediate prohibition of further Supreme Court approvals but that the rest of the Committee thought that such a prohibition would be unfair to concessionaires prosecuting claims under the existing law. The Colonial Office said that it had told Morel that the Governor had power to forbid any more agricultural concessions and that he should do so. Morel and the Secretary of State suggested an amendment to the Concessions Ordinance forbidding any concessions of land under cocoa cultivation.152

The WALC received hundreds of documents and heard seventy nine witnesses from all of the West African colonies in fifty two sessions. Griffith told the WALC that he believed it would be “a great mistake” to preserve land as communal. Disregarding the evidence of hundreds of years, he said that individuals wouldn’t work as hard if land were not theirs; he recommended that unrestricted land transfer be permitted but only between and among natives.153 He testified that he disliked the idea of family property because “lazy

152 BNA CO 96/523, No. 890, 12.20.1912.
153 BNA CO 879/117/1047.
member[s] get more than they ought to get” whereas a system of individual tenure “rewards energy and industry.” Finally, he said that he did not believe that widespread individual tenure would necessarily undermine chiefly authority because natives would still have to bring their land disputes to the Chiefs’ courts.  

Griffith’s views were his own and there is no evidence in the record from which to conclude that the members of the WALC or the Government shared those views. As I’ve noted above, family property had been an institution in the Gold Coast for a very long time and had resulted in a substantial annual cocoa crop that contributed to significant export earnings.

Belfield told the WALC that attorneys promoted litigation and the best way to avoid prolonged litigation would be to have the Executive do most of the concessions work; since the District Commissioners were on the spot it would also diminish uncertainty.  

Reinforcing the argument that litigation was bankrupting the indigenous population, Giles Hunt estimated that of the approximately £100,000 received by Grantors from concessionaires, £30,000 went for legal fees. He said that the Chiefs of the Western Province had “begged” the Secretary for Native Affairs, Francis Crowther, for an alternative tribunal to deal with concession matters in a less expensive way.

Testifying in favor of the current system of validating concessions, Emanuel J. P. Brown, a native Gold Coast barrister, told the WALC that it was not necessary for a District Commissioner to be involved in the negotiation of concessions as the Concessions Court was required to assure itself that the grantor’s rights were protected as condition to approval

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155 BNA CO 879/117/1047.
156 GNA ADM 5/3/16, 100.
and issuance of a Certificate of Validity. Moreover, the cost of obtaining such a Certificate was not so great as the only witnesses necessary were those to prove title and consent.\footnote{158}{BNA CO 879/117/1046, 205; GNA ADM 1/1/1/1705, 36, ¶896.}

This testimony must be considered somewhat disingenuous as Brown must have known that the Concessions Court required an expensive survey to be made of the land subject to the concession.

Giles Hunt, responding to a suggestion from the Committee that an executive officer could better determine boundaries than a judge, said that it was useless for a District Commissioner to look at the land unless he could survey it since the density of the forest prevented seeing the extent of the supposed grant, although he would prefer executive control. Nevertheless, he opined, the Governor-in-Council should not be a court of appeal to have the final say. Finally, he agreed that Gold Coast natives would prefer a judicial body to oversee concessions and appeals to the Full Court rather than to the Governor-in-Council.\footnote{159}{Ibid., BNA CO 879/117/1046, 227.}

The Secretary of Native Affairs, Crowther, opined that the Supreme Court would not always protect customary rights as it would allow a village to be moved if it determined that such a move was necessary to protect the health of villagers from mine tailings. Alienation of land, he argued, required more control because alienation led to individual ownership that would undermine social forms and only the Executive had the foresight to see the consequences of uncontrolled alienation and to prevent them, so that concessions should be subject to approval by the Governor and not the Supreme Court.\footnote{160}{GNA ADM 1/1/1/1705, 369-374, ¶¶10,261-283.} In this testimony, we can once again see the superior attitude of the British administration toward the indigenous
population, its conviction that only it knew what was good for them and its indifference to their desire to have access to the only British instrument of government that the people trusted.\textsuperscript{161}

Casely Hayford reminded the WALT that the deputation to Chamberlain on the Lands Bill had urged that land control should be in the hands of the Judiciary not the Executive, that Chamberlain had accepted that position, that he preferred judges to administrators and that the people did too. He explained that things were working out well in the Concessions Court and averred that litigation was not the main cause of stool debt. Insofar as having an executive officer deal with concessions, he said that District Commissioners often were forty miles or more from the land under concession and had poorer knowledge of the land than a Court had after receiving evidence. Moreover, the Court had much experience with these cases and the District Commissioner usually did not have any. He acknowledged that there were inexperienced judges just as there were inexperienced District Commissioners, but the former, who care, make the effort to learn all the circumstances, get plans and have counsel available to guide them whereas District Commissioners went on leave and moved from district to district often, sometimes after as little as six months. Thus, he disagreed with Gough’s view that the executive should deal with alienations and said that Gough may have been influenced by his experience as an executive himself.\textsuperscript{162}

\textsuperscript{161} Indeed, Governor Thorburn told the Committee, people would see a Certificate of Validity issued by an executive officer rather than a court as an effort by the Government to deprive them of their rights. “The people thoroughly believe that the court is a better Tribunal,” he said. \textit{Ibid.}

\textsuperscript{162} \textit{Ibid.}, 24-36, ¶¶ 610-847.
Chief Assistant Colonial Secretary, F. A. C. Robertson, told the WALC that he approved of Judicial jurisdiction over concessions but would prefer a separate Land Court because he was “not content with the executive administration of the land.” He would suggest empowering officers with both judicial and executive functions such as those possessed by Provincial Commissioners.¹⁶³ He was satisfied that the Judges looked after native rights but he would expand the jurisdiction of the Concession or Land Court to permit it to determine if a concession was in the best interests of the people.¹⁶⁴

Griffith denied to the WALC that the Concession Court had any arrears during his tenure or any problem in keeping up with the cases noticed for hearing. An application could be heard and decided in six to ten days unless a survey was required and had not yet been done. He noted that there were many “hung” applications where the concessionaire was not prosecuting the application but delayed having a hearing held. The former Chief Justice admitted that he had occasionally consulted with executive officers with respect to a concession application, but insisted that he had always noted the fact and the content of each such consultation on the record. He conceded that if they were drafting the Ordinance \textit{ab initio} he would have concessions dealt with as an Executive matter, but given the time the Ordinance had been in effect and the experience attorneys and concessionaires had had with it, people were used to the existing system. If, however, the Ordinance were to be repealed and a new one enacted, he thought that the Governor should have the authority for and the responsibility of dealing with concessions and should decide if a concessionaire

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¹⁶³ \textit{See above} as to the provisions of the Native Jurisdiction Amendment Ordinance of 1910 giving Provincial Commissioners appellate jurisdiction over land cases heard in Native Tribunals.

¹⁶⁴ GNA ADM 1/1/1/1705, 92-103, ¶¶2404-2444.
were a fit and proper person. He warned however that the people would be upset if the Ordinance were repealed and would feel that their land were being confiscated.\textsuperscript{165}

Sir P.C. Smyly, the Chief Justice of the Gold Coast since September 1911, testified that the Concessions Court was not in a good position to decide boundary issues that would best be done by local executive officers. He told the WALC that he largely agreed with Belfield's recommendations: executives should deal with uncontested applications with appeals from disputed applications to be to the Governor or the Governor in Council and not to the Supreme Court even if the Executive altered the terms of the concession. The judges' role should be limited to deciding title. Finally, Mr. Justice Gough submitted a statement in which he opined that regulation of concessions should be by the Executive because judges were not subject to any control and had too much discretion.

In Ellis, minuted that under the "lead" of E. D. Morel, the majority was inclined to stop acquisition of private property in land by natives and to transfer concession validation to the Executive. Only Ellis and Sir W. Taylor wanted a different result. But there was difficulty in getting the majority views on paper in a form on which they could all agree and that was causing delay in the preparation of a report and recommendations. Ellis didn't see, now that war had come, how the Committee could meet again. Moreover, he noted, Morel had been accused of aiding the enemy with propaganda and Wedgwood was with the army in France. Ellis believed, he said, that the Colonial Office couldn't wait for the Committee to prepare a final report but now had to decide how to proceed. He noted that the only thing about which the Committee was unanimous was that the tasks given to the Supreme Court were not "proper to be exercised by judicial officers" and that all the judges who appeared

\textsuperscript{165} \textit{Ibid.}, 488-509, ¶¶14,425-14,515.
before the Committee wanted to get rid of concessions work “as not being properly judicial.”

In March 1914, Kenelm Digby, Chairman of the WALC had written to Secretary of State Harcourt saying that the WALC would unanimously recommend the repeal of the Concessions Ordinance but that a detailed proposal and report might take much time. He explained the WALC’s finding that unrestricted concessions threatened the people’s needs. He urged the Secretary of State to suspend the power of alienation immediately, i.e. no more concessions should be granted and validation proceedings should be suspended pending delivery of the WALC report. “Judicial and Executive functions of the Government,” Digby wrote, “should be readjusted so that such concessions should from the first be under proper supervision and control.”

Governor Clifford, in an undated demi-official letter to the Secretary of State, wrote that the situation was nowhere near as critical as Digby suggested and that concessions had no impact on most Gold Coast farmers. Harcourt suggested that an ordinance suspending alienation should be enacted as soon as possible. Clifford replied that he was unwilling to act until he saw the entire WALC report as such action would lead to a charge of breach of faith and assumed that the Gold Coast Government would agree with

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166 BNA CO 96/556, Minute, 9.29.1914. A Memo to Frederick Butler, Lewis Harcourt’s Private Secretary, from an official identified only as “H. A. B.,” dated May 2, 1913, tells Butler that the Lands Committee had completed the taking of evidence and was working on its report but that there was no date when the completed report could be expected. The memo says, seemingly reflecting the view of the WALC, that the provisions of the Concessions Ordinance confiding approval rights to the Supreme Court rather than to the Executive is “radically unsound.” Oxford University Rhodes House MS Harcourt Dep. 498, folio 8.38.

167 GNA ADM 12/5/172, 3.18.1914.

168 Ibid.

169 Ibid., 3.13.1914. The Commissioner of the Central Province, Charles Harper, objected, telling the Governor that prohibition of alienation would be premature and should be discussed thoroughly and explained fully to the Legislative Council and the public before any action was taken. Ibid., 3.20.1914.
such a recommendation. “[H]asty” legislation, he wrote, would cause much unrest and he and his entire Executive Council unanimously opposed enactment of such an Ordinance at that time. There simply was no emergency justifying such drastic action at that time. He emphasized that such an Ordinance would be seen as a “blow” to natives’ inalienable rights in land and would cause the Government to suffer a “fatal” loss of prestige. To support his position, he enclosed the written opinions of each of his Executive Council members as well as of Provincial Commissioner Harper.\textsuperscript{170} As it always seemed to do when the local government stood up to London and strongly opposed its expressed desires, the Colonial Office backed down and said that enactment of such an Ordinance could await the Governor’s arrival in London on leave and face to face consultation with the Secretary of State.\textsuperscript{171}

No final report of the entire WALC was ever prepared. Rather, a draft by a sub-committee of four of the WALC members made its way to the Colonial Office and disappeared into its files. Nevertheless, the influence of that draft report on the thinking of various colonial officials about land tenure and the relationship between the judiciary and the executive as to land issues was profound and long lasting. Accordingly, it is worth while to examine that draft report in some detail.

Initially, the drafters asserted the power of the Government to regulate “in the public interest the use to which an owner may put his land or to prevent him from using those lands in a way calculated to prejudice the welfare of the community.”\textsuperscript{172} In making this assertion, the drafters utterly ignored the repeated admissions by the British Government as

\begin{footnotesize}
\textsuperscript{170} \textit{Ibid.}, 3.27.1914.
\textsuperscript{171} GNA ADM 12/5/172, 4.26.1914.
\textsuperscript{172} GNA ADM 5/3/16, 5. ¶12.
\end{footnotesize}
to ownership of the land by indigenous people and Joseph Chamberlain’s agreement that
the Colonial authorities would not seek to take from such owners the innate right to alienate
their land in their own interests.

Insofar as the role of the Judiciary in the regulation of concessions was concerned,
the drafters argued that the Supreme Court had been burdened by its past decisions
concerning alienation under native customary law and now had to deal with incessant
boundary disputes in addition to concession cases. They noted that Belfield described
litigation as one of the natives’ “joys of life.” 173 Land litigation clogged the courts through,
inter alia, interpleader on execution, foreclosure cases and contested succession. Quoting
Crowther, they wrote that “‘[t]he three most obvious forces which wear down the communal
system of tenure are firstly judicial practice . . . attributable to the want of knowledge and to
the want of machinery for gaining knowledge of native law and customs.’” 174 The Colonial
Legislature had charged the judges with duties properly belonging to the executive, noting
that Belfield had said that only a minority of the witnesses before him, and none whose
opinion he valued, favored continuation of judicial involvement in concession validation. 175
He and they, despite evidence of the dilatory actions of the concessionaires, the problem of
obtaining proper surveys and the view of Griffith and other witnesses, continued to assert
that the validation procedure was unduly prolonged and expensive. Ignoring fourteen years
of experience of successful enforcement of the terms of the Concession Ordinance, they

174 Ibid., 100, ¶306.
175 Ibid., 56, ¶162. They particularly noted that part of Griffith’s testimony that favored their evidently
preconceived conclusion, that at the time of original passage of the Ordinance, he objected to giving the
judges what he thought were executive powers, e.g. setting boundaries, fixing the amount of
consideration, setting terms of transfer and assuring adequate protection for the natives. Ibid., 57, ¶163.
concluded that only issues of title were fit for judicial resolution. All other matters, such as defining who owned the land and what land was covered by a concession were executive functions best carried out by local District Commissioners who knew the people, not by a judge dependent upon evidence that might not be adduced. These were executive questions that should be determined before and not after the grant of a concession. “The Legislature has laid upon the Supreme Court of the Gold Coast an almost impossible task of which it should be relieved and that the superintendence of the matters to which we have referred should be placed in the hands of the Executive.”176 In their zeal to strip the Judiciary of its functions in the Concession process, they ignored the simple expedient of having the District Commissioners testify to the Court as to their supposed superior knowledge of the land and the people under the safeguards of an oath and cross examination.

