##  JUURMAL UF ETHIUPIAV LAW


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The Journal of Ethiopian Law was inaugurated by His Imperial Majesty Haile Selassie I in the summer of 1964 as an important step in the development of Ethiopia's legal system. Subsequently, the Board of Editors of the Journal has invited those who are interested in the continuation and expansion of the Law Journal's activities to express their support by becoming Patrons of the Journal of Ethiopian Law.

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## IN MEMORIAM

We are most profoundly grieved at the death of H.E. Ato Nerayo Isayas who was a distinguished member of the Editorial Board of the Journal of Ethiopian Law since its inception until his death on October 13, 1968.

The late Ato Nerayo Isayas who was one of Ethiopia's first and leading lawyers was not, as we all know, limited to distinguishing himself in his official duties in the administration of justice, but was also an energetic participant in the promotion of legal education in Ethiopia.

Through the untimely departure of H.E. Ato Nerayo Isayas, the legal profession of Ethiopia and the Journal of Ethiopian Law have lost one of their most active members. We, the Editorial Board and Staff of this Journal and the Faculty and Students of the Haile Sellassie I University Law School, share the deep sorrow of his family and friends.


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# ANNUAL REPORT OF THE DEAN <br> 1967-68 (1960 $\quad$ E.C.) <br> Quintin Johnstone, Professor and Dean, Faculty of Law, Hale Sellassie I University 

This report, prepared at the close of the $1967-68$ academic year, is principally directed to alumni and friends of the Law Faculty in Ethiopia. The advice and assistance of these two groups are essential to our success, and they must be kept informed of what we are doing and the problems we face. What follows is a summary of Faculty accomplishments during the past year and our major needs for the future.

[^0]demic performance by an LL.B. student; Berhanu Kidane, best academic performance by a diploma student in the English section; Alemayehu Gulelat, best academic performance by a diploma student in the Ambaric section; Seifu Tekle Mariam, best legal writing (LL.B.), honorable mention, Billilign Mandefro; Girma Sellassie Araya, most improved student, honorable mention, Eden Fasil and Lemma Gutema; and Seifu Tekle Mariam, James C. N. Paul prize for outstanding extra-curricular contributions.

Ethiopian University Service prior to graduation will continue as a requirement for all day LL.B. candidates in the Faculty of Law, except for the few entitled to exemptions. As in the past, law students will be assigned to legal work, mostly in Government ministries. However, the University has decided that all unexempted degree candidates, ours included, should be sent on service prior to their last year of classroom study and should perform their service outside Addis Ababa and Asmara. Heretofore, law students have gone on service after completing all course requirements for their degrees, and most have worked in the capital. The advantage of the University rule is that students will bring back to their classes the realism and understanding of a year's employment in provincial communities, thereby enriching the subsequent learning experience of themselves and their fellow students. We are gradually phasing into compliance with the University regulation by sending some of our Law III students on service this coming year, along with all of our unexempted Law IV class. The percentage of Law III going on service will be increased over the following two years until the shiftover is complete.

Reflecting both the quality of our students and the shortage of trained lawyers in the Government, this past semester we had far more requests for service students than could be filled. After considerable negotiation and regretful disappointment of some ministries and agencies, final EUS assignments for the coming year are these: Chilalo Agricultural Development Unit-Tesfaye Berhane; Ethiopian Electric Light and Power Authority-Essayas Haile Mariam; Ministry of Finance-Alemseged Tesfai, Gedie Ammanuel Kidane Mariam, Girma Selassie Araya and Tesfa Ayana; Ministry of Justice-Aberra Degu, Alemu Fokion, Amha Tsiyon Domenico, Eden Fasil, Eyassu Imnetu, Fisseha Yimer, Gideon Agegn, Girma Haile Gebriel, Hailu Chernet, Johannes Habte Sellassie, Kebede Worke, Kifle Lemma, Weredewold Woldie and Yoseph Gebre Egziabher; Ministry of Land Reform-Alemante Gebre Sellassie and Bilillign Mandefro; and Ministry of Mines-Alemayehu Seifu Zawdie and Tesfaye Chemer.

Student extracurricular activities remained much the same as last year. In several of our publication ventures, notably the Journal of Ethiopian Law and the Consolidation of Ethiopian Laws, student translation work continued to be essential. Student editors also aided materially in case selection and the many miscellaneous functions required in putting out the Journal. On their own, students published "The Balance and the Sword," the annual Law Faculty yearbook. For a variety of reasons, the Law Student Association was less active than usual, but it did sponsor several social evenings and lectures, as well as the television program, "You are the Judge," and helped collect additional funds for Law House.

Staff. The teaching staff during the year consisted of twenty teachers on the full-time staff for LL.B. and English diploma classes and eighteen additional teachers on the part-time staff for Amharic diploma and certificate classes. Of paramount significance was the appointment of tbree Ethiopians to next year's full-time staff: Fasil Nahum, Semereab Michael and Worku Tafara. All three are high-ranking

## ANNUAL REPORT OF THE DEAN

graduates of our Law Faculty and next year will teach both degree and sub-degree courses. These are the first Ethiopians to join the full-time teaching faculty. Others will be appointed in the near future so that within a few years it is expected that most of the full-time teaching staff will be Ethiopian.

Some new courses have been added to the teaching obligations of the full-time staff. New LL.B. courses this past year were Introduction to Private Law (Law D), Revolutions and Constitutional Change in History (Law I), Employment Relations Law (Law III and IV elective), Evidence (Law III), Taxation (Law IV elective), Transnational Transactions (Law IV elective), International Organizations (Law IV elective) and Urban Problems and Local Government (Law IV elective). Approved for next year are these new LL.B. courses: Government contracts (Law III elective), The Legal Profession in Ethiopia (Law IV), Agricultural Land Reform (Law IV elective), Law of Natural Resources (Law IV elective), Legal Analysis (Law IV elective) and Islamic Law (Law IV elective). Also, this coming year, Administrative Law and Advanced Penal Law II (Disposition of Offenders) will be new diploma offerings.

In addition to teaching, the full-time staff has done a substantial amount of research and writing, helped administer the many activities that the law school is engaged in, and participated in important but time consuming University committee work. A brief review of but some of the non-teaching work of this staff is as follows:

James C. N. Paul. Is the Academic Vice President of the University, but remains a member of the Law Faculty; has been a most helpful adviser and counselor to the Law School all year and somehow found time to see through the printers Volume I of his book on Ethiopian constitutional development and to substantially complete Volume II.

Richard Cummings. Took over as principal Faculty editor of the Journal in the latter part of the year, prepared supplemental international law teaching materials and has several articles under way.

Harrison Dunning. Assistant Dean in charge of physical plant, non-teaching staff and miscellaneous problems; Chairman of the Curriculum Committee; member, University Faculty Council; completed an article on comparative eminent domain law and supervised our old Ethiopian judgments project.

William Ewing. Chairman of the Law School's Student Relations Committee, key member of the University Student Affairs Committee, in charge of the Consolidation of Ethiopian Laws project.

Stanley Fisher. Chairman of the Research and Publication Committee; supervisor of the lexicon project; by the close of the year had in the hands of the printer the manuscript for his comprehensive book, Cases and Materials on the Ethiopian Law of Criminal Procedure.

Jean-Denis Gagnon. Completed teaching materials on labor law and on extra-contractual liability, is working on several labor law articles.

Frank Horowitz. Peace Corps volunteer who came to us following a year of secondary school teaching in Ethiopian schools. Did considerable tutorial work on student writing assignments, gave special tutoring to students on academic probation, assisted Mr. Marshall in student advisory work and helped in Law House fund raising.

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Mechthild Immenkotter. Continued in residence during the first semester on a grant from the German Government to complete her book on Ethiopian commercial law.

Michael Kindred. Assistant Dean until the end of the first semester, Secretary of the Executive Committee of the Faculty Council, translated for publication two important civil law articles, preparing an article on rights of minors.

Lawrence Knowles. Chairman of the Law House Committee, completed revised teaching materials on Legal Process and an article on the Ethiopian legal profession.