The drafters recommended that native tenure should be encouraged as it was a natural means of administering land. They recognized that permanent cultivation (as, e.g. by cocoa) encouraged mortgaging and sale of land in a manner inconsistent with native tenure and encouraged litigation that was detrimental to development. They expressed their view that communal tenure required careful supervision of Native Tribunals to prevent wrongful deprivation of individual cultivation holdings, especially where such holdings might be replaced by permanent cultivation. They recommended that there should be no transfers of agricultural land to non-natives except via leases on specific terms that were contracted through the District Commissioners and approved by the Governor-in-Council after approval by the Attorney General. Only title questions should be referred to the

176 Ibid., 57 ¶164.
Supreme Court for resolution. There should be no transfers that would interfere with pre-existing occupancy. Land would be presumed to be communal or family land held for the benefit of the community or family. All tribal boundary disputes should be resolved summarily by the Governor and the Court should be obliged to stay boundary litigation until he had decided. In a radical change from existing precedent, Courts would be authorized to take judicial notice of customary law rather than to require proof and native authorities would be encouraged to decide and record native custom which need not be ancient. The drafters would have mining leases limited in term to fifty years and incidental surface rights in mining leases would have to be specifically defined and limited. Finally, timber licenses would be limited to places where natives were not collecting forest produce and to ten year terms renewable for five year terms.

It is unclear as to when, if ever, the Draft Report was delivered to the Gold Coast Government. Whether it was or its recommendations were conveyed in summary form by the Colonial Office, we know that the Governor and his advisors opposed them and that they were never implemented, at least in part because of fear of popular opposition to any claim to control indigenous land or to remove the judiciary from its role in the concession process. The inconsistencies between the assumptions found in the Draft Report favoring maintenance of customary tenure and those of many of the colonial officials on the Gold Coast favoring individual tenure were evidenced in a memorandum that Commissioner Harper, now Assistant Colonial Secretary wrote to himself in 1914. “[C]ocoa farms are

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177 These proposals ignored the differing and often contrary views of customary law often testified to by “experts” in court hearings.
178 BNA CO 879/117/1046.
appearing everywhere and farmers are dealing with them permanently so the idea of exclusive continuing ownership, fairly well established in the Coast towns and their neighborhood, began to take its place in the ‘bush’ by the side of customary tenure of land.” Moreover, he wrote, this tendency, a favorable one he suggested was supported by the fact that many farmers had become Christian and wanted land to pass on to the sons and not to enate nephews.\textsuperscript{180}

The failure of officials in the Colonial Office to pursue the recommendations contained in the Draft Report of a committee that the Colonial Secretary insisted be formed is yet another example of Britain’s inability to formulate and execute a consistent policy as to issues critical to the governance of the Gold Coast dependency. Both Belfield and the WALC Draft Report recommended making the Executive responsible for administration of most of the responsibilities imposed on government by the Concessions Ordinance yet nothing was done, likely for fear, as Governor Clifford had expressed, that Britain would be seen as engaging in a theft of indigenous land, of acting in bad faith and that its prestige would suffer. One cannot say what the actual result would have been had the Colonial Office pursued the recommendations of its Commissioner and its departmental committee, but the mere suggestion of opposition caused it to back off.

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\textsuperscript{180} Oxford University Rhodes House, MSS Brit Emp 5 344, Box 2/1 Harper 1914. \textit{See also} Naaborko Sackeyfio, \textit{The Stool Owns the City: Ga Chieftaincy and the Politics of Land in Colonial Accra, 1920-1950}, University of Wisconsin-Madison, 2008, 90: “In a contradictory fashion, colonial land tenure policy sometimes worked to preserve indigenous land tenure systems while, at other times favored the use of European land laws.”
Post WALC Developments

In April 1914, the Privy Council temporarily knocked the entire concession scheme into a cocked hat by ruling, in *Wassaw Exploring Syndicate, Ltd. v. The African Rubber Company, Ltd.*, that leases and similar conveyances were not concessions within the meaning of the Concessions Ordinance and therefore need not be approved by anyone other than the parties thereto. In June, Secretary of State Harcourt sent Governor Clifford a memorandum prepared by former Chief Justice Griffith pointing out that in view of the Privy Council’s holding a lease could not be validated by the Concessions Court. The local courts and the Legislative Council had always believed to the contrary but had to follow the Privy Council ruling.\(^{181}\) Now one might think that the Privy Council ruling offered the opportunity to revise or even to repeal the Concessions Ordinance in accordance with the Draft Report of the WALC. To the contrary, that document seems to have been ignored. Rather, Griffith recommended that the Ordinance simply be amended, as the Secretary of State suggested, retrospectively treating leases as concessions.\(^{182}\) Governor Clifford expressed concern that if retrospectively considered to be concessions, those that had not been validated would have to be submitted to the Court for a Certificate of Validity causing a lot of work and considerable expense. He suggested exempting transactions involving less than five acres, thus limiting the number of concession enquiries that would have to be conducted.\(^{183}\)

Acting Governor Bryan telegraphed the Colonial Office in July, concerned that the Privy Council ruling “enables land to be taken from natives to a large extent without control” and proposed amendments to the definitions section of the Concessions Ordinance to

\(^{181}\) GNA ADM /36, Confidential, 6.16.1914.
include agreements to sell as well as to leases of rural lands. J. A. Calder minuted his superiors commenting on Bryan’s suggestion that the definitions section should make it perfectly clear that “any demise of land whether by sale, lease or gift, except land situate in a town or village” falls within the definition of a concession. Ellis agreed and suggested that the amendment be made retrospective. Harcourt approved the suggested amendment. Despite this opportunity to redo its entire regulatory scheme and achieve the frequently proposed objective of transferring the primary responsibilities for approving concessions from the judiciary to the executive, the colonial authorities merely corrected the definition section of the Ordinance, so that the existing system continued in operation to the apparent dissatisfaction of colonial administrators but to the equally apparent satisfaction of their African subjects.

In mid March 1915, the Governor sent the Colonial Office a bill embodying all the amendments to the Concessions Ordinance discussed during 1914. A concession was retrospectively redefined to get around the Privy Council decision in the Wasaw Exploring Syndicate case. In addition, it authorized the Governor to exempt small transfers of land outside the towns from the provisions of the Ordinance, confirmed Certificates of Validity already granted so that the confirmation process need not be repeated, added provisions against future combinations of concessions (a practice called “dummying” that had already been sustained by the Supreme Court as complying with the letter if not the spirit of the Ordinance) and applied the area limitations of the Ordinance to options going forward

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184 BNA CO 96/546, 7.6.1914.
because the Supreme Court had held that the original Ordinance area limitations did not apply to options.\textsuperscript{185}

In a minute on the proposed amendment, Ellis expressed his unhappiness as to the continued role being given to the Supreme Court, a role that he continued to think was an administrative not a judicial one.\textsuperscript{186} The Colonial Office approved the Bill being introduced and read the first time with certain alterations and minor additions but most importantly, directed the Governor to prepare a Land Code taking control of the concession process from the judiciary and putting it in the Governor’s hands, to be sent to the Secretary of State for approval. At last it seemed that concession approval was to be remade into an administrative process from a judicial one.

Almost a year later, nothing had yet been done to consummate the plan to transfer concession approvals to the executive. A Bill to amend the Ordinance to overrule the \textit{Wasaw} decision had been drafted by the Attorney General.\textsuperscript{187} But, Governor Bryan reported to the Colonial Office, he had not yet been able to draft a comprehensive Land Code transferring to the Governor-in-Council control of future land transfers and saw no way he could do it in the foreseeable future, as he had yet to initiate the preliminary studies.\textsuperscript{188} Although he gave no reason, the demands on the Governor of the war and fear of native opposition offer plausible possible explanations. Thus, nothing more was heard concerning

\begin{itemize}
  \item \textsuperscript{185} BNA CO 96/556, 3.29.1915.
  \item \textsuperscript{186} \textit{Ibid.}, 6.14.1915.
  \item \textsuperscript{187} GNA ADM 12/3/24, Confidential, 8.15.1916. In addition to overruling the \textit{Wasaw} decision the Amendment (Concessions Ordinance Amendment Ordinance No.16 of 1916) sought to prevent concessions larger than the legal limit by treating related parties as one. Moreover, it authorized the Court to cancel any part of a concession in excess of the legal limit in area, thus increasing rather than limiting judicial jurisdiction. Finally, it authorized the Attorney General to sue to cancel concessions where it appears to him that the statute had been violated. GNA ADM 6/54, 1246.
  \item \textsuperscript{188} BNA CO 96/569, Confidential, 9.7.1916.
\end{itemize}
a transfer of responsibilities for concession validation for a number of years despite the view of authorities in both Accra and London that judicial independence was an "anomaly" unsuitable for a basically authoritarian colonial government.189

Land policy did not occupy much of the time of the Gold Coast Government again until the end of 1917, at which time Governor Hugh Clifford sent a Secret Dispatch to the Secretary of State covering a sixty three page printed detailed report on the land question in the Gold Coast and British attitudes and responses. Complaining that the British officials served much shorter terms in the Gold Coast than in Asia or the West Indies, he said that official memory was short and people forget Chamberlain’s pledge never to take native land. He reminded the Colonial Office that W. Brandford Griffith, Jr. had criticized the first draft of a Forest Ordinance Bill on grounds similar to those set forth in opposition to the 1897 Land Bill “in so trenchant and unanswerable a fashion that the draft was forthwith withdrawn” because the Bill deprived the natives of the right to clear forest land for cultivation thus violating the spirit if not the letter of Chamberlain’s promise and people believed the Government was guilty of bad faith.190

Commenting on Clifford’s dispatch, Risley concluded as a matter of law that land owners owned the minerals under their land and should receive the rent or other proper

189 Simensen, Commoners, Chiefs and Colonial Government, 79. It did, however, take small steps to remove the courts from what it to be considered political issues, depriving them of jurisdiction over stool disputes and giving the executive final say. Chiefs’ Ordinance of 1904, that also required the Governor’s approval of both enstoolment and destoolment of chiefs. John McLaren argues that colonial administrative officials insisted on judges serving “at the pleasure of the Crown,” rather than “during good behavior” because the judges were deemed by them to be colonial officials who were need to play an important role in colonial administration and who were expected to be loyal to both colonial and imperial governments. In their role of legislators, the judges, McLaren says, were often pressured by the executive to vote to support executive policies. John McLaren, “Judges and the Politics of Empire,” in Legal Histories of the British Empire, edited by Shaunnagh Dorsett and John McLaren, New York: Routledge, 2014, 1-12.

190 BNA CO 96/583, 12.26.1917.
compensation but that minerals under unoccupied land should be considered to be Crown land with compensation to natives only for disturbance of surface rights. The Secretary of State agreed and so told Governor Clifford who could not have been happy at this result as it amounted to an iteration of the discredited principles rejected by Joseph Chamberlain in 1897, for, after all, if the natives owned unoccupied land, as all seem to agree, surely under well known English legal principles, they owned subsurface rights as well.

Clifford argued that land policy should be directed at the development of agricultural resources through the agency of indigenous inhabitants. They wanted their own land, he believed, but were characterized by “indolent and casual” attitudes towards farming and wouldn’t work to a clock. He pointed out that the Gold Coast and Nigeria occupied radically different economic positions. Whereas the Gold Coast was dependent upon a single crop, Nigeria was self contained and was independent of European markets. He noted that the Gold Coast’s economy was inelastic with its population refusing to cultivate oil palms even when the demand and price for cocoa was low as during the 1914-1918 war and that for palm oil was high, because, he asserted, the population found that it was easy to cultivate cocoa and hard to work palm oil and cotton fields; He concluded that the Government had to continue to respect and support traditional communal tenure and not push development to the point where farmers turn into rural wage laborers.191

191  BNA CO 885/29/9. It is worth reminding the reader that Britain had been unwilling to impose any sort of direct taxation on the inhabitants of the Gold Coast, taxation that might have led to creation of a landless labor force. Indeed, such a result was feared by both the colonial administration as well as the drafters of the WALC draft report, all of whom favored a continuation of traditional life in the agricultural community. Cocoa continued to be the Colony’s leading export and there seemed to be no reason to alter the conditions under which families worked the land and produced the cocoa. Moreover, the state of Gold Coast industrial development was such that to push people off the land would merely result in large scale unemployment.
The battle for control of the concession process between the executive and the judiciary persisted into the 1930's, at least from the perspective of the Gold Coast educated classes that opposed a Concession Amendment Bill that was designed to minimize speculation would add a provision requiring the Governor’s approval of the concessionaires’ means and ability to develop the concession before it could be submitted to the Court for validation. The Bill was bitterly attacked by the press. Thus, the Gold Coast Times, 11.21.31 wrote of the Bill as an attempt to oust the court’s jurisdiction and to make approval of concessions an executive function: “The result of the whole enquiry would be made dependent upon the will of the Governor which renders the amendment particularly odious.” and “the issue of the concessionaires’ ability to develop the concession should be resolved by the court not the executive.” The Governor defended his proposal, one he actually thought would be applauded by the public, by saying that the court was not charged with investigating concessionaires’ financial condition, a task that would be better done by the executive. The Colonial Office agreed that the Executive was better suited to conduct this inquiry, and in this instance ignored public opposition and permitted the Bill to be passed as No. 12 of 1932.

192 BNA CO 96/701/9.
193 GNA ADM 12/3/56, Confidential, 2.2.1932,
194 BNA CO 96/701/9, No. 239, 4.2.1932.
CHAPTER XIII – LAND ISSUES – THE FOREST ORDINANCES
AND EFFORTS TO FORMULATE A LAND POLICY

This chapter discusses two different efforts to control land use through legislation. The first, a subset of land tenure issues, involved protection of the Gold Coast rainforests. In this chapter, I discuss the failed efforts to establish effective regulation of forests through legislation in 1912 and 1927. As described in the previous chapter, British policy with respect to rain forest protection vacillated between efforts to promulgate legislation that would prevent deforestation, an objective they considered necessary for the public good, on the one hand and their desire to prop up the authority of the chiefs through whom the British wished to rule.¹ The ecological consequences of British reluctance to impose their will on the indigenous authorities were perceived by them to be almost catastrophic, the destruction of a substantial portion of the forests with resulting reduction in lumber and cocoa exports.²

In 1908, the Government enacted an ordinance prohibiting the cutting of immature trees, a first step toward forest regulation. It was opposed by some of the educated class on the grounds that it trespassed on the rights of the chiefs by failing to discriminate between cutting for commercial and personal use. Over the next four years, the

¹ Helen Tilley argues that colonial forests policy and the scientific studies that supported it reflects colonial hegemony, a phrase she defines in terms set forth by Gramsci, Engels and Marx, as suggesting ways in which the colonial ideology helps the ruling class to make their rule appear natural and legitimate. To be successful that ideology had to incorporate and transform local values. Helen Tilley, "African Environments and Environmental Sciences: The African Research Survey, Ecological Paradigms and British Colonial Development, 1920-1940," 109, n.2.

² In fact, between 1900 and 1944 cocoa production grew from an average of 1300 tons in the period 1898-1903 to an average of 448,900 tons in the period 1939-1943, while the volume of timber exports fluctuated between 900,000 logs in 1900, rising to 4.8 million in 1913 and 3.2 million in 1944. G. B. Kay, ed., The Political Economy of Colonialism in Ghana: A Collection of Documents and Statistics, 1900-1960, Cambridge: Cambridge University Press, 1972, 336, 410.
Government worked toward formulation of a Forest Ordinance that would halt deforestation. Opposition based on the claim that the Government was confiscating land owned by the chiefs was widespread, but an Ordinance establishing forest reserves and prohibiting concessions on reserved land passed the Legislative Council and was sent to the Colonial Office for Sovereign approval where it died because of the intense local opposition. Unlike the instances that William Beinart and Lotte Hughes describe in other parts of the Empire, opposition in the Gold Coast was not violent and was, apparently far more successful.³ For fifteen years, nothing was done and the unregulated cutting of trees continued unabated. The role of the judiciary was purposefully limited with all critical decisions to be made by the Reserves Settlement Commissioner thus carrying out in this limited area the recommendations of the Belfield Commission and the WALC. When a Forests Ordinance was finally passed in 1927, its impact on the people of the Gold Coast was minimal.

The second issue discussed herein involves the colonial rulers’ efforts to formulate a consistent and effective land policy, also through legislation, efforts that like most of the British initiatives discussed in this dissertation never came to fruition. Efforts to reform land tenure continued sporadically throughout the period covered by this study. During the twenties, yet another committee studied the advisability of introducing a Torrens registration system such as the French had put into effect French West Africa and to enact a statute of limitations on land claims, both in an effort to make land more readily alienable. At the beginning of the 1900’s, the French had introduced a Torrens system of registration in order to encourage conversion of tenure from collective to individual and to create secure title for

those acquiring land from the State and from indigenous people claiming to own it.\(^4\)

Registration was obligatory for those with French civil status who acquired land from one subject to customary law.\(^5\)

In the early 1920's, a three man committee was appointed by Governor Guggisberg to study possible institution of a Torrens system of registration in the Gold Coast. The Committee was divided in its conclusions, the Attorney General, R. W. H. Wilkinson, stating his opposition to the proposed system in a minority report. As might be expected, no registration system was implemented. Moreover, despite encouragement by the Parliamentary Undersecretary of State, David Ormsby-Gore, a proposed statute of limitations on land claims that would overturn customary law and tend toward alienability of land, drafted and redrafted with the assistance of Chief Justice Smyly, languished and ultimately disappeared.

All of the discussions as to forest legislation and land policy in general involve the issue of who is to control the administration of whatever policies were to be adopted. As has been seen in the earlier chapter on land disputes, the local population favored and lobbied for control by the judiciary. As will be seen in the following discussions, the role of the judiciary in overseeing operations of land ordinances and resolution of disputes was at

\(^4\) The Torrens system of registration discussed for introduction into the Gold Coast originated in South Australia in 1858. Originally proposed by Sir Robert R. Torrens, this system established title to property by means of registration rather than by recording deeds or other evidence of land title. It eliminates the often tedious searching of all transactions involving the subject parcel as the Torrens system grants title by means of registration. An application would be made to a court for a certificate of registration and notice given to all potential claimants. After hearing any and all claims, the court would rule on the question of ownership and the prevailing party would be enabled to register his title which would be good as against the world. Olin L. Browder, Jr., Roger A. Cunningham and Joseph R. Julin, Basic Property Law, (St. Paul, MN: West Publishing Co., 1966, 1209. J. Stuart Anderson discusses the failure to enact a Torrens system in England over the opposition of English solicitors concerned for the income they derived from conveyancing as well as their professional status. J. Stuart Anderson, Lawyers and the Making of English Law, 1932-1940, New York: Oxford University Press, 1992.

\(^5\) Salacuse, 57.
the heart of the debates, even those as seemingly remote from judicial concerns as a Torrens system. The administration was never able to remove the judiciary from a dominant role in concessions and forestry policy. The judges remained as the final arbiters of claims and disputes.

**Forestry Preservation and Land Law, 1897-1927**

Well before the establishment of the Gold Coast Colony, the British were aware of the detrimental consequences of deforestation. Grove says that “extensive descriptions” can be found of the damaging effects of deforestation as far back as the 1300's on the Canary Islands and the mid-sixteenth century in the West Indies. Their experience in India and on the island of St. Helena taught the British that the loss of forest cover desiccated agricultural areas and negatively affected the production of food and other crops. However, in part because elsewhere in the Empire the British had greater control over the land, nowhere did they face greater indigenous opposition to their conservationist policies than on the Gold Coast. Nevertheless, the British were familiar with local hostility to their forestry policies. Increased population due to Colonial peace and sanitary provisions, the demand of mining companies for timber to shore up mine shafts and to fire steam machinery as well as the overgrazing of cattle all had a most deleterious impact on the forests. Grove argues that British policies as to conservation were not entirely without political objectives. Such

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8 For a general discussion of the development of British conservation policy in India, Burma, Mauritius and the Cape Colony, see Grove and Falola, “Chiefs, Boundaries and Sacred Woodlands: Early Nationalism and the Defeat of Colonial Conservationism in the Gold Coast and Nigeria,” 5 et passim.

policies, he says, were useful not only in ensuring a continuing supply of timber but to use “the structures of forest protection to control their unruly marginal subjects,” that is to say by requiring establishment and management of forest preserves by the colonial authorities to keep those people of the south neither educated nor particularly responsive to the rule of chiefs in line.\(^6\) Unlike those parts of the Empire, such as South Africa, where indigenous peoples were barred from owning land in certain parts of the country, the people of the Gold Coast kept ownership of their land from the earliest days of British colonialism and argued successfully on numerous occasions against policies they perceived to be an attack on such ownership, including those pertaining to conservation. Indeed, Beinart and Hughes note that in parts of the Empire, including West Africa, “the exercise of colonial power was highly constrained.”\(^7\)

Forestry policy in Nigeria as well as in the Gold Coast exemplifies such constraint and the inability of the British to implement a policy they believed to be correct and necessary when faced with indigenous opposition. Indeed, Grove argues that contrary to views of R. Guha and N. L Peluso, British conservation policy was not an instrument of colonial oppression.\(^8\) Rather, he says, British forestry policy was “dictated far less by the colonial state than by indigenous political interest groups in close alliance with metropolitan capital.” He contends that this view accords with that of Polly Hill as set forth in her study of migrant cocoa farmers.\(^9\)


\(^7\) Beinart and Hughes, 18.


\(^9\) Ibid., 148.
created three separate forestry services for the three major parts of its dependencies in Nigeria as a consequence of its efforts to protect and enhance the production of rubber, an essential element along with hardwoods, to its export trade.10

Governor Roger decided that something had to be done to preserve the Gold Coast forests and looked to the experience of Southern Nigeria to develop a forests policy. Yet, in view of the Government’s experience being undermined by the Colonial Office on the 1897 Lands Bill, one would think that the local administration would not seek to interfere further with the use by the natives of their land. Nevertheless, it did indeed do so in attempting to preserve the forests of the Gold Coast.11 Whereas previously it had attempted to assume the right to exploit indigenously owned, but yet to be developed, lands, now it attempted to limit exploitation of those lands in the name of protection of the forests and cocoa cultivation.12 As noted above, the Gold Coast government knew of and relied heavily on what had been done in Nigeria to preserve the forests.

S. Ravi Rajan for the most part agrees with Grove’s analysis of British conservation policies although he inferentially criticizes Grove for not looking at problem of deforestation on a global basis, focusing rather on the interaction of scientists and colonial officials in the colonies he studies and being vague as to the meaning of the scientists’ conservation ideas

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12 Grove and Falola accuse Governor Griffith of having distorted the views of the conservation advocate, Alfred Moloney, to justify proposals to take over all land in the Gold Coast not under active cultivation. Grove and Falola, “Chiefs, Boundaries and Sacred Woodlands: Early Nationalism and the Defeat of Colonial Conservationism in the Gold Coast and Nigeria,” 9.
in terms of colonial agendas and ideologies. Rajan views British colonial forestry policy throughout the Empire as *ad hoc*. The truth of this observation can be seen in what took place in the Gold Coast at the end of the nineteenth century where the indigenous forests were continually shrinking. In the earliest days, there was little concern for the environmental consequences of deforestation until it began to be promoted, initially in India, then in Burma and South Africa, by the need of the Royal Navy for teak to replace the dwindling supply of native oak for its ships. But no consistent policy was promulgated. Subsequently, forest conservators, particularly in West Africa, made the case for preservation of forests in order to prevent dessication and to protect agriculture from a feared decline in rainfall. J. R. Ainslie, a forestry officer from Nigeria pointed out that the absence of imperial action had resulted in halving the forests of Nigeria due to shifting agriculture, causing soil erosion and deterioration. Without its forests, Nigeria would lose half its export trade. Concern for ecology in general would not induce imperial authorities to deal with deforestation, Grove argues. The role that the scientific community played was to convince colonial authorities that, prevention of deforestation was necessary to preserve

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17 Rajan, 172-173. Ainslie was hardly the first to make this argument. In 1887, Cornelius Alfred Moloney, later Governor of Lagos, had argued that uncontrolled deforestation was causing climate change resulting in reduced rainfall. *Sketch of the Forestry of West Africa*, London: S. Low, Marston, Searle, & Rivington, 1887. Thomas F. Chipp, a forestry officer in the Gold Coast during the 1920's also blamed shifting cultivation as the most damaging reason for deforestation. Thomas. F. Chipp, “The Gold Coast Forestry Problem,” *Empire Forestry Journal*, Vol. 2, No. 1 (April 1923): 64-75, 72.
the economic viability of the tropical Empire.\textsuperscript{18} However the approach of these professional foresters to a solution to deforestation failed the test of political practicality. In West Africa generally, and on the Gold Coast particularly, as we shall see, conservation could not, as they proposed, be imposed on an unwilling populace.\textsuperscript{19}

Forest departments first came into being in India but were not created in most other colonies until the turn of the twentieth century. A bill to restrict the cutting of trees for commercial purposes and to establish a forestry department for the Lagos Protectorate was submitted in 1897 but was withdrawn as it was seen by the local people, similarly to the response to the Gold Coast 1897 Land Bill, as a usurpation of land rights.\textsuperscript{20} A forests department was finally created in 1899 but little was done because of a lack of sufficient funding. A Forest Ordinance was enacted in 1902 that permitted the Governor to create forest reserves but only with the consent of any chief whose lands were affected.\textsuperscript{21} By 1905 only five reserves had been established. The Lagos department was merged into a newly created Southern Nigerian department in 1905.\textsuperscript{22} The Gold Coast was neither first nor last to create a Forestry Department, but, as we shall see, that was only the first, and easiest step toward conserving the indigenous forests.

\begin{itemize}
  \item \textsuperscript{19} Rajan, 198.
  \item \textsuperscript{20} Grove, \textit{Ecology, Climate and Empire: Colonialism and Global Environmental History, 1400-1940}, 167.
  \item \textsuperscript{21} \textit{Ibid}, 171. In 1908 a similar ordinance requiring consent to the establishment of reserves of the indigenous authority was enacted covering the former Kingdom of Benin. Pauline Von Hellerman and Uyiawo Usuanlele, “The Owner of the Land: The Benin Obas and Colonial Forest Reservation in the Benin Division, Southern Nigeria,” \textit{The Journal of African History}, Vol. 50, No. 2 (2009):223-246, 228. However, a 1916 Ordinance gave the government power to compel establishment of reserves although that power was not used, the Government preferring to negotiate agreements with the chiefs establishing reserves in exchange for removal of prohibitions on cutting of specified species of trees. \textit{Ibid.}, 231, 234.
  \item \textsuperscript{22} Rajan, 12; Egboh, 17, 32.
\end{itemize}
As early as 1900, the Government had regulated timber cutting, requiring a license approved by the stool that owned the land and a new seedling for every tree that had been cut. 23 Chief Justice Griffith, in an unofficial communication forwarding a letter he had received about the manner in which the natives were mistreating rubber trees, told newly arrived Governor Nathan that the natives were “encroaching on the forest” and that the issue of how to deal with such encroachments was “worth considering” so that the Government could take steps as soon as possible “for their preservation.” 24 Griffith’s initiative did not produce any action and the issue of forest conservation seems to have been ignored until, in the context of a Legislative Council discussion about judges’ modification of concessions to deprive mining concessionaires of timber rights, the Mining Member, Giles Hunt, moved that it would be advisable for the Government to consider what, if any, steps should be taken to conserve the forest and regulate the cutting of timber. 25 People, he asserted, were cutting without licenses or concessions in a totally unregulated manner. Timber cutting should be subject to the Concessions Ordinance in the same manner as mining was. Chiefs should be regulated to the same extent as concessionaires and not allowed to cut without a license in order to prevent destruction of the forests. 26 Sarbah objected to imposing such a requirement on chiefs so that they might cut timber on

23 GNA ADM 1/2/53, No. 108, 3.12.1900. The Government of the Nigerian Protectorates issued similar rules in 1898 requiring licenses for cutting and specifying minimum sizes. These rules were to be enforced by local chiefs rather than the Government. Egboh, 34-35.

24 Oxford University Rhodes House MS Nathan 307, 1.11.1901.

25 GNA ADM 14/1/7, 3.4.1907. Despite such motion by the mining member, British commercial and mining interests consistently opposed proposals to restrict forest use in the Gold Coast. Indeed, according to the Gold Coast Government in its 1923 Blue Book, the combination of chiefs, European timber interests and cocoa planters rendered the colonial government’s conservation policies “utterly useless.” Grove and Falola, 12, 17.