George Krzeczunowicz. Completed two articles on civil code problems; on leave second semester working on his treatise, Ethiopian Law of Extra-Contractual Obligations.

John Marshall. Assistant Dean, beginning the second semester, in charge of student counselling, registration, admission and the extension program. Member, University Faculty Council. Preparing teaching materials for administrative law and also taxation. Has several articles in preparation.

Paul McCarthy. Publications business manager. Completed article on De Facto Business Organizations in Ethiopia, included in this issue.

Paul Ponjaert. Assistant to Dr. Vanderlinden in the documentation and bibliographical work of our Center for African Legal Development.

Peter Sand. Chairman of the Library Committee. Completed a series of articles on Ethiopian law, and is working on teaching materials for the Ethiopian law of successions and family law and a manual on Ethiopian law of successions.

Norman Singer. Formal or informal faculty adviser on all student activities; worked on several field research projects of a legal-anthropological nature; has three monographs on Ethiopian legal institutions completed or near completion.

Zacharias Sundstrom. Completed a three-volume set of teaching materials on Transnational Transactions.

Peter Strauss. Held primary responsibility for the Journal of Ethiopian Law during most of the year; editor of the new English edition of the Fetha Negast, soon to be published; completed a supplement to our penal law teaching materials; has a major article under way on penal law; working on a decision theory article with Michael Topping; Chairman of the New Appointments and Promotions Committee; Chairman of the Honor Board.

Michael Topping. Prepared a monograph, Introduction to Roman Law; working on a decision theory article with Peter Strauss and on a study of Ethiopian insurance law.

Jacques Vanderlinden. Director of the Center for African Legal Development. Has under way monographs on the Ethiopian Law of Persons, Ethiopian Law of Marriage, and Ethiopian Legal History.

Since the inception of the extension program, we have been most fortunate in our part-time certificate and diploma staff, a dedicated group that has added teaching duties to already busy and exhausting schedules. Particular commendation goes to our provincial teachers: Getahun Damte in Harrar, Berhanu Bayih and Judge

## ANNUAL REPORT OF THE DEAN

Kassa Beyene in Asmara and Ababiya Abajobir in Jimma. These men have not only started new programs this year, but have had to be responsible for considerable administration as well. Much missed will be Ababiya Abajobir who is going abroad for special study. He did a remarkable job in Jimma and has shown the great intellectual and professional potential of provincial extension courses.

Special mention should be made of two staff members whose contributions during the year were particularly notable: Mrs. George Krzeczunowicz, who took over as Administrative Assistant and Registrar, ably performing difficult and often frustrating jobs; and Mrs. Joseph Grunfeld, an experienced lawyer, who was of invaluable help in preparation of the Consolidation of Ethiopian Laws.

Eight members of the full-time teaching staff completed their work with us at the end of the year and returned home; four will continue teaching law: Peter Sand at McGill University, Stanley Fisher and Paul McCarthy at Boston University and Lawrence Knowles at the University of Louisville. Peter Strauss will be on the staff of the Solicitor General of the United States; Jean-Denis Gagnon will be in Montreal private practice; Norman Singer in advanced graduate work at Harvard University; and Frank Horowitz will be completing his law studies at the University of California, Los Angeles. In addition Alan Butler, our libratian, left to become head librarian at Chung Chi College, Hong Kong.

Foreign Funding. Establishing a new law faculty of high quality is a tremendously expensive endeavor. Financial help from foreign governments and foundations has greatly assisted Haile Sellassie I University in being able to create the kind of high level Law Faculty that it now has. The largest single donor has been the Ford Foundation, a benefactor that has just made another large grant to the Law Faculty supplementing the Foundation's major grant of several years ago. The new allocation of funds is to be spent during the academic years 1968-69 and 1969-70. For our foreign assistance, we are most grateful.

Library and Documentation. Library holdings continue to grow. Including books on order, the Law Faculty collection consists of about 15,000 volumes and, in addition, we currently are receiving 300 periodicals. In order to house new acquisitions expected during the next two years, library space is being expanded by enclosure of the portico area on the west side of the main law building. A major supplement to the library's holdings will be the great collection of microfiched comparative African legal materials, both legislation and articles, now being assembled by the Law Faculty's Center for African Legal Development, largely financed by the Belgian Government, and under the able directorship of Dr. Jacques Vanderinden. Toward the close of the year, the first microfiche duplications were made and delivered to the Law Faculty, starting what will be a regular flow of such documentation. The Center has been concentrating on the collection of materials from 1946 to date; but with additional funds just obtained, it will soon expand its acquisitions to include materials back to 1900. An extensive bibliography of books, articles and other documentation on African law is also being prepared by the Center, and the first installment of this bibliography was published a few months ago.

Law House. During the first semester, construction began on Law House, our student residence hall and meeting center made possible by generous contributions of hundred of individuals and organizations. The start of building was delayed somewhat and costs increased by a last minute relocation of our structure required by a determination to run a large sewer line through our original site. Law House is situated on the main University campus several hundred metres from our classroom buildings. Completion is scheduled for shortly after school reopens this next
semester. The Law Faculty is deeply appreciative of the many gifts from our friends that are enabling this much-needed structure to be built. It is the first university building in Ethiopia to be financed by public subscription. We plan that Law House will not only be a residence for our students, but also an important center for professional gatherings of Ethiopian lawyers, judges and law students.

Needs and Problems. One of the educational success stories of modern Africa has been this Law Faculty. In only five years, a law school has been established that is as good as any on the continent. But as with every institution, the Law Faculty has needs and problems that must be frankly recognized and worried over if we are to progress or even hold our own. Smug satisfaction with accomplishments of the past and complacence toward threats of the future can only mean deterioration and inevitable drift into mediocrity. The difficulties we face must be recognized and our alumni and friends outside the University should be made aware of them, for educational progress in modern Ethiopia requires understanding and help from many sources. This is especially true of a professional school.

In my view, among the more important problems and needs of the Law Faculty are these:

1. Transition to a predominantly Ethiopian full-time teaching staff. To develop such a staff of high quality and vitality is our major problem in the immediate future. I am confident that Ethiopians of high intellectual potential can be attracted to our teaching staff. But converting beginners of promise into top flight teachers and scholars is more difficult. Our new Ethiopian teachers should be given assistance and encouragement: adequate salaries and rank, opportunities for forcign study when needed, prompt promotion when earned, teaching loads light enough to make writing and research possible, and assurance of publication for writing that merits it. Ultimately, however, much will depend on the degree of commitment of the Ethiopian teachers themselves. It is they who must perform. Others can only provide opportunities.
2. More degree students. Ethiopia, to a greater extent than any other major country in Africa, desperately needs more well-trained lawyers and judges. Our subdegree programs are a helpful stop-gap panacea but not a solution. There must be a greater output of well-qualified LL.B. graduates. However, our Law Faculty is not doing enough to fill this need because we do not have a sufficient number of degree students. Yet we now are equipped to handle at least double our present LL.B. enrollment without impairing the quality of our education. More students of ability want to enter the Law Faculty than we are permitted to take under present University quota restrictions. Improvement in this situation is dependent on such factors as manpower - allocation studies more realistically reflecting the contribution of and need for law-trained personnel; a higher University quota of students for the Law Faculty; and in the long run, a much larger University enrollment, thus providing a greater pool of students from which we and other faculties may draw.
3. More research and writing on high priority Ethiopian problems. Our Faculty has done a good job in preparing course teaching materials, particularly for code courses. In my opinion we should now start giving increased attention to basic research on the legal problems of Ethiopia, with special stress on the role of law in accelerating development. This is a difficult assignment and one requiring interdisciplinary competence and cooperation. It also should entail more consideration of comparative law of developing countries-of the ways that other nations with comparable problems have used law as a development tool. The tasks are hard ones; but if done well, the pay-off for Ethiopia should be great.