26 ibid., 4.29.1907.
their own lands. Such a restriction would be improper on the same basis as was the Lands Bill. Cooling off the argument that seemed to be getting heated, the Colonial Secretary said that the Government had been looking for a competent Forestry Officer and that it would be premature to legislate until it could find one.27

Nevertheless, at the beginning of 1908, the Governor sent to the Secretary of State an Ordinance, Number 20 of 1907, prohibiting the cutting of immature timber along with the remarks Sarbah had made in voting against the Ordinance. He opposed because it did not distinguish between cutting for export and for domestic use and therefore improperly deprived the natives of their rights.28 Arguing in favor of obtaining the approval of the Secretary of State for the Ordinance, Governor Rodger said that there was no distinction between cutting an immature tree for export or domestic use and that there were more than enough mature trees available for native use for building purposes. He strongly contended that no one should be allowed to contribute to destruction of the heritage of the people, be they foreigners or chiefs.29

Following up on that Ordinance, the Governor appointed a Commission chaired by Puisne Judge Arthur R. Pennington to study timber cutting and licensing of the same. Its report, sent to the Colonial Office in July 1908, recommended that natives be permitted to cut mature timber on their own land for their own use without licensing if such timber was not offered for sale. The Governor expressed himself to be “strongly” in favor of acquiring land for forest reserves as soon as a Forestry Department could be established. Following

27 Ibid.
28 GNA ADM 1/2/68, No.15, 1.11.1908. By 1911, there had been 23 convictions for cutting immature timber and another 17 cases were pending. GNA ADM 5/1/66.
29 Ibid.
the Commission’s recommendations, Roger proposed to give all revenue in excess of costs to the communities on whose land the reserves were established as was being done in Southern Nigeria and would exempt or acquire farms on land where reserves were established with compensation to be paid to those whose land was acquired. Finally, he would repeal the Immature Timber Ordinance of 1907 and enact its provisions as part of a comprehensive new Forestry Ordinance.30 Also in 1908, Roger requested that the Conservator of Forests of Southern Nigeria come to the Gold Coast to inspect and report on the forests of the Colony and Ashanti and to make recommendations on preserving the forests. He recommended creation of a forestry forest department and of forest reserves. In 1909, his deputy in Nigeria, N. C. McLeod, was appointed to the post of Conservator of Forests in the Gold Coast.31

After years of more or less fruitless discussion, Governor Rodger sent the Secretary of State a draft Forests Ordinance that he said was based on that of Southern Nigeria, but was nevertheless still not ready for consideration as the draft was being analyzed and revised by his Attorney General. Rodger warned that “some of the principles involved will probably give rise to considerable discussion in the Legislative Council,” that is, they would engender a good deal of opposition.32 The draft Bill and Rules followed in October along with an analysis of the Bill by the Attorney General which noted that the changes from the

30 GNA ADM 1/2/69, No. 348, 7.14.1908. Nigerian efforts at forest conservation were making little more headway. Legislation to create and administer forest preserves could not be enacted because of Colonial Office fear of opposition if it required the consent of the local chief to the creation of the preserve. Egboh, 40. Even when the chiefly veto was done away with in 1916, the Government was reluctant to impose preserves on the local population and ultimately agreed to permit local authorities to create forest preserves after notice to the people. These preserves would be controlled and managed locally albeit subject to Government supervision and advice. Egboh, 56-57.


32 GNA ADM 1/2/74, No. 448, 7.18.1910.
Southern Nigeria model were in accord with the recommendations of the recently appointed Conservator of Forests. The Governor urged action now because so much land was being alienated by concession.\(^{33}\)

The Attorney General urged that attention should be given to the manner in which the Southern Nigeria Ordinance worked before finally agreeing that the Bill should be withdrawn and a new one drafted by Griffith and revised by the Executive Council and differing mainly in the procedure for constituting reserves, designating how land to be reserved would be acquired from tribal owners and exempted from the Concessions Ordinance, exempting reserves created under by-laws by chiefs and prohibiting concessions on reserved land without the consent of the Governor. Even then, the Attorney General stated that some additional amendment in the Committee of the Whole would be required.\(^{34}\)

Leading articles in the *Gold Coast Leader* in early 1911 typified the publicity campaign against the proposed Forests Bill, attacking on the basis of the same arguments made in opposition to the Lands Bill, *i.e.* that it forcibly converted land belonging to the chiefs and the people and saying that the people would be no better off than if the Lands Bill had gone into effect.\(^{35}\) Even before the Legislative Council began consideration of the Forests Bill, the ARPS had advised that it “emphatically” protested against the Bill as impairing the chiefs’ “immemorial rights to lands.” The Governor told the Colonial Office that the opponents would be heard before the Legislative Council and the latter replied that


\(^{34}\) BNA CO 96/508, No. 291, 6.2.1911.

\(^{35}\) *Gold Coast Leader*, Cape Coast, 2.4.1911, 3; 2.11.1911, 3.
the Secretary of State would consider any petition against the Bill sent via the Governor before advising the King whether or not to disallow any Ordinance passed.\footnote{BNA CO 96/509, Confidential, 8.19.1911; No. 522, 8.24.11.}

When the Forests Bill came before the Legislative Council, Francis Crowther, the Secretary for Native Affairs expressed his concern about widespread propaganda against it. “Some suspicion and fears were aroused in the minds of the chiefs and people with reference to certain provisions of the Forest Bills with regard to the compulsory acquisition of lands by the Government,” he reported, suspicion that was based on “unfounded rumour (\textit{sic})” that had been “spread particularly in the bush that the Bill would require forfeiture of crops and compulsory labor.”\footnote{GNA ADM 5/1/68.} No matter how unfounded, the Administration still had to consider the effect of such rumors and consequent possible violence, just as it had in the late 1890’s.

Casely Hayford appeared before the Bar of the Legislative Council on behalf of a number of chiefs to oppose the Bill. As one of the leading barristers of the Gold Coast and the author of a recently published attack on British land and forests policies, he was clearly one whom the chiefs considered most able to present their case.\footnote{J. E. Casely Hayford, \textit{Gold Coast Land Tenure and the Forests Bill of 1911: A Review of the Situation}, London: C. M. Phillips, 1912.} He recapped the history of land legislation since 1894, including the meeting of the Gold Coast deputation with Secretary of State Chamberlain and charged that the Bill would enact “encroachments on the people’s proprietary rights which they objected to in 1894 and 1897.” If Government wanted to establish forest reserves, he argued, it should acquire the land under the Public Land Ordinance and pay for it, although he candidly admitted that the chiefs would probably...
object to the application of that Ordinance outside the towns. 39 Rather than create a wasteful bureaucracy, Government should appoint forestry officers to work with the chiefs to enable them to create reserves. Other lawyers and African Council members also spoke, arguing that the Bill was too broad and did not define “forest.” 40 In moving the second reading, the Attorney General argued that the Government held the lands of the Colony in trust not only for the benefit of the living but for those yet to be born and had to do what it thought best to protect the estate from wastage and abuse. 41 Sadly, given the decline of the forests since 1911, the Government, as we shall see, was unwilling or unable to adhere to these noble sentiments.

The Bill provided for a Reserve Settlement Officer who would determine all objections to and disputes concerning creation of the new Reserves. Council Member T. Hutton Mills, a barrister, urged an amendment to permit counsel to appear on behalf of objectants in proceedings before this official. While noting that nothing in the Bill prohibited such appearances, Acting Governor Bryan was unwilling to permit express authorization. This official, like District Commissioners, would have discretion to permit (or deny) legal representation. 42 The Bill provided that no concessions for timber or other forest products such as rubber would be valid unless more than half of the stool or family land involved was reserved for agricultural use by the stool or family and that concessions would be limited to

39 GNA ADM 14/1/9, 491.
40 Ibid., 494.
41 Ibid., 514.
42 Ibid., 515.
fifty years. In an effort to disarm the opposition, the Bill specified that the Government would make no public acquisition of forest lands except on lease.43

During the pendency of the Legislative Council debate on the Bill, which passed unanimously on November 7, 1911, the Government received notice from the ARPS of its intention to send a deputation to the Colonial Office on behalf of the chiefs similar to that which met with Chamberlain in 1897 if the Bill passed in the form then being debated. After passage, with the ARPS continuing its opposition, London advised the Governor that it would take no action to have the Bill approved pending receipt of an ARPS petition.44 When the Petition was received, specifically objecting to having an administrative official, the Reserve Settlement Officer, rather than a judge of the Supreme Court decide contested issues, a Colonial Office bureaucrat minuted his disappointment that after efforts to meet the objections specified in the arguments before the Legislative Council and passage of the Bill without opposition in the Council that “these people should still be irreconcilable. It is to be feared that no concession would satisfy them.”45

In January 1912, the Governor transmitted the ARPS Petition to the Colonial Office and noted its intent to send a deputation to meet with the Secretary of State. He suggested that his Commissioner of Forests who was then in England be present if it were decided to receive the deputation. He expressed his dismay at the Petition and said that its promoters could not have studied the Ordinance since it was only passed in November and published in the Gazette in December. Contrary to what the Petitioners said, the Bill as passed was considerably modified from the one as introduced in September. As passed, only land

43 BNA CO 96/514, Confidential, 10.26.1911.
44 Ibid., Confidential, 11.16.1911.
45 Ibid., Minute 12.27.1911.
found by the Reserve Settlement Officer to be unoccupied could be taken for a Reserve, there would be no change of ownership, the Reserve would be managed by the Forest Department with staff hired on recommendation of the owners and the Government would only be the owners’ agents or lessees, but would have no ownership interest or option to purchase. The Government repeatedly said that it had no intention to sublease and agreed with the Petitioners that chiefs could make by-laws, but pointed out that they had not done so with respect to reserves. Bryan cast doubt on the credibility of the Petition by asserting that the Accra chiefs told him that they had never read the Bill as it had been passed and thought they were protesting a prior version. Moreover, he noted that two African members of the Legislative Council, T. Hutton Mills and Mate Kole, a traditional chief, objected to the original Bill but supported the modified version that was enacted. The Petition, the Governor asserted, represented a fear of what Government might do, not what it was doing and the continuing fear of losing their land that harkened back to the 1897 land Bill. Almost immediately, the Colonial Office responded that any decision as to approval or disapproval of the Ordinance would await Belfield’s report (discussed above) and that the Petitioners should be advised to talk to Belfield as soon as possible.

It is unclear whether or not Belfield saw or spoke to the Petitioners as he was then in London and they were in the Gold Coast. However, he did discuss the Forests legislation and recommended a number of amendments, among which were ones to require the Government only to administer the land and never to sublease any land in a reserve to private parties, to pay all profits to the native owners and to limit the land taken from any

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46 GNA ADM 5/4/5, 1.8.1912.
47 Ibid.
48 Ibid., 1.12.1912, 2.5.1913.
one owner for purposes of establishing a forest reserve to no more than a minor percentage of the total. 49

The ARPS deputation included Casely Hayford and other “well connected natives.” One Colonial Office official noted that Casely Hayford had handled many concession cases. Harcourt agreed to meet the Africans and asked Bryan to provide him before the scheduled meeting with a memorandum on the points at issue and the Government’s observations on them. 50

The petition against the Forests Ordinance was revised after the Belfield Report became public and the deputation met with Harcourt. It made the following points: the Conservator of Forests’ report as to destruction of forests was exaggerated – there were huge tracts of untouched forest because there was as yet no way to get the timber out; chiefs could just as well implement Belfield’s recommendations as to selection, demarcation, constitution and maintenance of reserves under the Native Jurisdiction Ordinance as Government could and Belfield was correct in saying that the people did not trust Government not to sublet reserve lands to third parties. 51 A supplemental Petition went on to argue that a chief was not a trustee with sole decision making power over the cestui qui trust, but a joint owner who could not act without the consent of other owners. Further, the proposed transfer of jurisdiction over issues arising from creation and maintenance of reserves from the courts to the executive “cannot be made without doing violence to their sense of justice,” and since District Commissioners could not be trusted to be impartial in advising chiefs and because their interpreters were ignorant as to legal

49 BNA CO 96/525, 6.18.1912.
50 BNA CO 96/518, Telegram, 6.10.1912.
51 Ibid., Confidential, 7.16.1912, ¶¶ 151-159.
terminology, the only protection for chiefs was a limited judicial inquiry, one that would not infringe upon the prerogatives of the chief in attempting to supervise the manner in which consideration was used and/or distributed.\textsuperscript{52}

The deputation from the ARPS were represented by Michael Healy KC MP, who challenged the jurisdiction of the Legislative Council to make any law touching the natives' forest land. He reiterated that the people owned all the land and were as interested in conserving the forests as was the Government which should assist the chiefs not take over the land. He denied that the cocoa planters were destroying the forest, rather they were using palm trees to shade the cocoa plants. Lastly, he complained that Belfield conducted his inquiry behind closed doors and kept the evidence from the public which created suspicion and mistrust.\textsuperscript{53}

Hayford went immediately to the heart of the issue saying that even though the Government would only acquire leaseholds rather than title, it would still prevent the chiefs from control over their land. In this he was repeating the argument successfully made to Chamberlain that even though Government would not acquire title, it would deprive the indigens of the ability to use the land they owned for such purposes as they desired. Beyond this quintessential point, the deputation objected to provisions permitting the Executive to control forest concessions because people did not trust the Executive but only the Supreme Court which had extensive experience in dealing with land issues that the

\textsuperscript{52} Ibid., Confidential 8.29.1912 ¶¶ 30-36. Further they objected to the lack of any provision for judicial review of the decisions of Conservator of Forests. Ibid., ¶¶ 68-69.