## ANNUAI REPORT OF THE DEAN

4. Curricular improvement. We have a fairly broad and satisfactory. LL.B. curriculum, but 1 think it can be improved. It is unduly heavy on private law subjects and does not concentrate enough on crucial Ethiopian problems. A serious difficulty is lack of available data on the effects of existing laws and the probable implications of recommendations to improve these laws. There is relatively little accurate and systematic writing about the way Ethiopian society operates that can be used to evaluate the needs of the legal order. Thus curricular improvement is dependent in part on more research and writing of the kind mentioned in the paragraph just above, research and writing by both legal scholars and social scientists. At the certificate and diploma levels, special curricular difficulties exist because we need to think through more carefully what we are trying to accomplish with these programs and then what courses and course coverage can best achieve our objectjves. In particular, renewed attention should be given to what distinctions there should be between certificate and diploma offerings and the kinds of students each should attract. The demand for sub-degree extension law study in Ethiopia is tremendous, and we have a functioning system almost unique in the world. We must make sure that we are getting the best possible results from these efforts.
5. An active and meaningful alumni association. Now that the new Association has been formed, it needs to be made useful, for a mere paper organization is of no value. We have hopes that it will begin to assume some of the functions of a bar association or law society, focusing attention on professional problems, developing standards of conduct for bench and bar and creating a sense of professional identity on the part of those who are law trained. Regular and frequent meetings are essential. Conceivably the Association could work cooperatively with the Faculty in preparing and distributing to lawyers a series of short manuals and monographs on Ethiopian law. Through group meetings and individual advisory sessions, the Association might also be of help in easing the transition of our students from academic life to the realities of the professional world.
6. A satisfactory physical plant. We now occupy a set of buildings that are shoddy, poorly maintained and ill-suited to a well-functioning law school. For the next few years we can get by with what we have, bat plans should soon be made for a new building that will comfortably house under one roof all classrooms and offices, as well as a library attractive for study and large enough to accommodate anticipated growth in holdings. We are crowded now, but conditions will become much worse as enrollment grows and the library expands. Crucial to any new law school structure is inclusion of the full law library in that structure, and this library should be controlled by the Law Faculty.
7. Fruitful ties with the outside world. I see some danger that over the next decade the Law Faculty may become unduly narrow in its professional concerns and increasingly isolated from intellectual and educational developments outside Ethiopia. This is a big country and such is the tendency of professional schools in big countries as they become locally staffed. The Faculty should concentrate heavily on Ethiopian institutions and problems, but if it becomes too inner-directed and parochial the education it offers will suffer. A proper balance should be maintained, and the Ethiopian staff should retain familiarity with relevant laws, legal literature and legal personalities abroad-particularly those in other African countries. This will enrich our teachers' knowledge and broaden their frame of reference for more creatively analyzing the Ethiopian legal scene. It will also make them intellectually and pedagogically more alert and exciting, and enable Ethiopia to contribute its fair share to international scholarship.

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## REPORTS

The following are nine cases decided by the Supreme Imperial and the High Courts of Ethiopia. The Ambaric judgment is official and always precedes the English. It is important to note that in those cases heard before mixed benches of both Ethiopian and foreign judges, two separate opinions are written, one in Amharic and one in English. These opinions are not translations of one another, but are independent judgments based upon common agreement among the judges as the to principles and final outcome of the case.

The Journal of Ethiopian Law is a scholary publication, addressing itself to all members of the profession. Its purpose in publishing judgments is to make known to the profession interesting decisions which in the opinion of the Board and Editors raise important issues of law.

In selecting a particular judgment for publication, the Board and Editors do not wish to convey the impression that the judgment is definitive on any proposition for which it may stand although the quality of the decision is always an important consideration in determining whether it should be included in the Journal. When in the opinion of a Board Member or an Editor, a judgment is of interest and raises an important issue of law but there is reason to believe that aspects of the decision are contestable or that the result reached by the court is not clearly the only supportable conclusion, a note on the case is often included. The absence of such a note is not however to be interpreted as indicating complete finality on the issues raised in the case, as it is expected that members of the profession on all levels may hold differing opinions on the merits of any judgment published herein.

The Members of the Board and The Editors.

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# SUPREME IMPERIAL COURT 

Div. No. 2

Justices:
Bal. Haile Mariam
Dr. W. Buhagiar
Ato Mekuria

## THOMAS HALLOCK v. DOROTHY HALLOCK

## Civil Appeal No. 247/50

Private International Law - Jurisdiction - Domicile - Nationality - Residence.
On appeal from a decision of the High Court which held that it had no jurisdiction to entertain the petition of the appellant who is seeking a dissolution of marriage from his wife on the ground of desertion.
Held: Decision affirmed.

1. Where a suit is between two foreign nationals involving their personal status, the fact of residence of one or both of them in Ethiopia is not sufficient to give jurisdiction to an Ethiopian Court.
2. A party seeking to use the Ethiopian process for the determination of matters rclating to the dissolution of marriage must establish that he is a national or at least a domiciliary of Ethiopia.
3. The contrary provisions of the law of any other country, which requires merely the simple fact of residence, has no extra-territorial effects and is therefore not binding in Ethiopia.

This is an appeal from a decision of the High Court which held that it had no jurisdiction to entertain the petition of the appellant who is seeking a dissolution of marriage from his wife, the respondent, on the ground of desertion. The High Court beld that as there was no codified law on private international law in Ethiopia, the question of jurisdiction had to be decided by having recourse to the system most common on the European continent, that is, that there is jurisdiction if the defendant is resident in the country where the court is sitting, or, if the suit for divorce is based on abandonment or desertion, if the defendant had been residing in the country of the court and from that country one spouse deserted the other. The presiding judge of the High Court was also of opinion that the suit should be struck out on the ground that there was already pending in a foreign court a suit for a dissolution of marriage instituted by the respondent. Several submissions have been made on this point by the appellant in his memorandum of appeal, but for reasons which shall appear later (apart from the fact that this was not the ratio decidendi of the majority judgment of the High Court) it is not necessary for this Court to deal with this question.

The appellant, the husband, is now residing in Ethiopia and has had residence here for over a year; be is employed on a contract by the Ethiopian Airlines Inc.; he is in possession of a resident's identity card issued by the Ministry of

## THOMAS HALLOCK V. DOROTHY HALLOCK

the Interior. He claims that his wife, the respondent, has deserted him and on this ground he is seeking a dissolution of marriage. The appellant's ground of appeal is that under the law of Alabama, which both parties have accepted as applicable to them, residence in the State (of Alabama) for at least one year, of the plaintiff is sufficient to establish jurisdiction when divorce is sought on the ground of voluntary abandonment.

As the High Court rightly pointed out there is no codified law at present in Ethiopia with regard to rules of private international law nor with regard to the jurisdiction of the Courts in matters where, as in the present case, the personal status of foreign nationals may be affected and a confict of laws may, therefore, arise. In default of an express provision of law on the subject it is necessary to turn to general principles of jurisprudence accepted in other countries. There are three possible solutions to the problem, but there is no uniformity in foreign systems of legislation in accepting one solution in preference to the other. The three possible solutions are nationality, domicile and residence. In some countries the only courts which are held to have jurisdiction to dissolve a marriage are the courts of the country to whose nationality the parties belong; in others it is the courts of the country where the parties are domiciled; in others residence of the parties or of one of them is sufficient to give jurisdiction to the courts of the country where the parties or one of them are or is residing.

It may also be stated here that the principle of residence for the purpose of giving jurisdiction to a court in matters of divorce is an exceptional one; it is of very recent growth in some countries. It is also hardly necessary to stress the fundamental difference between domicile and mere residence. Residence consists of the mere fact of a person being for a particular period of time in a particular place, while domicile consists of that fact with, in addition the animus manendi or the animus non revertendi, that is the intention to stay in a particular country and make that country his adopted home or the intention of not returning back to his country of origin. It is also generally accepted that while the wife has the domicile of her husband, she need not necessarily have the residence of her husband.

As pointed out earlier, the appellant alleges that as the law of Alabama lay down that residence is sufficient to give jurisdiction to a court to deal with a suit for a dissolution of marriage, the courts of Ethiopia have jurisdiction to deal with the appellant's petition. This argument is not tenable. Any express provision of law as the law of Alabama on which the appellant relies cannot have any extraterritorial effect and cannot be binding on the Empire of Ethiopia. Such a provision is not a provision dealing with the personal status of the citizens of Alabama but is merely a provision giving the courts of Alabama jurisdiction to deal with certain matters in certain cases and is a provision of which any person, whatever his nationality or domicile, may take advantage while he is resident in Alabama. Such a provision cannot have the effect, and was not intended to have the effect, of giving jurisdiction to any court outside Alabama to take cognizance of matters of divorce whenever a citizen of Alabama happens to be in a foreign country.

In the opinion of this Court, the principle of simple residence of the plaintiff should not be accepted, in default of an express provision of law, as granting jurisdiction to the courts of Ethiopia to take cognizance of matters of divorce between foreign nationals. In our view, at least domicile in Ethiopia should be
established before the courts of Ethiopia can take cognizance of a suit for a dissolution of marriage, and the appeliant is not domiciled in Ethiopia.

For the above reasons we confirm the judgment of the High Court and dismiss the appeal. Costs to the respondent of $\$ 100$.

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## SUPREME IMPERIAL COURT

Div. No. 1

Justices:
Afenegus Ketaw Yitateku
Dr. W. Buhagiar
Ato Taddese Tekle Giorgis
ABEBE WOLDE TSADIK et AL. v. KNGIDA WOLDE TSADIK et AL. Civil Appeal No. 576/55

Successions - Prohibition of pacts on future successions - Partitions made by donations - Civil Code Arts. 1114, 1117.

On appeal from the decision of the High Court, holding that agreements made by the respondents on prospective inheritance of the property of their father who was alive are of no effect. Held: Affirmed with one modification.

1. Agreement among prospective heirs relating to the succession of their father who is alive is invalid by virtue of Art. 1114 Civ. C.
2. The agreement relating to the property of the mother of the respondents made together with the agreement relating to the property of their father is valid since she was deceased at the time of the agreement.
3. This case is not one of partition under Art. 1117 Civ. C., because it does not appear that it was executed by the father.

Having examined the Judgment rendered by the High Court in File No. 319/54 on the dispute over inheritance between these two parties, and having scrutinized and heard the written and oral evidence respectively submitted by both parties before this court, we give the following decision:

The appellants, the six sons of Kegnazmach Wolde-Tsadik by Woizero Hawa, and the repondents, the three children by another woman, having unanimously reached a compromise through the medium of elders on Hidar 21, 1951, divided among themselves the property of Kegnazmach Wolde-Tsadik and that which the mother of the six appellants was entitled to receive as a share from her husband, Kegnazmach Wolde-Tsadik.

The death of Woizero Hawa, the mother of the six appellants, had occurred before that of her husband, Kegnazmach Wolde-Tsadik.

The three respondents have contended that the compromise reached in the High Court was untenable on the ground that it was made while their father was alive.

On Hidar 21, 1955, the High Court, citing Article 1114 of the Civil Code, decided that an agreement made on prospective inheritance is forbidden, and consequently untenable.

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The appeal is lodged against this judgment. In principle we agree with the decision of the High Court.

It is improper on the part of children to take full control of their father's property while he is still alive. A court will not permit such a practice to take root. The aim of Article 1114 of the Civil Code is to forbid the making of such an agreement, and, if made, to render it invalid. Similarly, an agreement made by an heir, whereby he takes full control of his prospective inheritance that has not devolved upon him, or renounces it partly or entirely, is invalid.

The law has forbidden such an act since it infringes upon the right of the father and is repugnant to moral rules. Reaching an agreement in violation of the law is impossible. Though we agree with the decision of the High Court invalidating the agreement made by the children on Kegnazmach Wolde-Tsadik's property while he was alive, we have not come upon any ground for repudiating the agreement with respect to the property which the wife of Kegnazmach WoldeTsadik, the mother of the appellants, would be entitled to receive from her husband as her share.

As for Kegnazmach Wolde-Tsadik's inheritance, as already stated, we are of the opinion that the partition of his property while alive should not be a precedent, and it is forbidden by law.

We cannot say that the partition was done by the father while alive in accordance with Article 1117 of the Civil Code because it does not appear to be so; it was executed by the children at will. It has been alleged that Kegnazmach Wolde-Tsadik gave a verbal consent; but the partition was not done by him. Since he did not sign, we cannot say that he executed the allocation. Although we agree with the High Court's decision on this point, the agreement reached by the sons of Woizero Hawa and the children of the other woman on the alleged share of the deceased should not be rejected, since nothing prohibits them from dividing among themselves by agreement the share of the deceased wife of Kegnazmatch Wolde-Tsadik. We are of the opinion that it should be maintained.

For all these reasons, having affirmed the High Court's decision made in accordance with Article 1114 of the Civil Code, repudiating the agreement reached by the children of Kegnazmach Wolde-Tsadik as regards dividing his property while he was alive, we amend the High Court's decision to the extent that the agreement made by the children of Woizero Hawa and the three children of Kegnazmach Wolde-Tsadik by the other woman on the alleged share of Woizero Hawa should not be rejected; it must be maintained.

The fees of the original court must be borne by both parties, those of the appellants by respondents; both must pay their respective lawyer's fees. Judgment was rendered in the presence of both parties on Hidar 23, 1956, E.C.

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# SUPREME IMPERIAL COURT 

Div. No. 4

Justices:
Vice Afenegus Tebebu Beyene
Ato Wolde Hanna Gebre Kidan
Ato Tekola Wolde Kidan
THE ETHIOPIAN ABATTOIRS' ASSOCIATION v. A. BESSE COMPANY
Civil Appeal No. 11/57

Contracts - Invalidation - Effect of Invalidation - Arts. 1, 216, Comm. C., Arts. 2190, 2193(1), 1815, Civ. C.

Companies - Purchase by a company of its own shares - Art. 332, Comm. C.
On appeal from a majority decision of the High Court rejecting the appellant company's request that the court invalidate the contract whereby the respondent company sold its rights over shares of the appellant company to the chairman of the appellant company.
Held: Decision reversed.

1. The granting of wide powers to the director of a company under the memorandum of association does not amount to an authorization by a meeting of the shareholders to make contracts under Art. 332 of the Commercial Code.
2. A contract made without an authorization by a meeting of the shareholders under Art. 332 of the Commercial Code must be ratified or repudiated in a meeting of the shareholders, in accordance with Art. 2190, Civ. C.; where the contract is repudiated by a meeting of the shareholders, then the contract must be invalidated.

After the Ethiopian Abattoirs' Association, the appellant, was established, A. Besse Company, the respondent, loaned to Hadji Rahmato Muktar a sum of $\$ 196,600$ to be repaid in a period of 25 years.

In the contract of loan, the borrower entered into an obligation that the money would be used to buy shares in the Ethiopian Abattoirs' Association and that the borrower would not donate or transfer the ownership of the shares to a third party without the written consent of the lender. Since the loan is interest-free, the lender receives the profit derived from the shares from time to time.

Plaintiff's first piece of evidence: The loan was later reduced to $\$ 136,600$. Since no profit was derived from the shares, in 1950 E.C., the lender and the borrower agreed that the shares should be sold to Ethiopians at a price either lower or higher than the original buying price and that the sum thus obtained should be given to the lender.

Plaintiff's second piece of evidence: In 1965 the respondent company sold its right over the sum of $\$ 136,600$ referred to above for $\$ 150,000$ to the chairman of the appellant company. The directors of the appellant company repeatedly ex-
pressed their objection to the respondent company on the ground that the sum of $\$ 150,000$ should be paid back since the sale was illegal. But the respondent company did not accept the request of the directors.

Plaintiff's fourth piece of evidence: Since the respondent company rejected the request of the directors, the general meeting of the appellant company was convened and held. At the general meeting, the chairman and directors expressed their views to the general meeting and the report of Price Waterhouse was read. The general meeting repudiated the contract of sale and passed a resolution that the Board legally compel the respondent to return to the treasury of the association, the sum of $\$ 150,000$ used for the purchase.