\textsuperscript{53} BNA CO 96/525, Confidential, 6.28.1912. At the request of the Permanent Undersecretary, the Governor sent to the Colonial Office all Orders-in-Council and Law Officers' Opinions dealing with the jurisdiction of the Legislative Council to pass the Forests Bill, so that it might determine the validity of the Petitioners' claim that the Council lacked jurisdiction. J. S. Risley, the Legal Advisor, concluded that it did have jurisdiction. Ibid., Confidential, 7.12.1912.
Executive did not have. The Court, Hayford continued, could correct errors and violations of
the law as to the amount of land conceded or the rent to be paid, he argued, never
admitting that a specially trained administrator could probably fulfill such tasks equally as
well. Hayford sought indirectly to deflect that argument by claiming that District
Commissioners and Forest Officers had no knowledge of native law or custom (not a
certainty in the case of many District Commissioners by any means) and the Supreme
Court did (another assumption not always borne out by experience). The chiefs, he went
on, had authority under the Native Jurisdiction Ordinance to make by-laws providing for the
establishment and maintenance of forest reserves and allowing for shifting cultivation as
land unoccupied today might be occupied tomorrow. Secretary of State Harcourt suggested
that the Ordinance be amended to provide that all revenue above the amount necessary to
administer the reserves be returned to the chiefs and limiting leases only to Government
and never to third parties, but offered nothing responsive to the complaints about
administrative versus judicial control of the process of creating reserves.\(^{54}\)

The deputation left without any resolution of the questions raised, but whether from
fear of violence or merely an indisposition to commit to a particular policy – the record is
silent on his reasons – Harcourt still hung back from making a decision as to whether or not
to seek confirmation of the Forests Ordinance while the Gold Coast Governor complained
bitterly of the “intolerable” dissemination of misleading propaganda against the Forests
Ordinance in mission schools, and reporting on his efforts to “dispel the distorted version [of
the Ordinance] disseminated.” Such propaganda campaign Colonial Office minutes
attributed to agents of the ARPS who, it was charged had made “unscrupulous” efforts to

\(^{54}\) \textit{Ibid.}
arouse ill feeling against the Forests Ordinance. It was having a bad effect on “ignorant and credulous” natives in the Volta River districts.\textsuperscript{55}

Acting Governor Bryan pled for the Colonial Office to make a decision as to whether or not to approve the Forests Ordinance as soon as possible because the forests, he said, were being irreparably harmed, destruction of trees was continuing apace and cocoa plants were likely to die within five years as aridity spread because of deforestation.\textsuperscript{56} His Commissioner of Forests, he said, strongly disagreed with Belfield’s recommendations as to all proposed amendments to the Ordinance except the recommendation that reserves should not take more than one third of any chief’s stool land and that staff working on the reserves should be nominated by the owners, provided, the Commissioner said, that they had to work under Forest Department direction and control.\textsuperscript{57}

In November 1912, despite years of work, the Colonial Office effectively killed the Ordinance, saying that it had sent the Acting Governor’s dispatch seeking a speedy decision to the WALC which should be pushed for an interim report and advice on the Forests Ordinance, but since the Ordinance was tied so closely to the issue of land alienation it was not possible to decide on its approval or disapproval until the WALC made its report. In the meantime, Harcourt suggested that the District Commissioners be directed to talk to chiefs and convince them of the danger to the forests and that they and their

\textsuperscript{55} BNA CO 96/523, Confidential, 10.10.1912. It had to be the ARPS according to the Colonial Office bureaucrats because there was no organized opposition in areas where the ARPS was not active, although the reasons for the lack of opposition were many and diffuse and by no means pointed directly at the ARPS which was charged with acting only in the interests of rich coastal natives.

\textsuperscript{56} GNA 1/2/92, No. 741, 10.21.1912.

\textsuperscript{57} \textit{Ibid.}, 10.25.1912
people should not cut trees.\textsuperscript{58} Despite a recommendation of the WALC for implementation of the Ordinance and state control of administration of forest reserves, the Colonial Office continued to remain silent as to approval of the Ordinance. Thus ended for the next decade or more the saga of the initial effort to preserve the Rain Forest, not, in T. S. Eliot’s immortal words, with a bang but a whimper, an effort evidencing the mutual distrust of colonizers and the colonized as to motives and methods as well as the unwillingness of the colonizers to impose their will in the face of anything more than minimal opposition.\textsuperscript{59}

Governor Clifford agreed with a number of the criticisms of the Forest Ordinance. The WALC draft report, he said, adopted the position Belfield had taken and recommended that the entire gross proceeds of land leased by the Government to third parties under the Forests Bill of 1912 should be paid to the natives and even then compensation would have been inadequate for the “sacrifice that had been demanded of them” (\textit{i.e.} giving up their rights to cultivate). Moreover, Clifford went on, any future Forests Bill should not require some states to sacrifice for the benefit of all states without compensation from general revenue of the Colony, such compensation to be negotiated at first but fixed by the Supreme Court if agreement could not be reached, with the Government to pay the costs of litigation. Finally, he concluded, if constituted forest reserves deprived a state of so much land that expansion of cultivation was impossible, the state should be compensated with

\textsuperscript{58} \textit{Ibid.}, 11.30.1912.

\textsuperscript{59} The record is devoid of any evidence as to the reasons for abandoning pursuit of a Forests Ordinance other than concern that Gold Coast domestic issues might divert energy from pursuing Britain’s war aims in West Africa. David Killingray points out that the Gold Coast government was careful to avoid policies, such as conscription either for labor or military service, that might cause unrest. Nevertheless, Gold Coast troops fought in Togo, Cameroun and East Africa. Nor, despite the cost of the war, was any effort made to impose direct taxes on the people of the Gold Coast. David Killingray, “Repercussions of World War I in the Gold Coast,” \textit{The Journal of African History}, Vol. 19, No. 1 (1978): 39-59, 40, 45, 48.
land from adjoining states (by negotiation if possible) for dispossessed neighbors with fair compensation to the adjoining state for any land it had to give up.  

During World War One, the Gold Coast government engaged in few initiatives and none that might engender wide scale opposition. Yet even after November 1918, the Government did not seek to resurrect the dormant Forests Ordinance. It was not until Clifford’s successor as Governor, Sir Frederick Gordon Guggisberg, had been in office for four years that pressure to establish forest reserves once again arose. Reporting on his Government’s activities for 1923, he said that upon his arrival on the Gold Coast, he had promised the chiefs the opportunity to effect reserves themselves but only a few chiefs had taken advantage of the opportunity. He offered cooperating chiefs Government assistance to mark boundaries of proposed reserves and to give them technical advice, but warned that if no progress were made, he would propose a compulsory Ordinance, because prompt action was necessary to prevent the land from drying out and destroying cocoa production. Guggisberg’s biographer, Ronald Wraith, argues that the Governor overestimated his own ability to convince the chiefs to set aside reserves without compulsion or underestimated the suspicion harbored by the chiefs that had been created by prior Administration’s land policies.

Unhappy that the chiefs did not react positively to his invitation that they set aside reserves of their own volition, Guggisberg began preparations for enactment of a new

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62 Ronald E. Wraith, *Guggisberg*, , 122. The Chiefs had only set aside 240 acres for reserves when the forestry experts considered 6,000 acres to be the minimum necessary to prevent destructive climatic changes. *Ibid.*, 122, n.1.
Forests Ordinance. His Commissioner of Forests set forth a definition of lands subject to protection, *i.e.* where water supply or cultivation of neighboring lands would be jeopardized.63 The Forests Commissioner met with the Attorney General and drafted a new Forests Bill that he presented to the Colonial Secretary with the recommendation that all references to Government leases be eliminated because such leases were impracticable and would cause trouble.64 Writing of proposals to make payments to the holders of cultivation rights in the proposed reserves, the Attorney General said that they are not legally required but voluntary and would be useful to tamp down expected opposition. However he had to insist on his own language about appeals because language in an earlier draft limiting appeals was beyond the competence of the Legislative Council which could not prevent appeals to the Privy Council as the Forest Commissioner wanted to do.65

The new Bill was introduced at the end of August 1926, but no further action was taken on it and it was withdrawn following a conference of Chiefs at the end of December.66 A modified Bill was prepared providing for reserves to be established at the request of chiefs and private owners and for mandatory reserves if the Government determined it to be necessary to protect water supplies, prevent injury to agriculture or prevent imperiling of the supply of forest products to nearby land owners and villages. It authorized the Reserve Settlement Commissioner to inquire into claims to land with a reserve and to refer title issues to the appropriate Native Tribunal whose decision would be binding on him. He would decide which rights in the reserve, such as rights to cultivate and/or to collect forest

63 GNA ADM 15/56, 3.15.1926.
produce or firewood would be permitted or accommodated, or, at the Government’ option, be acquired in return for monetary compensation. Appeals from his rulings or those of the Native Tribunal as to title would be permitted to the Supreme Court. An annual payment of £1 per square mile would be made to the owners of lands situated within the reserve.67

Public opinion as reflected in the local press was not favorable, with leading articles attacking the proposed Ordinance as another threat to native land rights to the same extent as were the Lands Bills of the 1890’s and the Forests Ordinance of 1911. Moreover they noted that the Provincial Councils of Chiefs of the Central and Eastern Provinces had resolved to oppose the new legislation.68

Nevertheless, the Government determined to go ahead and the Forests Commissioner moved the Bill at the March 1927 meeting of the Legislative Council.69 He told the Council that he had accommodated the objections of the two Provincial Councils of Chiefs by exempting reserves created by stools pursuant to by-laws they had enacted so long as such reserves were administered satisfactorily in accordance with Government rules. Title issues would be submitted to the Native Tribunals of the Paramount Chiefs and would be subject to the provisions of the Native Administration Ordinance.70 The Ordinance sought to protect 6,000 of 28,000 square miles of forest in the cocoa growing zone but, he acknowledged, such area might have to be enlarged if it were shown to be insufficient to protect water supplies and cocoa agriculture.71 After its second reading the Bill was

67 Ibid.
68 See, e.g. Gold Coast Leader, Cape Coast, 2.5.1927, 8.
69 GNA ADM 14/2/13, 342.
70 Ibid., 343-344.
71 Ibid., 347-348.
amended slightly in the Committee of the Whole at the behest of some of the chiefs and reported out to be passed with the votes of all of the rural members of the Council as No. 13 of 1927.\textsuperscript{72} So after years of futile effort to achieve a result that the colonial masters insisted was necessary to the welfare of the entire community, after backing and filling and refusing to insist that the population accept the Government’s policy, after claimed untold damage to the rain forests, the Government finally achieved approval of a law that would, it was hoped, stem the continuing damage to the environment and the feared reduction in the cocoa crop the export taxes on which were necessary to keep the colonial government’s accounts in the black.\textsuperscript{73}

**Efforts to Formulate a Land Policy 1920-1944 – Registration and a Statute of Limitations**

As noted above, the problems of difficulties in alienating land were considered to pose obstacles to economic development. Accordingly two proposals were mooted to deal with that problem: the first originally raised in 1922 by the Registrar of Lands, was institution, as the French had done, of a system of land title by registration that would ensure purchasers of land with good title as against all challenges; and, second, proposed in 1926 by Parliamentary Undersecretary for the Colonies, was enactment of a statute of limitations as to claims relating to title to land to prevent ancient claims from being asserted. The educated elite opposed both proposals, but, significantly, institution of a registration system was also opposed by an important member of the Gold Coast administration. Neither proposal was ever adopted.

\textsuperscript{72} Ibid., 3.4.1927, 348.

\textsuperscript{73} Historians studying conservationism in West Africa, particularly Grove, do not relate British policies to fear of driving people from the land into the cities.
A deed registration Ordinance was enacted in 1883 (Nos. 8 and 12 of 1883) which was replaced in 1895 by a substantially similar Land Registry Ordinance (No. 1 of 1895). However, both of these enactments required a proper description of the land and registration did not cure any defects in the description or the documents purporting to establish title. As surveys of land were rarely made due to cost and the uncertainty of the extent of communal land, the registry system afforded little security of title. Up to the period now under consideration, Torrens registration had not been successfully implemented in British West Africa. During Guggisberg’s Administration, the Surveyor General, Rowe, proposed to establish a system of land registration that ultimately would lead to certainty of title and, inevitably, to the break down of the communal nature of land ownership. The Governor appointed a committee of three people, Rowe, the Acting Commissioner of the Eastern Province, H. S. Newlands, and the Attorney General, Wilkinson. The two former officials prepared a majority report from which the Attorney General dissented. The Governor pointed out that the WALC had recommended that a registration system be put in place but only for transfers by non-natives because the issues of native tenure and who had individual title as opposed to family tenure were too difficult and would lead to extensive litigation. The draft WALC Report recommended that in the towns on the coast, tenure should be determined according to English law whereas the

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76 GNA ADM 12/3/39, Confidential, 6.7.1923.
The Governor disagreed with the Majority Report view that land held under native tenure could be registered because, he said, the Chief, contrary to the view expressed by the majority, held title as a trustee only colloquially not legally and there was no generally accepted definition of the nature of such “Trust” as it varied from tribe to tribe and even within tribes. If land so held were attempted to be registered, it would generate litigation over who had rights in the “trust” and what its exact nature was, or even whether the chief had authority to register the land without the consent of his councilors. Even individual tenure couldn’t always be relied upon because it might have evolved into family tenure as when an individual title holder died intestate. Guggisberg said that he could not recommend the proposals of the Majority as they did not promote good title or security for lienors and would not slow down alienation of native lands, but would accelerate such alienation since good title would promote attempts to buy and sell and would promote even more litigation and strong local opposition. Wilkinson’s Minority report argued that the current “political-legal conditions” were “markedly unfavourable” to title registration. Native opposition to a

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77 Ibid., 6, ¶9.
Torrens system in the Legislative Council would be strong and would inevitably be tied to the questions of “Jurisdiction of Native Tribunals and to native customary law.”

The differences set forth in the two reports of his Registration Committee continued to be unresolved into 1927. Guggisberg told the Secretary of State early in that year that he was “seriously disturbed” by the unresolved difference of opinion between Wilkinson on the one hand and Rowe on the other about proceeding toward a land registration program particularly since his Colonial Secretary, J. C. Maxwell agreed with Wilkinson, so he’d delayed any decision to go into it further. Moreover, he said that he was deferring seeking approval for a Land Court, as Ormsby-Gore had also recommended, pending consultation with Chief Justice Smyly, but thought that at least two itinerant judges would be needed who would be lawyers of high standing and considerable experience in land law and conveyancing to be judges. The court he was considering would consist of a judge, an assistant lands commissioner and possibly another member. The judge would decide land questions in situ with the assistant lands commissioner acting as am assessor. It would be necessary, the Governor said, to alter the law so that the judgments of the Land Court could have in rem effect, that is they would attach to the land, with appeals to be limited to questions of law. Even this skeletal proposal failed to consider how such a Land Court would work with the Native Tribunals since the proposed Native Administration Ordinance, that the Governor was seeking to enact in the face of increasing opposition, would give exclusive jurisdiction over all cases involving the title of land to such Native Tribunals and,

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78 Ibid., Enclosure No. 2.
79 GNA ADM 12/3/47, 1.10.27
80 Ibid.
together with registration legislation would undoubtedly increase fears of a new land seizure by the Government already raised by the new Forests Ordinance.\textsuperscript{81}

The Governor was also pressing for the establishment of a Land Department right then no matter what system of registration was adopted since “it is obvious that some system regulating land tenure must ultimately be adopted.” Preparatory work had to be done as soon as possible, he argued because title issues were multiplying even with respect to proper title on land purchased by the Government.\textsuperscript{82} Meanwhile the merchants of the Colony represented by the Accra Chamber of Commerce were petitioning the Government to enact some law dealing with land tenure so as to provide “protection to merchants and others” by requiring compulsory registration of title and that only land that is registered would be eligible to serve as security for debt. Unable to afford the merchants any satisfaction, the Government responded only that land issues were under consideration.\textsuperscript{83}

In the previous year while Guggisberg was on leave, Colonial Secretary Maxwell, then acting as Governor, prepared a dispatch saying that it was most important to pass an ordinance imposing the English Statute of Limitations on all land transactions and creating prescriptive rights in land that would be applicable to Native Tribunals as well as to the Supreme Court.\textsuperscript{84} He noted that the Supreme Court, as a court of equity, would probably find reason not to disturb long and continuous possession (as we have discussed above) but native custom, designed to deal with shifting cultivation, had to be modified to deal with

\textsuperscript{81} Ibid.