Plaintiff's eleventh piece of evidence: As the respondent company was unwilling to reimburse the money after the general meeting had passed a resolution, the advocate of the appellant filed a suit in the High Court for the invalidation of the contract. The respondent submitted a statement of defense alleging that the contract should not be invalidated. After both made a lengthy argument, the High Court in a majority opinion gave a judgment that the contract may not be invalidated since it was legal, and that the plaintiff must pay the court fee for the sum of $\$ 150,000$.

But the dissenting judge expressed his opinion that the contract made between the chairman of the appellant company and the defendant company must be invalidated since it was inconsistent with Art. 332 of the Commercial Code of Ethiopia.

The advocate of the appellant company has lodged this appeal for the reversal of the majority opinion of the High Court. The facts of the petition are briefly as follows:

The board of directors of the company granted full power to Balambaras Ashebir as chairman. It is clear that the chairman executes his duty in accordance with the objectives of the company and the Commercial Code.

He bought for $\$ 150,000$ in the name of the company the right claimed by the respondent company against the heirs of Ato Rahmato Muktar, the estimate of which was $\$ 136,000$. Though it was his obligation to consult the members of the company or the sharehoders in the general meeting before the contract had been completed, he did not do so and therefore was not officially authorized to act. It was only after the contract had been signed and the money had been paid to the respondent that the directors and shareholders knew of the chairman's action. When they learnt of the action, they inmediately objected.

The general meeting of the shareholders then passed a resolution that the respondent must pay back the sum of $\$ 150,000$ which was unduly paid.

The majority opinion was mostly based on the assumption that the chairman of the company has been granted full power under Arts. 29 and 30 of the memorandum of association of the company. But the scope of power granted to him does not enable him to buy the shares of a company or to receive shares as a pledge. Under Art. 332 of the Commercial Code it is stated that the power to do this is not valid unless it has been authorized by the meeting of the shareholders. The judgment has confirmed the fact that the company acquired the right of ownership of the loan and that it received the shares in pledge as a result of the contract signed by the chairman.

ETHIOPYAN ABATTOIRS v. A. BESSE

Since Art. 332 of the Commercial Code applies only to the relationship between a company and its shareholders, and not to third parties, the court held that (4) of Art. 332 is inapplicable to this case. The purpose of the law is to protect the rights of shareholders and creditors. The decision with respect to the payment of the court fee is also incorrect. According to the opinion of the dissenting judge, the sum given to Hadji Rahmato under the disguise of a loan was not actually a loan. It was a purchase of shares executed under the disguise of loan which created a pledge if there was actually no purchase. It is only if the provisions of Art. 332 of the Commercial Code were satisfied that the transfer of a right would be binding on the company. Therefore, the minority opinion should be affirmed and the majority opinion should be reversed.

Counsel for the respondent company in his response petitioned for the dismissal of the appeal on the ground that the minority opinion of the High Court is erroneous and that the majority opinion should be affirmed since it was proper. The facts as contained in the argument of the petition of the respondent are as follows:

The majority opinion with respect to the payment of the court fee was correct because when he filed the suit with the High Court the appellant in his statement of claim asked for the repayment of the money in addition to his petition for the cancellation of the contract. Thus, it is clear that since in his statement of claim be asked for the repayment of $\$ 150,000$, the decision ordering him to pay the court fee fixed for that sum was correct.

When Hadji Rahmato asked for a loan, the respondent company gave it to him. The minority opinion gave a different interpretation without anything to support it; however, there is nothing obscure or illegal about the loan. There is no law that forbids a person from borrowing a sum sufficient to buy shares. If the view of the appellant is correct, it would lead to various interpretations of Art. 332 of the Commercial Code with regard to pledged shares.

When the respondent company sold its claim to the loan to the appellant company, it was not a shareholder; it was a third party. Balambaras Ashebir was the chairman of the company, who was granted wide powers under the articles of association. The contract of sale between them was not a contract to sell the shares of Hadji Rahmato. It was only to sell the claim to the loan against Hadji Rahmato. And such a contract, besides its not being rendered void by the law, is permitted under Arts. 29, 30, 31 and 44 of the memorandum of association. Moreover, since the respondent company acted in good faith and did not try to defraud the chairman of the appellant company or anyone else, this may be an adequate defense.

As for the contention based on the legal provisions Art. 332 of the Commercial Code, it is inapplicable in this case. This article discusses the acquisition of one's own shares through purchase. But the appellant company did not purchase its own shares. The same article discusses the relationship between a company and its shareholders. The respondent company, however, is not a shareholder in the appellant company. Sub Art. (4) of the same article lays down the requirements to be fulfilled when a shareholder in a company borrows a sum from it and seeks to pledge his shares. In this case the heirs of Hadji Rahmato did not receive a loan and did not pledge their shares. Even if Sub Art. (4) is considered relevant, it must be applied in accordance with Arts. 363 and 416, and therefore the right of a third party in good faith is reserved.

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The respondent has written a lengthy argument on Art. 363 of the Commercial Code on the ground that the appellant had repeatedly referred to it in the High Court. We have carefully considered their arguments. Concerning the contract which was referred to in plaintiff's piece of evidence and which was alleged to be a contract of loan, by the respondent, the dissenting judge stated that the contract entered into was not related to the contract of loan. According to his opinion the purpose of the loan was to confer the ownership of the shares upon the defendant company through Hadji Rahmato for a reason that was not disclosed to the court.

On examination of the contract of loan, we find no profit whatsoever which Hadji Rahmato, the borrower, derives from the loan. The loan is used for the purchase of the share of the Ethiopian Abattoirs' Association. And the loan is for a duration of 25 years from the date in which the Ethiopian Abattoirs' Association was established. Not even a fraction of the profit derived from the share was reserved for the borrower; all went to the lender. It is also expressed that Hadji Rahmato, the nominal owner of the shares, may not donate or transfer the shares.

If the association goes bankrupt, the lender has no claim whatsoever against the property of the borrower except over the shares. The borrower is not responsible. Thus, it is clear that the respondent company indirectly bought the shares through the instrumentality of Hadji Rahmato, since the latter was an employee of the respondent company. As for the opinion of the dissenting judge that the ownership of shares was transferred to the defendant company through the medium of Hadji Rahmato, it is clear from the memorandum of association, that $30 \%$ of the shares could be bought by Ethiopians and only $40 \%$ by foreigners. The respondent company bought indirectly for fear that if it bought in its name the prescribed limit of $40 \%$ would be exceeded.

When we examine the plaintiff's second piece of evidence, since the shares bought in the name of Hadji Rahmato were not profitable at the time, both parties agree that the sum obtained through the sale of shares to Ethiopians at a lower or higher selling price should be due to the company of Mr. A. Besse.

Therefore, Hadji Rahmato confirms that he made a complete transfer to the company of Mr. A. Besse. A. Besse agreed to receive the price when Hadji Rahmato sold the shares.

If the respondent company had been the actual lender, why should it have decided to receive any price instead of receiving the difference from the borrower when the value of the share was reduced? And if the share was unprofitable what interest had he to demand the sale of the share? As it is written in the plaintiff's first piece of evidence, since the share was its own and since it itself receives the profit, it is clear that the decision to sell was made because the stock was unprofitable.

Since the sum was received by the respondent company when the share was sold, the ownership of shares nominally owned by Hadji Rahmato was transferred by the contract. It may be said that the only duty Hadji Rahmato was responsible for was the sale of the shares. They sold for $\$ 150,000$ which was stated to be unprofitable under plaintiff's second piece of evidence. Plaintiff's fourth piece of evidence states that the price was estimated in the contract at $\$ 150,000$ by reckoning what was paid for the transfer of ownership, plus the interest and additional related expenses. As it was stated in the plaintiff's first and second pieces of evidence, since there is no interest and siace no profit is derived from the shares,
there is no sufficient reason to give other than that this was an excuse devised by the respondent to take the money of the appellant.

The respondent has repeatedly raised the defense of good faith. But we have come to the conclusion that the act of the respondent did from beginning to end arise out of bad faith and not out of good faith. This is because: firstly, it bought the shares indirectly and not openly and in good faith, secondly, it was agreed that the shares should be sold only to Ethiopians instead of to any buyer when it knew that the shares were unprofitable; and thirdly, it sold the shares which had no profit and interest as though it had, these for $\$ 150,000$ which was beyond its price.

As for the petition of the respondent that the contract should be valid since the chairman was granted wide power under Arts. 29 and 30 of the memorandum of association of the appellant company, it is only to do those acts prescribed by law that directors are granted wide power under the articles of association. They are not granted power to do acts which are inconsistent with the law. Even if they are granted it will not be supported by the law. It may be difficult for a third party to know whether or not the shareholders gave an authorization on the basis of Art. 332 of the Commercial Code. Had it been in other cases it would have been difficult to say that he should have known it.

Since this article refers to the possibility of buying and pledging one's own shares and since it affects the interest of the shareholders, it would not be difficult for a shareholder to know whether or not an authorization has been granted. And since the respondent company is, though indirectly, the owner of the shares and since it was able to know that the shares were unprofitable, it is impossible to say that it did not know this.

In general, the contract entered into by the respondent company and the chairman of the appellant company was a contract made without the authorization of the shareholders according to Art. 332 of the Commercial Code.

Moreover, when we examine the Civil Code on the basis of Arts. 1 and 216 of the Commercial Code, since this contract must be ratified or repudiated in a meeting of shareholders in accordance with Art. 2190, a resolution was passed in the meeting of the shareholders repudiating the contract; and in such a case there is no reason to justify the validity of the contract. It is impossible to say that the shares must be transferred back to the appellant on the ground that, though the memorandum of association of the company limits to $40 \%$ the number of shares that may be bought by foreigners, the shares of the respondent exceeds this limit; not only is the contention not based on this fact, but it has also been stated in the plaintiff's eleventh piece of evidence that the shares of foreigners do not exceed $3 \%$.

Therefore, having supported the minority opinion of the High Court and having reversed the majority opinion, we have decided that the contract which was made between the respondent company and the chairman of the appellant company and which was referred to under the plaintiff's fourth piece of evidence must be invalidated; that the respondent must pay back to the appellant company the sum of $\$ 150,000$ in accordance with Arts. 2193 (1) and 1815, and that the respondent must on receiving receipt pay the court fees paid by the appellant and $\$ 500$ for expenses incurred since the decision of the High Court ordering the payment of the court fees and the fact that the payment was made in this case were proper.

Let it be remitted to the High Court to be executed in accordance with the judgment.

Megabit 14, 1957 E.C.


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# SUPREME IMPERIAL COURT <br> Div. No. 4 

Justices:
Vice Afenegus Tebebu Beyene
Ato Woldehana Gebre Kidan
Ato Tekola Wolde Kidan
NADJ SAID y. ABDUL MELIK MOHAMMED
Civil Appeal No. 978/57
Proof in relation to contracts - Disclaiming signature - Disclaiming signature or handwriting under oath - Verification of signature or handwriting - Civ. C. Arts. 2007-1, 2008.

On appeal from a decision of the High Court striking out the suit on the ground that the plaintiff may not require an examination of the signature of the defendant after the defendant has denied the same under oath.
Held: Decision reversed.

1. A signature or handwriting denied under oath may be examined by experts by virtue of Art. 2008. Civ. C.
2. Ordering the verification of a signature or handwriting immediately after a party has denied under oath that the same is his, saves the time of the litigants and that of the examining expert.

The appellant has filed a suit in the High Court alleging that having paid to Nicola Lazaridis, the creditor, the amount of $\$ 9719.95$ as guarantor to the respondent, he has been subrogated to the rights of the creditor and hence the respondent should pay him the said amount.

Since the respondent has not only denied any debt but also alleged that the appellant owes him some money, the appellant has introduced some documents. The respondent, having disdained his alleged signature, has formally denied the same under oath on the application of the appellant.

Later, the appellant argued that the signature be examined, that persons who have seen the respondent replied that neither the witnesses should be introduced nor the signature be examined since he has given his affidavit under oath and that the suit be struck out. The majority of the Court has struck out the suit on the ground that the plaintiff should not ask that the signature be examined after the defendant has denied under oath that it is his signature. The minority judge dissented, saying that the signature should be examined.

The respondent, after replying that the judgment appealed against is valid, has said that he does not oppose the examination of his signature.

As we examined the matter, Art. 2007-1 of the Civil Code states that "he against whom a non-authenticated instrument is set up shall, where he intends not to recognize it as his own, formally disdain his alleged handwriting or signature". Whether this express denial is under oath or not, the signature or the handwriting cannot escape examination under Art. 2008. Even more, instead of wasting the time of the litigants and that of the handwriting experts by sending the signature or the handwriting to be examined just because the party carelessly disclaimed it, the fear of the result of denial under oath would reduce much litigation, if the handwriting or the signature is sent to be examined only after the party has disclaimed it under oath having carefully examined it.

We therefore change the majority decision, and rule supporting the minority so that the signature be technically examined and proved.

The respondent shall pay the Court fees for the appeal according to receipt. The parties shall bear their own costs. So that the High Court shall get the document examined and give judgment in accordance with the result obtained, a copy of this judgment shall be sent to the High Court.

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## SUPREME IMPERIAL COURT

Div. No. 4

Justices:
Vice Afenegus Tebebu Beyene
Ato Woldehana Gebre Kidan
Ato Kabteh Yimer Afrasie
GEBRE JEMANEH and JEMANESH BELEHU v. TAREKEGN
Civil Appeal No. 638/57
Family law - Filiation - Presumption of Paternity - Institution of action to disown - Civil Code Arts, 741, 790.

On appeal from the order of the High Court allowing the respondent to introduce witnesses to prove the fact that the respondent is the child of a deceased despite the fact that the paternity of the respondent is attributed by law to another person, the lawful husband of the respondent's mother at the time of his birth.

Held: High Court order reversed.

1. A child born in a lawful marriage may not institute proceedings to contest the status of the person to whom his paternity is attributed by law and introduce witnesses to prove the fact that he is the child of another person with whom his mother bad relations during the marriage.

Appellants opened a probate file No. $12 / 56$ with the High Court requesting that they be declared as the heirs to the succession of their brother, the deceased, who died on Nehassie 2, 1955 without leaving any descendants and whose only nearest relatives in the line entitled to the succession were the appellants.

The respondent appeared as the son of the deceased through his guardian, and the wife of the deceased appeared as such. Considering the contention of both sides, the High Court ordered respondent to open a separate probate file, and accordingly his guardian opened probate file No. 164/56. The present appellants had denied the contention of respondent.

The guardian applied to the court to produce witnesses to ascertain that respondent is the son of the deceased. The appellants objected to the hearing of any witness on such issue, their reason being that the mother of the respondent was married to a man from whom she had many children, and that she could not bring witness to prove that only one of them is the son of the deceased, who was not her husband; according to the Civil Code her husband the priest should be the father of the respondent.

The guardian of the respondent stated in reply that the argument of the appellants would have been appropriate if the deceased had not recognized his child while he was alive. But in this case the deceased recognizing and accepting the respondent as his child had looked after him and supported him in every respect.

It is true that the respondent was conceived while his mother was with her lawful husband. But as the result of this the mother of the respondent was separated from her lawful husband and the respondent was born at his uncle's house. After that also she never returned to her husband's home. The deceased knowing all this had accepted his son and it was under his responsibility that the respondent was brought up.

The respondent applied to the High Court to be allowed to submit witnesses to ascertain all these facts.

After both sides argued on the basis of the Civil Code provisions they thought relevant to their contentions, the High Court found it necessary to ascertain whether, during the pregnancy period the lawful husband of the mother of the present respondent knew that the child was conceived from another man and as the result, separated from her while she was still pregnant, whether the baby was born at her brother's house and whether the deceased recognizing the respondent as his son brought him up by maintaining him, and therefore ordered that witnesses be heard.