\textsuperscript{82} GNA ADM 12/3/47 Confidential, 3.11.1927.

\textsuperscript{83} GNA ADM 15/60, 199, 201, 11.17.1927.

\textsuperscript{84} BNA CO 96/663, 11.17.1926, although written eight months earlier on 3.13.1926.
continuous [commercial] cultivation of commodities, e.g. cocoa. A statute should be passed enabling a person to obtain a declaration of individual ownership although it might revert to being family land if he died intestate unless the succession laws were changed as well. Maxwell argued that the Provincial Commissioners, acting as appellate judges under the Native Jurisdiction Ordinance, did a good job on appeals of land cases from the Native Tribunals, suffering only nine reversals and seven remands of their decisions by the Full Court of the fifty appeals in the decade from 1912 to 1922. Therefore he wouldn’t recommend that the Executive replace the Full Court as the final Court of Appeal in land cases, as such a move would not only be a political mistake but “a serious administrative blunder.” Nevertheless, appeals to the Full Court or the proposed West African Court of Appeal should be limited to questions of law only just as Chief Justice Smyly had recommended to the WALC in 1912. Following up on Governor Guggisberg’s proposal for a Land Court, Maxwell said, as a division of the Supreme Court, it could determine questions of fact in situ or better, a Lands Board could meet with the parties before hearings by the Provincial Commissioner or the Supreme Court to narrow issues and get as much agreement as possible to the facts, get the land surveyed and determine what customs applied.

While some tepid consideration was being given to Maxwell’s proposals, Chief Justice Smyly was redrafting a proposed statute of limitations bill specifying differing time periods for commencement of differing actions. It provided for a limitation of twelve years on actions relating to land and trespass on land, notwithstanding any customary law to the

85 Ibid., 22, ¶ 27.
86 Ibid., 26, ¶¶ 40-41.
Public reaction was not positive. The Provincial Commissioner of the Central Province said that the Chiefs were not happy but grudgingly agreed to consult their counselors. The Acting Commissioner of the Eastern Province advised that no limitations bill be passed until customary law was codified pursuant to the new Native Administration Ordinance, because he was convinced that the chiefs would not agree to administering English law in their Tribunals. Finally, the chiefs of the Central Province passed a resolution against a limitations bill saying that it would destroy mutual assistance among natives, because they wouldn't lend to each other, and cited Sarbah’s *Fanti Constitution and Laws* for the uncontested and incontestable proposition that there was no limitations period in customary law.

In late 1927, Guggisberg’s successor, Alexander Ransford Slater, submitted a 114 page *Memorandum on Reforms Required in Respect of the Land Legislation of the Gold Coast Primarily In Order to Promote Security of Title* that included memoranda and dispatches on the subject created over the prior five years. Slater said that throughout the Twenties, Executive Officers had considered the necessity of some kind of legislation to provide greater security of title, because questions of whether land was communal, family or individual and whether proper consents had been obtained for alienation all too often made title inalienable. He recapped Rowe’s December 1922 memorandum laying out the technical problems and proposing a solution including a three year survey of the entire

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87 BNA CO 96/671/6. For purposes of comparison, the Statute of Limitations on real property actions in New York State is ten years, McKinney’s Real Property Actions and Proceedings Law §501.


91 BNA CO 96/671/6, Confidential, 10.1.1927; GNA ADM 11/1/1710, Confidential 10.2.1927.
colony and stool boundaries; the history of the committee to look at the possibility of enacting a Torrens Registration system, Attorney General Wilkinson’s dissent from Rowe and Newlands’ majority report because it did not provide for a statute of limitations, his feeling that Native Tribunals couldn’t deal with issues related to registration and the likely strong native opposition in the Legislature. He attached to his Memorandum a dispatch from Maxwell, dated June 6, 1923, reminding the Colonial Office that the WALC had recommended that land held under native tenure should not be brought within the sphere of registration legislation. Guggisberg, Slater said, declined to go along with the Majority Report recommendations because European mortgage and lease holders got no protection unless all underlying titles that had first been registered by their owners had had all title questions cleared in a judicial proceeding. Slater agreed that the Gold Coast was not yet ready for a Torrens Registration system as to which there would be much opposition from native members of the Legislative Council.

Then, in connection with Ormsby-Gore’s visit, Maxwell, then Colonial Secretary, wrote another memo, March 13, 1926, saying that judicial proceedings were not satisfactory because the claims dealt with were considered to be personal to the claimants and not attaching to the land and were often improperly defined. Accordingly, until that problem was corrected, registration should be limited to ownership, not possessory claims, under English tenure and that it would be necessary both to bar stale claims and create Land Courts. Slater reminded the Colonial Office that Colonial Secretary Maxwell, acting as Governor, had Wilkinson prepare a draft Statute of Limitations bill that was sent to the Colonial Office in May 1926, was approved by the Secretary of State and was to be submitted to the Legislative Council at its next sitting and that Ormsby-Gore regarded “the introduction of
legislation of this nature [i.e. a statute of limitations] as an essential change.” The
Undersecretary, Slater said, was convinced that a Torrens Registration system could not
help deal with land issues until existing title problems had been dealt with. The first step in
this process was to bar stale claims. Slater noted that a Statute of Limitations bill was
read for the first time, but the second reading was deferred in view of the opposition of the
Provincial Councils of Chiefs.

R. S. Rattray, anthropologist and a District Commissioner in Ashanti, thought
registration of land held under native tenure to be a bad idea that would destroy the
authority of the chiefs, lead to rapid alienation of land and create a landless underclass of
impoverished paupers. First, Rattray recommended, the land should be surveyed then
communal land should be vested in chiefs and family members as true legal trustees. Mr.
Justice E. Gardiner Smith thought Maxwell’ recommendation of a Land Board to be
unhelpful as it would merely add an unnecessary additional layer of bureaucracy.
Moreover, even if created, Provincial Commissioners should not be members because that
would make them judges as well as administrators, for which former position they were not
trained. He agreed with Justice Hall and Chief Justice Smyly that judgments relating to land
should be deemed to be in rem so as to bind everyone claiming the same land or that
claims should be subject to a statute of limitations, but not both. It took Central Province
Commissioner Jones to pop the balloon of fantasy about creating a Land Court by pointing

92 Ibid.
93 Ibid.
95 Ibid., 12.27.1927, 29, ¶3. See also Wilkinson’s views as to a Land Court, Ibid., 12.30.1927; and
Hall’s and Sawrey-Cookson’s views on the same subject, Ibid., 1.5.1928, 32, ¶5; 33, ¶6; 2.9.1928, 46-47,
¶11.
out to his colleagues that they could not promote a British Land Court when they had just
caused to be enacted a thorough going reform of the native courts granting them exclusive
jurisdiction in all land cases and to the Provincial Council of Chiefs exclusive jurisdiction
over boundary disputes. In any event, he would prefer land disputes to be handled by an
executive officer with the aid of assessors as needed. If there is to be a judge, he should
have local experience and the authority to make judgments in rem. Chief Justice Smyly
agreed with Jones that in view of the Native Administration Ordinance, a Land Court was no
longer feasible and judgments could not be in rem if jurisdiction in land cases would be
limited to determining appeals from Native Tribunals. To achieve these desired results
would requirement amendment of the Native Administration Ordinance to authorize nisi
prius jurisdiction. Slater also sent a volume of comments on his Memorandum from
various Gold Coast officials. Wilkinson urged that the pending statute of limitations bill
moved to passage. To the contrary, Provincial Commissioner Jones said that he would
not suggest enacting any statute of limitations until the opposition to the Native
Administration Ordinance died down and the "political atmosphere clears." Justice A. B.
Howes wanted a statute of limitations for all cases but at least for personal suits such as for
tort and debt.

It should come as no surprise given the history of inaction by both London and Accra
governments, that nothing should have come from this mass of proposals. Even the Civil

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97 GNA ADM 11/1/1710, VOL. II. Further discussion of a Land Court was put aside until proposals
   for a Native Courts Bill were mooted in the early 1940's. See Chapter V, above.
98 Ibid., 12.30.1927.
100 Ibid., 1.16.1928, 51-52, ¶3.
Limitations Bill that was published in the Gazette on February 5, 1927 and that would have limited the time in which to commence actions in both British Courts and Native Tribunals in both land and personal cases such as tort, contract and debt went nowhere. The Attorney General told the Legislative Council that the Bill responded to the complaint by Undersecretary Ormsby-Gore as to the lack of finality and to "safeguard the title to property and the enjoyment of individual rights and the fruits of individual enterprise from the assaults of those who have unreasonably delayed in asserting their claims." Prosperity he said, is dependent upon the security of property and the "sanctity of contractual rights."\(^{101}\) It is not difficult to see that enacting these principles of English law would have utterly destroyed some of the basic tenets of Gold Coast customary law that held that no debt was ever extinguished by time and no title could be obtained prescriptively. The Central Provincial Council of Chiefs promptly expressed its opposition to the Bill as not only contrary to custom but because it was impossible for illiterate people to administer and would encourage fraud being perpetrated on these same illiterates.\(^{102}\) So, too, the Eastern Provincial Council of Chiefs resolved to oppose the Bill. It would not limit litigation, but rather would encourage the filing of more cases in order to avoid actions being defeated by inexact time limits while accelerating the replacement of customary law by English law.\(^{103}\) Nor did Government officials deny such charges. Indeed the Commissioner of the Eastern Province wondered aloud if it were not time to do away with customary law altogether as being an obstacle to progress and the people’s welfare. Individual tenure was rapidly increasing, he argued, undermining customary tenure, which latter would disappear entirely.

\(^{101}\) GNA ADM 11/1/1004, Gazette, 2.5.1927, 201.

\(^{102}\) Ibid., 5.29.1927, ¶¶2, 4 -5.

\(^{103}\) Ibid., 7.29.1927, ¶25.
if a limitations bill were enacted.\textsuperscript{104} The Assistant Secretary of Native Affairs, more than a year after the Colonial Office determined not to proceed with limitations legislation because of the opposition, was still pressing for such a Bill. Foreign capital, he argued, requires such a statute to justify investing in the country. The average educated African, who engages in business or the professions, supports such a law when it was explained in clear language. Fear of exploitation of illiterates is overstated, in part because education was spreading and land owners were becoming more sophisticated. The could be no land registration and no certainty of title without stifling stale claims through limitations legislation. For all these reasons, he urged reconsideration of legislation that might be offered in two parts, one for personal actions and one for real action.\textsuperscript{105}

Another Ordinance enacted in 1929 demonstrates the inconsistency of British policy in the administration of law. At that time, the Government introduced a Bill as a consequence of a Supreme Court decision that the English Statute of Limitations was a statute “in force” as that term was used in the Supreme Court Ordinance, to which native law was subject and was incompatible with customary law so that it had to be applied in Native Tribunals. “It is undesirable that the English law of limitations should be brought in to control native transactions” at that time, said the Attorney General, Sidney Abrahams, declaring the object of the Bill to be the overruling of the Court decision and prevention of possible application of other English statutes that might “frustrate Native Law.”\textsuperscript{106}

Thus while promoting enactment of a statute of limitations in order to make land titles more secure, the Government sought legislation to prevent a limitations period from being

\textsuperscript{104} Ibid., 12.14.1927, letter.
\textsuperscript{105} Ibid., Memorandum No. 21, 10.28.29
imposed by the courts. This one hundred eighty degree change in policy seems to have derived from Colonial Office fear of the opposition of the chiefs and other traditional authorities despite the arguments that failure to impose a limitations period would continue to make land title cloudy and deter foreign investment.

**Conclusion**

In 1930, the Colonial Office once again examined the issue of land tenure on the Gold Coast. At its request, the Governor sent to London a compilation of all material related to land tenure through 1928. J. A. Calder noted that the issues were complex and difficult to resolve the question being whether “Govt (sic) should facilitate or obstruct the tendency of tribal and family lands being converted into individual ownership.” E. W. Flood opined that the Supreme Court had “unintentionally increased the problem by dealing with land matters in a sort of compound of native customs overlaid with English law, with resulting confusion.” Flood feared that only compulsory registration would have any positive effect, but knew that it would be seen as government “confiscation and would provide quite a sufficient battle cry to stir up much mischief in West Africa.” He said that only complete surveys and registration of stool land stands a chance of quieting title, but the amount of work involved and the expense would be “prodigious,” since surveys of all stools, paramount and divisional, would be necessary and would produce an “immense amount of litigation” before final settlement. Assistant Undersecretary of State Charles Bottomly suggested appointment of a commission to examine titles. He believed that if chiefs would bring problems to the commission, they would come to believe it to be “prudent” to have land
“ascertained and confirmed.”107 Picking up on that suggestion, the Colonial Office suggested that the Government proclaim all land to be stool or family land and that all persons, including companies and corporations, claiming land to be individually owned would have to prove their claim before a quasi-judicial commission to which chiefs might bring their land problems and who might then want to have their land “ascertained and confirmed.”108

In late 1931, Governor Slater advised the Secretary of State against implementing the latter’s suggestion that anyone with a claim to individual title to any land should prove it before a quasi-judicial commission and then register ownership at that time as it would encourage floods of litigation and would complicate, not simplify the title issues. Via the Governor, Attorney General Sidney Abrahams also advised that introduction of a statute of limitations would be a “most unfortunate step” as the people would consider it unknown and “distasteful.” It would advantage the sophisticated at the expense of the simple, Abrahams continued, and would provide terrible problems for the Native Tribunals attempting to apply it. Rather, Abrahams concluded, “gradual pervasion of equitable principles will eventually bring about the desired effect and enable suitable enactment to be introduced.”109

M’Carthy, the Acting Solicitor General, supported Abrahams’ view based on his reading of the Full Court’s decision in Aduwah V Nindom.110 M’Carthy reminded his readers that the doctrine of long possession applied, albeit sporadically and inconsistently, for a long time, but now was well established. He described a recent (unnamed) case affirmed by the

107 BNA CO 96/693/17, Confidential 2.18.1930.
108 Ibid., 5.2.1930.
109 GNA ADM 12/3/50, Confidential, 10.10.1931.
110 Gold Coast Law Reports, F. Ct. 1926-1929, 465.
West African Court of Appeals that gave title to one in undisturbed possession without payment of rent or tribute for fourteen years. He pointed out that this doctrine gave voice to an equitable concept without a “rigid time limit” with roots in indigenous law. He was certain, M’Carthy said, that it would “inevitably” come to be applied by Provincial Commissioners deciding appeals from native tribunals in land cases and ultimately influence those Tribunals.\(^\text{111}\) Jones, the Secretary of Native Affairs agreed that if the Provincial Commissioners followed such equitable principles in their consideration of land cases, no statute of limitations would be necessary. The Colonial Office minuted that the Governor made a good case against land registration/limitations legislation at that time. Alexander Fiddian, a senior official in the West African Department, concluded that ownership issues “should as far as possible be allowed and encouraged to evolve from within” \([\text{i.e. be left to the courts}].\(^\text{112}\) As was often the case with policy initiatives intended for implementation in the Gold Coast, considerations of potential opposition as well as increases in cost and reduction in staff made going forward with a statute of limitations, now deemed to be “inexpedient,” undesirable and the issue disappeared from view.