This appeal was brought on the contention that such order allowing to hear witnesses was illegal and that it be reversed; while the respondents insist that the order given by the High Court was legal.

This Court in the process of examining the arguments and evidence on each side asked the respondent whether the lawful husband of his mother had brought an action in a court in connection with the fact that the respondent was not his son, and the respondent answered that such action was brought with the Addis Ababa Woreda Court, No. 3. Accordingly this court wrote to the Woreda Court to have the file, to which the court answered that it could not find any such file, in spite of its thorough search.

According to Art. 741 of the Civil Code, the father of any child conceived during married life is the lawful husband of the mother at the time. According to Art. 790, the one who is entitled to institute an action to disown a child is the one to whom paternity of the child is attributed by law. It is clearly expressed that neither the mother, nor the man who claims the paternity, nor the public prosecutor can apply to institute such action.

The effect of this provision is that even if a child is born between two persons not bound by lawful wedlock but the mother is already legally married and the lawful husband of the mother knows the facts of the birth, the choice of whether to bring an action to disown the child, declaring it to be illegitimate or to disregard such a proceeding for the reason of keeping the integrity and honour of his family intact, depends solely on the lawful husband's own discretion.

Up to this day the lawful husband of the respondent's mother has not instituted any action to disown the respondent under Article 790 of the Civil Code. Therefore in the absence of such action brought by the lawful husband, the one to whom paternity of the child is atributed by law, the action by which the son is proceeding to disown his lawful father is in contradiction to the above cited provisions.

Therefore the order given by the High Court to hear witnesses on this issue is illegal and we consequently reverse the order.

## GEBRE JEMANEH v. TAREKEGN

The court fees paid by the appellants should be refunded to them on the basis of their receipts, and other damages resulting from the suit be shared equally between the parties on each side.

The copy of this judgment should be sent to the High Court for execution as decided.

Hidar 2, 1958 E.C.



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# SUPREME IMPERIAL COURT 

Div. No. 4

Justices:

# Vice Afenegus Tebebu Beyene <br> Ato Woldehana Gebre Kidan <br> Blata Demessie Work Agegnehu 

A. BESSE ETH. LTD. v. SOLOMON GIDEY and ABRAHAM MEKONEN

## Civil Appeal No. 1673/57

Commercial Code - Cheques - Responsibility of the drawer - Arts. 840, 850, Comm. C.
Civil Code - Contractual obligations - Burden of proof-Arts. 2001, 2019(1), Civ. C.
On appeal from a decision of the High Court rejecting the appellant's request that the Court order the defendants to pay the price of 100 boxes of batteries which defendant No. 1 bought from appellant through defendant No. 2.
Held: Decision reversed with respect to the 1 st respondent and affirmed with respect to the 2nd respondent.

1. Art. 840, Comm. C. implies that once a person has signed and given a cheque to another he guarantees its payment. This guarantee cannot be cancelled except for sufficient reason.
2. Producing a signed cheque is sufficient proof of the existence of an obligation for purposes of Arts. 2001(1) and 2019(1), Civ. C.
3. A legally valid cheque may not be cancelled just because the person who gave the cheque in payment for goods be bought, contends that he did not receive the goods at a time when it cannot be remembered how delivery was made, having kept silent until the time when the cheque was payable and suit was filed against him.

The appellant pleaded that, "Defendant No. 1 customarily bought batteries from us through defendant No. 2. On April 13, 1962, defendant No. 1 bought 100 boxes of batteries from us, signed a receipt No. 1107 and paid the price by a cheque bearing the number 169412. The cheque was written and brought to us and the batteries were taken to defendant No. 1 by defendant No. 2. The cheque bears the date Miazia $25 / 62$. When we presented it to the bank, we were told there was not enough money. We are thus not paid the price of the batteries, which is $\$ 7,900$."

The appellant filed suit, civil case File No. 63I/55, in the High Court requesting that the court order the defendants to pay the price of the batteries jointly and singly.

In his statement of defense, defendant No. 1 pleaded, "I have signed the cheque but I did not receive any batteries. I did not sign the receipt numbered 1107. I do not have to pay the price of goods that I did not receive.."

Defendant No. 2, in his statement of defence, pleaded, "I am a salesman of the office of defendant No. 1. It is not true that defendant No. 1 took batteries.

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I wrote the cheque and the receipt. My duty is not to deliver and I do not have responsibility" (responsibility for the delivery).

After the plaintiff produced bis documentary and oral evidence, the lower Court concladed that the defendants were sued improperly. "Although it is known that a person is indebted to another for whom he has signed a cheque, when he is sued to pay, he has the legal right, as is pointed out in Art. 850 of the Commercial Code, to defend that he does not have to pay by invoking his existing relationship with the person for whom he signed the cheque. Although Ato Solomon (defendant No. 1) has admitted that he signed the cheque, his pleading that since the plaintiff did not, according to the contract, deliver the goods he sold, Ato Solomon does not have to pay, is a proper defence. The signing of a cheque is not sufficient evidence for the delivery of the goods.
"Ato Solomon has denied the signature on the receipt of the goods. The plaintiff should have asked the Court to order verification of the signature as is provided in Art. 2008 of the Civil Code. But since the plaintiff failed to do this, the first and second pieces of evidence will not be binding on Ato Solomon. Even though it is admitted that Ato Makonnen wrote the cheque and plaintiff's first piece of evidence, since there is no evidence to show that the batteries were delivered to him, defendants do not have to pay the price of the batteries."

The appellant has appealed against the judgment of the High Court. In his memorandum of appeal, the appellant in short stated "that evidence has been introduced to show that respondent No. 2 was in charge of the appellant's sales and delivery section. He had loaded the batteries in dispute in a lorry which was driven by him to deliver them to respondent No. 1.
"Respondent No, 1 received the batteries, signed a cheque cashable in the future and gave it to respondent No. 2. Had not the goods been delivered to him, there was no need for him to sign the cheque. After he gave the cheque he did not notify the appelfant that he did not receive the goods. If respondent No. 1 had not received the goods, he would have asked that his cheque be returned to bim. It was after the appellant failed to cash the cheque and filed suit that respondent No. 1 said that he did not receive the goods. It was because respondent No. 2 stated that the goods were delivered to respondent No. 1 that I sued them together. Therefore, I request that the Court order that one of the two pay me the amount I claimed."

The two respondents in their reply stated that since the judgment of the High Court is proper, it should be affirmed. They gave oral arguments to support their reply.

We have examined carefully the arguments of both sides and the judgment of the High Court. Article 850 of the Commercial Code which was cited by the High Court to show that so long as the cheque is in the hands of the person who first received it, the person who wrote the cheque can present defense and objections against its being cashed reads, "Persons sued on a cheque cannot set up against the holder defenses founded on their personal relations with the drawer or with previous holders, unless the holder in acquiring the cheque has knowingly acted to the detriment of the debtor." Appellant did not object to respondent No. I's defense against the cashing of the cheque. According to the opinion of the High Court and respondent No. 1, it is a sufficient defense if the person who wrote the cheque states that the cheque has no value since the respondent wrote

## A. BESSE v. SOLOMON GIDEY

it when he did not accept the goods. We say this because the respondent did not produce evidence to show that he had not received the goods and had signed the cheque because of fraud or something of that sort.

Art. 840 of the Commercial Code states, "The drawer guarantees payment. Any provision by which the drawer releases himself from this guarantee shall be of no effect."

What this article shows is that once a person has signed and given a cheque to another he guarantees its payment and this guarantee cannot be cancelled because of petty reasons. In a case like this, if the drawer finds sufficient reason to "cancel" the cheque, he must do it then through the appropriate channels. Failing this, a person cannot, at the time of the payment avoid his liability by stating that he does not have to pay the money.

Art. 2001 of the Civil Code states, "(1) He who demands performance of an obligation shall prove its existence. (2) He who alleges that an obligation is void, has been varied or is extinguished shall prove the facts causing such nullity, variation or extinction."