In 1940, the Secretary of State proposed once again to conduct an inquiry as to native land tenure in West Africa. In connection with this inquiry, he requested and received all of the materials developed during the 1895 Inquiry, Belfield’s investigation, the WALC hearings (and the documentary evidence adduced therein) as well as all of the reports,

\(^{111}\) \textit{Ibid.}

\(^{112}\) BNA CO 96/700/8, Confidential, 10.10.1931. Along with the doctrine of long possession, the British courts now more frequently and regularly were applying the well established English legal concept of laches. In \textit{Adai v. Zacca and Bonso}, [1938] D.Ct. (Land), 7, aff’d 6 WACA 14, the Court held that a transfer of family property would not be set aside when the objecting family members held out the defendant who executed the transfer as the one to deal with the property and left it to him to manage the property. On these facts however, one can equally find that he was merely acting as agent of the family.
memoranda and correspondence compiled with respect to possible land law reform in the 1920's. In providing all this information, Governor Arnold Hodson advised the Secretary of State to be very cautious before undertaking any inquiry, as the people of the Gold Coast were hypersensitive about land issues and it was not then a good time to ask questions about land when, the Governor noted, the institutions of native administration were unstable due to the war.\textsuperscript{113}

Still the issues of individual versus communal tenure, and executive versus judicial control were roiling the Colonial Office. At a meeting with Lord Moyne, the Secretary of State, and other Colonial Office officials, in early 1941, Lord Hailey opined that individualization of land tenure was a “natural process of economic development” but the recognition of proprietary rights without restriction on the power of alienation or mortgaging land might lead to a dangerous situation of rural indebtedness, particularly in the Gold Coast where it had already gone to great lengths. Some stools, he pointed out, had sold off nearly all of their land to “stranger natives.” The difficulty was that there was no land record and no system of registration so that it was not possible at any one time to say without a detailed investigation what was really being sold.\textsuperscript{114}

Despite this mass of information, more data was sought to get at the facts as to alienation of native land. On November 25, 1943, Lord Hailey chaired a meeting addressing the need for information on land tenure so that the courts could handle land questions effectively. The consensus of the meeting was that each colony should create an agency to advise “how best existing systems of land tenure should be adapted or modified

\textsuperscript{113} GNA ADM 12/3/72, Confidential, 6.26.1940.
\textsuperscript{114} BNA CO 847/21/18, 3.18.1941.
to meet the needs of society and economic progress.”

In a subsequent meeting on Lord Hailey noted the role of the courts in shaping land tenure systems and suggested the possibility of establishing “guiding principles” for courts to follow. That suggestion quickly fell by the wayside. A Colonial Office minute notes that the consensus of this second meeting was that it was “undesirable” for courts to handle land questions because judges had little practical experience with African customs and tended to interpret tenure “in terms of European law” – a statement that was dubious at best. The meeting participants recommended establishment of a land tenure committee within the Colonial Office [echoes of WALC] as well as of an outside advisory group.

So at the end of the seventy year period of this study, we find that as to the relationship between judges and the executive concerning land tenure, nothing had changed. Multiple studies had been conducted, almost all of which recommended that the judiciary be removed from involvement with land issues. Many bills designed to achieve reform of land law along English lines (at the same time that officials complained that the courts were interpreting the law too much as if it were English law) had been proposed. Few if any of the studies’ recommendations were carried out, and certainly none of the material ones. Little if anything was done to slow the seemingly inevitable trend toward the “Anglification” of customary law. Their dealings with the land issue demonstrate in the starkest fashion the inconsistency and weakness of the British colonial state in the Gold

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115 BNA CO 847/21/10, 11.25.1943.
116 Ibid., 12.8.1943.
117 Ibid., 12.16.1943.
118 Between 1920 and 1944 the majority of the 19,794 land transfers registered in the Land Registry were in English forms leading to claims of freehold rights; that and the increasing number of execution sales moved more and more land from traditional and customary tenure to English tenure. Sackeyfio, The Stool Owns the City: Ga Chieftaincy and the Politics of Land in Colonial Accra, 1920-1950, 127.
Coast, primarily because of their unwillingness to “risk uprisings in order to achieve the development of mines and plantations. “119

119 Clarence-Smith, supra, 66.
CHAPTER XIV – CONCLUSION

This study, a case study of British colonialism as it was practiced in the Gold Coast, a relatively small non-settler dependency, demonstrates that Britain was never able, nor even willing, to impose its most important policies on its colonial dependents. The story of British rule was one of an inability to take a firm stand as to policies that administrators in Accra and/or London were convinced were good for the British and for their Gold Coast dependents. It was full of variations, inconsistencies and reversals of course in the administration of justice as in most other areas. Thus the answer to the question whether the colonial state had the power to implement its policies consistently over time and whether its policies were coherent and coherently applied, must be a qualified negative. Although Britain undoubtedly had the power to impose its will, it was often unclear as to what that will was and even when determined upon a course of action, it was also too often unwilling or unable to use its power.¹

British inconsistency goes back to the early nineteenth century when government of the settlements was placed in the hands of merchants, then the metropolitan government, then back to the merchants and then back to the government once more. In neither case was the British presence adequate to staff the governing of millions of dependents. Indeed, as G. B. Kay argues, due to the small number of British administrators in the Colony who, he notes, were “instinctively aware, if not fully conscious, of the frailty of their position and knew they could never maintain their power in the face of organized opposition,” the British

¹ Lawrance, Osborn and Roberts, 7.

-586-
exercised "deliberate restraint."² Nor, as Sara Berry has said, was such number sufficient to exercise, with rare exceptions, effective control in order to carry out what the administration set out to do.³ As a consequence, as Richard Grove and Toyin Falola have noted, the people of the Gold Coast had space in which to manipulate the colonial state to their advantage.⁴ The existence of such space gave rise to an unresolved British dilemma: the colonial power was obliged to rely on traditional authorities that they never fully trusted or were able to control. This dilemma is best seen in the problem of the administration of justice in the traditional courts where they could not reconcile British concepts of equity with African notions of fairness that all too often seemed to result in oppression of litigants. Frederick Cooper has described this space as one of power relationships between colonials and colonized and argues that they were not entirely one way.⁵ Thus, the traditional authorities, understanding that the British needed them, were able to obtain concessions because of that need that the educated elites of the coastal communities, with whom the chiefs vied for the role of representatives of the people, could not obtain.

Richard Rathbone persuasively argues that law was a language in which Africans spoke to the colonial state. I have shown in this dissertation that the law was also a language in which the colonial power spoke to its dependents. As Richard Roberts and


⁴ Richard Grove and Toyin Falola, "Chiefs, Boundaries and Sacred Woodlands: Early Nationalism and the Defeat of Colonial Conservationism in the Gold Coast and Nigeria," 1. Indeed, the authors attribute the defeat of conservationism in the Gold Coast to the colonial policy of indirect rule that allowed indigenous authorities power to obstruct the efforts of the colonial government to create forest preserves. Ibid., 2.

⁵ Cooper, "Conflict and Connection: Rethinking Colonial African History," 1521.
Kirsten Mann have argued, British law both facilitated and restrained colonial power. It subjected the colonial people to its sometimes arcane rules while forcing the administration in Accra as well as the indigenous litigants to follow those rules. It spoke in terms of access to British courts and, albeit less effectively, control over traditional tribunals. This dialogue developed continually over the seventy year period considered in this dissertation. African barristers developed great skill in representing their clients’ interests in the colonial courts. They understood and played an important role in the development of an imperial common law in the Gold Coast. Similarly, the Supreme Court, in its rulings on appeals from Native Tribunals, taught the traditional authorities what rules the latter could impose without fear of British intervention, although it all too often appeared that those authorities did not learn the lesson. Nevertheless, by retaining the final word as to decisions of the traditional courts and the meaning of customary law, the colonial state assured its domination. Indeed, as Björn Edsman argued, toward the end of the period considered in this dissertation, rule was becoming more and more direct, particularly with respect to the operations of the traditional courts since the chiefs had utterly failed to accept British limitations on their ability to coerce excessive fines and costs from indigenous litigants.

Crawford Young has argued that the criminal and civil law brought to the Gold Coast from England “was clearly an arm of the overall relationship of dominance between European and African, as the European in most instances held all the trump cards through superior access to and familiarity with the legal framework.”6 While that may have been true in settler colonies, my research leads me to conclude that with respect to the Gold Coast,

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Young has overstated his claim. African barristers, along with their British counterparts, ably represented their clients, whether European or African, in the British courts and prevailed often enough to annoy the colonial administration thoroughly. African barristers represented an elite with whom the colonial administration had to contend. Indeed, Edsman argues, the most famous of Gold Coast barristers, John Mensah Sarbah and J. E. Casely Hayford, saw themselves as modern Africans, British educated and imbued with the principles of the common law and the society that such law represented. Their desire was primarily to take part in the governance of the colony and not, until the very end of the period under study, to separate from Britain. In their ongoing struggles with the traditional chiefs, these educated lawyers saw English law as an engine of social change by which the Gold Coast would come into the modern world. Customary law, they argued, had to be adapted along English lines. Their view never prevailed against the opposition of the colonial government and codification of customary law had to await the work of post-independence jurists. Indeed, it was just this opposition to modernizing that Frederick Cooper saw as the dead hand of tradition and protection of traditional elites that colonialism advanced and supported permitting the chiefs to exploit their subjects while maintaining their privileges. This dissertation demonstrates the essential dilemma of colonial rule exemplified by administration of justice: the British needed the traditional authorities and thus were obliged to permit them to operate courts, courts that the British tried but could not successfully control and whose limitations they never really accepted.

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7 Edsman, 147, 247, 249.
8 Cooper, Colonialism in Question: Theory, Knowledge, History, 3.
Following on the work of Henrika Kuklick and Anthony Kirk-Greene, I have shown that the judges of the Gold Coast, including those who manned the inferior courts, the District Commissioners and District Magistrates, came from the same strata of British society with essentially the same educational background as those who engaged in purely administrative duties and, quite unsurprisingly, held the same innate view of Britain and English law, as Allan Mcphee noted earlier, that such law was the best for any country, not merely England and was superior to that of all other nations and their laws. This assumption enabled the colonial authorities to ignore the necessity for legal knowledge among the men chosen to apply the law in the Gold Coast. Indeed, as Charles Jeffries aptly noted, in selecting the officers of the inferior courts, the Colonial Office deemed legal knowledge and credentials as of lesser importance than their personality and ability to get along, reflective of the Colonial Office’s “anti-vocational prejudice.”\(^9\) Too often they were men who had failed in their profession in Great Britain but who, as Sir Alan Ward has written, came into the Colonial Service with the support of a patron rather than on their own merits.\(^10\) Despite repeated demands from the colonial administrations for men trained in the law, the Colonial Office sent out non-lawyers with only superficial and inadequate training in legal subjects. They were primarily administrators who performed magisterial duties that often conflicted with their administrative roles. Thus, the vast majority of the men who served as judges, who oversaw the native tribunals in the first instance, the judges of the inferior courts, had no judicial independence and no tenure. They were subject to removal and transfer at the whim of the senior executives. Only the judges of the Supreme Court

\(^9\) Jeffries, 143-144, 146.

\(^10\) Ward, 301.
had a substantial measure of independence and a limited form of tenure, but even they were subject to transfer.

I have also shown that the appointment process, open to men of color in the mid and late nineteenth century when Charles Bannerman served as Chief Magistrate and Governor of the British settlements and Francis Smith was a Puisne Judge and Acting Chief Justice during a twenty year career, became tainted with a racism expressed as concern that an African judge might be influenced corruptly by friends and family resulting in decisions determined by personal connections rather than the evidence. No evidence of any such corruptly influenced results were seen in the archives, but the calumny persisted. Thus despite a goodly number of indigenous barristers with excellent legal educations and skill as advocates and even intellectuals – John Mensah Sarbah and J. E. Casely Hayford to name but two – only a few Africans were appointed to positions as inferior court judges and the naming of Woolhouse Bannerman to a position as Puisne Judge was held up until 1935 after he had served with distinction as a Police Magistrate and Acting Puisne Judge on numerous occasions for sixteen years.

Until 1910, the Supreme Court asserted plenary subject matter jurisdiction in the Gold Coast, a state of affairs that Chief Justice W. Brandford Griffith, Jr. felt to be one that served the people. Thereafter, it had only appellate jurisdiction as almost all personal and real disputes, the latter, discussed below, being dealt with by indigenous courts subject to appeal to District and Provincial Commissioners, administrative officers, who could retry the cases de novo. Even when it did have jurisdiction, the British courts were obliged by the Supreme Court Ordinance to decide cases involving indigens on the basis of traditional custom and law. The courts were thus obliged to determine what the applicable custom
was, a determination that was deemed to be one of fact to be proven by evidence. The evidence they heard was often faulty and incomplete and the courts were compelled to create a hybrid common law that incorporated indigenous custom and English juridical principles that were felt to comply more with the ideals of English equity than traditional custom would permit. The Supreme Court exercised ultimate control over customary law through application of the repugnancy doctrine that permitted the judges to apply their own moral views to traditional mores that may have endured for hundreds of years but which did not align with British values. Moreover, in part because of their unfamiliarity with customary law, the British courts asserted the applicability of English law whenever the opportunity arose, such as where they decided that evidence of custom was insufficient and in cases where the judge could conclude that traditional law did not encompass the matter in issue, corporations, for example, that the courts claimed were unknown to traditional custom.

Even such restraint as the Supreme Court Ordinance imposed on the colonial courts in civil litigation tended to disappear in criminal actions where the Supreme Court continued to exercise an almost complete monopoly on the enforcement of criminal law as it had done since execution by Fanti chiefs of the Bond of 1844 that authorized decision in criminal cases on the basis of rules and principles imported from the metropole that were often at utter variance to those by which the indigenous people had lived for centuries. English procedure required the trial of most felonies by juries, but the colonial administration, fearful of how local barristers might influence local juries, favored trial by a judge with assessors whose opinions might be disregarded by the presiding judge. Such a procedure reduced the space in which colonial dependents could act while seeming, at least to the British, to allow them rights similar to, if not the same as, those exercised by the citizens of the
metropole. English criminal procedure, together with the repugnancy doctrine, also limited the space in which Gold Coast Africans could engage the colonial power and insured that ultimate control over the provision of criminal justice remained in British hands.

The weakness of the colonial administration in dealing with the chiefs and native judicial functions had great consequences. For the entirety of the period under consideration here, colonial administrators complained of corruption and injustice through political decisions and imposition of excessive costs and fees seen by them to be rampant in the native judicial system. Moreover, these administrators often stated that they knew of the reasons for such conditions. Yet they took no effective steps to eliminate oppression of indigenous litigants by traditional tribunals because they could not afford to undermine the prestige of the chiefs through whom they had decided to rule, albeit toward the end of the period under consideration, they did mitigate the problem by reducing the role of hereditary chiefs and their councils in the formation of native tribunals.

The archival evidence shows repeated efforts to limit the ability of chiefs and their advisors to oppress litigants. Yet even when such efforts resulted in legislation, limitation of fees and fines were ineffectively enforced, if at all. District Commissioners to whom fell the task of enforcing such limitations were too few in number and too often absorbed in administrative tasks to review the records of native tribunals that were themselves incomplete. Moreover, the administration responded to chiefly complaints that fees and fines were necessary to finance their local government and that too much pressure on them would disable them from carrying out the governing role the British assigned to them. In addition, the British seemed to have one eye fixed on the coastal intellectual elite, men with European education and often substantial financial means, whom they feared as a locus of
anti-colonial agitation. They chose to rely on the chiefs, the traditional rulers of the people rather than coastal men, owners and editors of the newspapers that molded public opinion among their readership and lawyers who held themselves to be the leaders of the people and who resented the traditional authorities whom the coastal elite saw as retrograde and ignorant. Consequently, the British could not or would not bring themselves to take the steps necessary to eliminate perceived corruption effectively and to bring to the people the justice they so loudly and frequently proclaimed to be their right and one of the main purposes of British colonialism on the Gold Coast.

Differently from the manner in which the French viewed the educated elite in its West African dependencies, the British disdained and resented the educated class in the Gold Coast and particularly the lawyers. To the extent Britain rationalized its imperial rule there, it did not do so to make Gold Coast indigens into Britons or to engage these educated Gold Coasters in governing the colony on any superior level until relatively late in the colonial era. Rather, as I’ve repeatedly noted herein, Britain turned to the traditional authorities, whom it saw as the natural leaders of the people, to act as its agents. Yet, it simply could not reconcile its perceived need to rule through these traditional authorities with its repeated proclamations of the importance of delivering justice to its Gold Coast dependents. It could not exercise the required close supervision of the manner in which the chiefs conducted their courts without undermining the latter’s prestige and status that the chiefs remonstrated were necessary to permit them to maintain the respect and obedience of their subjects. The colonial authorities repeatedly condemned the imposition of fees and fines deemed to be excessive, yet it deprived the native authorities of revenue adequate to support their
traditional states and left them only with those same fees and fines with which to finance local government.

By contrast, Alice Conklin argues that prior to World War One, bringing to its dependents in West Africa French educational and judicial policies constituted what it meant to be “civilized, French and republican.” Africans, particularly those in the so-called Quatre Communes of Senegal, were to be assimilated and were encouraged to seek a French education and to adopt the cultural mores of the colonial power. It was not until after World War I that the metropolitan authorities altered their views of their African dependents and gave up on assimilation, turning to a policy of “association.” The French determined to keep the chiefs in their traditional positions where, having received the benefit of French training, they in turn could “civilize” the Senegalese masses. They would be consulted but not really be involved in policy decisions.  

Nevertheless, some Africans, principally the “originaires” of the Quatre Communes, would be entitled to vote in local and imperial elections. Men, such as Blaise Diagne, engaged in politics and won a seat in the French National Assembly. No Gold Coaster ever sat in the British Parliament although, after passage of the Native Administration Ordinance of 1927, chiefs were consulted as to legislation that directly affected them. It would be interesting to compare the attitude of the British and the French toward their educated African dependents and to examine why the French were prepared to accept Africans as metropolitan legislators and even ministers of the metropolitan government, roles that subsequent African leaders such as Leopold Sedar

\[\text{Conklin, 174-175, 188.}\]

Senghor and Felix Houphouet-Boigny played in the 1950’s, while the British were unprepared until the eve of independence to give Africans a significant role in their colonial governments, much less that in London.

Sometimes it seemed that the British were frustrated at their inability to convince the traditional authorities whom they wished to support to adopt British ethical notions, to separate their personal interests from their obligations as judges. Yet this frustration derived from their inability to understand the role that the chiefs had played throughout their history as mediators and conciliators who rendered decisions for one side or the other only as a last resort and who were deeply involved in the outcome of the disputes brought to them. The British wanted them to act like European judges, independent of the parties, while carrying out traditional roles. These inconsistent roles could not be easily, if at all, reconciled even had the colonial power made the effort to do so.\(^\text{13}\) The primary consequence of Britain’s weak and inconsistent judicial policies was exactly what the British did not want: reduction of the stature of the chiefs to the point where by 1944 they were ready, indeed eager, to cede all but a symbolic role in the operation of Native Tribunals. At the same time, perhaps not intentionally, it allowed the indigenous courts to continue to impose excessive fees and costs such that perceived corruption in the administration of justice outlived the reforms of the 1944 Native Courts Ordinance (as the Havers Commission sadly learned) and apparently continues to this day. Indeed, in 2013, large

\(^{13}\) The French suffered from the same dilemma in their West African dependencies, and essentially for the same reasons: an unwillingness to provide the manpower necessary to supervise the indigenous courts and to undermine the traditional authorities upon whom they relied. Ruth Ginio, “Negotiating Legal Authority in French West Africa: The Colonial Administration and African Assessors, 1903-1918,” in Intermediaries, Interpreters, and Clerks, African Employees in the Making of Colonial Africa, edited by Benjamin N. Lawrance, Emily Lynn Osborn and Richard L. Roberts, Madison, WI: The University of Wisconsin Press, 2006, 115-135.121, 123. See also Conklin,86-87.
billboards dotted the City of Accra, Ghana advising the people that they were entitled to justice and that they did not have to pay bribes to judges or court officials in order to obtain it. Crawford Young argues that “personalization of power by the ruler,” something that the traditional chiefs manifested from pre-colonial days, persisted into the era of Ghanaian independence. Inextricably connected to this exercise of personal power was the corruption of absolutism expressed in clientism where loyalty was exchanged for material advantage.\textsuperscript{14} He also points out that post-independence judges could not always be relied upon to cooperate with prosecutions initiated for political reasons as “the culture of the law [inherited from the British] retained its hold on many judges (often still expatriate) long after other components of the state had been placed under party command.”\textsuperscript{15} Nevertheless, he goes on, judicial personnel felt the same “survival pressures as other state agents” so that “the administration of justice became more subject to monetary intervention or social power disparities.”\textsuperscript{16} Thus, one can see the line drawn from the failure of the colonial power to eradicate corruption to the problems of the postcolonial state.

Kwame Nti argues that colonialism in the Gold Coast was, as elsewhere, a “project of control,” with land as the objective of colonial economic and political power, but a project that failed in the face of tenacious resistance.\textsuperscript{17} The Administration’s policy as to


\textsuperscript{15} \textit{Ibid.}, 137.

\textsuperscript{16} \textit{Ibid.}, 173-174.

\textsuperscript{17} Nti, “This is Our Land: Land, Policy, Resistance, and Everyday Life in Colonial Southern Ghana, 1894-7, 13.
concessions for mining and forest conservation is evidence of British weakness in the face of concerted opposition. For example, British experts claimed that the rain forests were being destroyed by thoughtless lumbering, but the colonial government could not bring itself to put into effect legislation necessary to preserve the forests, forests that they asserted were vital for cocoa cultivation. A weakened bill was passed in 1912, but despite repeated remonstrations from the colonial administration in Accra, the Colonial Office dithered about seeking sovereign approval of the legislation and eventually allowed it to lapse. Only after another fifteen years was an ordinance enacted and put into effect, and then only after the proposed legislation was amended to reduce control by the government over proposed forest reserves. In part this weakness was a result of the control of the land by the traditional chiefs. They, not the British, owned the land and retained and exercised their power to allocate parcels of land to their subjects for agriculture or to award concessions for mineral or palm oil exploitation. In part also, the ineffectiveness of both concessions and forest legislation may be attributed to the dispute between those who favored administrative control and the indigenous population who steadfastly opposed removal of the judiciary from their role in approving concessions and forest preserve creation and operation. In the latter case, the executive was able to minimize the role of the judiciary by limiting its jurisdiction to review of decisions of a quasi-judicial forests commissioner, but despite almost unanimous recommendations of a specially appointed Commissioner and a departmental committee and the testimony of some of the judges, including the former Chief Justice, W. Brandford Griffith, Jr., that much of what the courts were being asked to do was properly and better done by administrative officers, the executive could not dislodge
the judiciary from the work of approving concessions, primarily because the Gold Coast peoples trusted the judges far more than they did the administration.

During the later 1920's the Government once again proposed a firmer land policy that would allow for greater security of title, an objective sought by European mining and other business interests. A Statute of Limitations on land claims, a proposal favored by the Parliamentary Undersecretary at the Colonial Office, but that was utterly contrary to customary law was drafted and placed before the Legislative Council where it met the opposition of the African members. Once again, the Government backed away from taking the steps necessary to implement a policy that it was convinced was the correct one. Proposals to permit registration of land titles did not even make it that far. These failures clearly support Berry’s argument that colonialism was “a process prone to contradiction, fragmentations, and deep structural weaknesses.”

I have argued in this study that the colonial judiciary was not independent of the Administration. This lack of total independence continued during the entirety of the period under study. District Commissioners were political officers who exercised judicial functions both directly and as supervisors of native tribunals in contravention of British beliefs of judicial independence even after the 1935 reforms that created the post of District Magistrate and granted a substantial jurisdiction to those officials. This lack of independence was readily acknowledged by Colonial Office officials such as Grattan Bushe, the Colonial Office Legal Adviser, as well as people such as Sidney Abrahams, who served as Gold Coast Attorney General. Yes, they acknowledged that it was wrong but accepted such lack of independence because the British were unwilling to spend the money

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necessary to separate the executive from the judiciary. Moreover, the power to transfer or compulsorily retire judges, a power that the Colonial Office was not loathe to exercise as we saw in the case of Chief Justice Deane, hung over the heads of judges with what effect we cannot prove. Moreover, the Colonial Executive all too often exerted undue influence on judges for political purposes. Indeed, some District Commissioners made no bones about bringing and deciding cases in order to make political points.

It is difficult to determine the basic reasons for British behavior in administering justice in their dependency on the Gold Coast. They proclaimed the necessity for the rule of law, but their conduct oftentimes belied that proclamation. Some historians, such as Anthony Haydon, assert that Britain’s primary interest was to maintain peace and order at the least possible cost and that all else took a back seat.\textsuperscript{19} We have seen how Britain compromised its principles almost continually in order to achieve the objectives that Haydon noted. Nevertheless, the British brought to the Africans the traditions of the British courts and English law, setting before the native tribunals the model of organized procedure that constituted a unifying force and a tendency toward cohesion.\textsuperscript{20}

British administration of justice on the Gold Coast destroyed much traditional behavior and encouraged corruption by indigenous authorities, yet the echoes of British legal imperialism may be heard in post-independent Ghana where English common law governs most civil disputes and British style courts continue to exercise a measure of control over those traditional tribunals that still function. This is not to justify British legal imperialism


\textsuperscript{20} Elias, The Impact of English Law on Nigerian Customary Law, 30.
uncritically. Yet the British, despite having replaced many traditional legal concepts with cognate English rules, left a heritage that the independent successor state valued and continues to value. Resort to a judicial process, either traditional or British, for the resolution of disputes in place of violence became the habit of the indigenous people previously accustomed to settling disputes through violence as witness the many violent acts between Fanti states and the many nineteenth century Ashanti incursions, protection against which was a rationale for British intervention in the first place. However, problems with the traditional tribunals that existed at the outset of the colonial venture in the Gold Coast remained until the close of the period under study and even afterward. The British repeatedly enacted legislation purportedly designed to overcome those problems but declined to establish a corps of administrative officers large enough to require the chiefs, who were their clients and agents, to abide by such legislation systematically, thereby encouraging, at least indirectly, the kind of corruption it proclaimed to be attempting to root out.

The British were caught in a dilemma between their belief in the rule of law and their need to rule their dependents authoritatively, between the pressure applied by educated attorneys, merchants and ministers for a greater role in government and less reliance on traditional authorities and their commitment to indirect rule through those authorities. Their inability to resolve this dilemma produced less than perfect justice, but was, I conclude, sufficiently satisfactory from the British perspective to resolve most legal disputes while maintaining a relatively peaceful and stable society in which small farmers could raise and sell their cocoa and coastal merchants and lawyers could prosper at the least cost to the British taxpayer. The dead hand of tradition that Frederick Cooper has argued was
imposed on Gold Coast society was, in the final analysis, really not so very different than that which was imposed on English and other common law societies by a legal system of reliance on precedent. As a technique of colonial administration it was, despite the fits and starts of colonial policy and a failure to eradicate seeming oppression of litigants in traditional courts, one that was reasonably effective.
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