So also Art. 2019(1) of the Civil Code states, "Where a person has promised to make a payment or acknowledged a debt, the person in whose favour the promise was made or the debt acknowledged need not prove a cause justifying them."

Examination of the case in light of these articles shows that the appellant has satisfied his burden of proof by producing the cheque signed by respondent No. 1. That respondent admitted that the cheque and the signature on it are his. But he did not produce any evidence to show that the cheque is without validity.

The only defense produced by respondent No. 1 is that he did not receive the goods. If, as he contends, he had not received the goods, why did he not then in two or three days time say so? He wrote and gave the cheque on April 13, 1962. The cheque was payable on April 25, 1962. He was silent about the transaction until the appellant tried to cash the cheque without success and filed suit against the two respondents.

In order to prove that the goods have been delivered to the respondent, the appellant has produced the receipt.

The respondent objects on the ground that the signature on the receipt is not his. Since it is customary that people who deliver goods take them to the shop of the buyer and deliver them to him if he is there or to anyone who is in charge of the shop if the owner is not found, if respondent No. 1 had immediately informed the appellant that the goods were not delivered, it would have been possible to know who received them. Both law and conscience prevent us from denying the validity of a legally valid cheque just because respondent No. 1 contends that he did not receive the goods. He contends this at a time when it can no longer be remembered how the delivery was made, having kept silent until the time when the cheque was payable and until the time when suit was filed against him. If a cheque is to lose its validity and if commercial activity is to be disturbed because of such petty reasons, this will harm not only businessmen but the economy of the country as well.

A person goes to a shop, buys the goods he wants, and pays the price in a cheque. When the shop owner asks for his money from the buyer, having first tried to cash the cheque but failed because the person who signed the cheque has not got money at the bank, if the buyer's contention that he signed the cheque without receiving the goods is to be a sufficient defense, won't businessmen insist on selling their goods in the presence of witnesses? Or are sales of all goods to be in writing? It can safely be said that these practices are not in conformity with modern commerce. Modern commercial transactions are carried out in more efficient procedures. Things that hinder commerce and cause it to drag are not acceptable. There is nothing that forces a person to sign a cheque and give it to another. When he does, he creates an obligation to pay or if a person, without being forced, pays when he does not have to pay, he has no one to blame except himself.

The goods were taken out of appellant's store. Since respondent No. 1, knowing he had to pay, signed a cheque which was payable a month later and gave it to the appellant and did not inform the respondent that he did not receive the goods, before the suit was filed against him and did not produce any evidence to show that he was forced to sign the cheque, it is not appropriate that appellant should not get the price of his goods. We reverse the judgment of the High Court and we give the following judgment: Respondent No. 1 shall pay the appellant the $\$ 7,900$ with $9 \%$ interest from the time the suit was filed until the respondent pays the money plus $\$ 200$ for costs. We affirm the part of the judgment of the High Court that excludes appellant No. 2 from liability. (Let a copy of the judgment be sent to the High Court so that the judgment may be executed).

Ter 26, 1958 E. C.

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## HIGH COURT

Addis Ababa, Commercial Division No. 2

Justices:
Dr. W. Buhagiar
Ato Denki Ashenafe
Ato Ajebew Wolde Meskel

## GUETTY FORTI v. AUGUSTE FORTI

Civil case No. 174/55
Civil Procedure - Jurisdiction - Domicile - Arts. 183 and 184 Civ. C.
Family law - Dissolution of marriage - Desertion-Art. 669 Civ. C.
Action for dissolution of marriage celebrated in Egypt between plaintiff, a Greek, and defendant, an Italian.
Held: Dissolution of marriage ordered.

1. Ethiopian courts have jurisdiction to entertain a claim instituted by a party domiciled in Ethiopia.
2. The procedure laid down in the Civil Code regarding the appointment and decision of family arbitrators does not apply to the case where one of the parties is outside of Ethiopia or where his whereabouts are unknown.

In these proceedings the plaintiff is praying for a dissolution of the marriage which was celebrated in Egypt on May 7, 1943 (Gr. Cal.) between herself and the defendant; the ground for the dissolution is desertion since August 20, 1943 (Gr. Cal.). The claim of the plaintiff is supported by an affidavit sworn on January 23, 1963 ( $\mathrm{Gr} . \mathrm{Cal}$.) in which she stated, inter alia, that the whereabouts of the defendant are not known, that attempts through a lawyer in Alexandria to establish communication with defendant have been without success and that she does not know whether the defendant is living or dead. In view of these facts the Court allowed substituted summons through the newspaper but on the appointed date March 28, 1963 (Megabit 19, 1955), the defendant did not appear in answer to the summons.

The facts in this case have been established by means of the affidavit above mentioned. From this it results that the plaintiff and the defendant were married in Alexandria, Egypt, on May 7, 1943 (Gr.Cal.) that the parties separated on August 20, 1943 (Gr.Cal.); that since the separation the plaintiff and the defendant have never lived together and the defendant has not contributed to the support of the plaintiff; that there are no children of the marriage; that the plaintiff came to Addis Ababa, Ethiopia, in the year 1946 (Gr.Cal.) and has lived continuously in this country since that year; she is employed by the Ethiopian Air Lines, and has no home outside Ethiopia. It is not known whether the defendant is living or dead. The plaintiff states in her statement of claim that she is of Greek nationality and the defendant is of Italian nationality.

## GUETTY FORTI v. AGUSTE FORTEI

The first matter to be considered is whether the courts of Ethiopia have jurisdiction to deal with the present prayer for dissolution of marriage. The difficulties arise because the Civil Code of Ethiopia contains no provision dealing with private international law, and decisions on this matter have not been uniform. There has been, however, a certain amount of uniformity in Ethiopian cases in rejecting simple residence of one or the other of the parties as a ground for establishing jurisdiction. Since the coming into force of the Civil Code, "domicile" has acquired a different meaning from that in the Anglo-American systems of law; Article 182 of the Civil Code defines "domicile" and Article 184 creates a presumption as to intention. Under these two articles it is clear that the plaintiff has acquired a domicile in Ethiopia. As to the principle of nationality for establishing jurisdiction it may be said that this has not been frequently followed in recent cases and in any case that principle would not be of much help in the present case where the parties seem to be of different nationality. For these reasons this Court holds that it has jurisdiction in the matter before it, on the ground that the plaintiff has a domicile in Ethiopia and the whereabouts of the defendant are not known.

The second point to consider is whether this Court can take cognizance of the matter before the arbitration provisions of the Civil Code have been complied with. The Civil Code makes no provision for situations where one of the parties is outside Ethiopia or where the whereabouts of one of the parties are not known. Under these circumstances it seems to this Court that the appointment of arbitrators for one of the parties who is absent and whose whereabouts are not known would be meaningless and therefore the said provisions of the Code do not apply and the Court can take cognizance of the matter without the said formalities having been fulfilled.

There is no question that desertion is a good and indeed a serious ground for divorce under the Civil Code (see article 669(b)).

For the above reasons this Court orders the dissolution of marriage celebrated between the plaintiff and the defendant in Alexandria on May 7, 1943 (Gr.CaI.) on the ground of desertion on the part of the defendant. As there are no children of the marriage and as there is no property, common or personal, to be dealt with, no order is made on these points.

Megabit 24, 1955 E.C.

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## HIGH COURT

Addis Ababa, Commercial Division

Judges:
Dr. W. Buhagiar
Ato Abebe Awgitchaw
Ato Tadesse Mengesha

WOIZERIT NEGEST MAKONNEN et AL. v. E.A.L. SHAREHOLDERS CO.
Civil Case No. 701/55
Civil Procedure - Striking of suit-Dismissal of suit-Arts. 69, 73 and 71, Civ. Pro. C.
Motion for decision.
Held: Motion denied.

1. Where neither party appears on the date fixed for hearing, a suit may be struck out.
2. Where the plaintiff does not appear on the date fixed for hearing and where no evidence has been brought before the court, the court may dismiss the suit.
3. Where the plaintiff does not appear after evidence has been offered and an adjournment necessary for some reason, then the proper remedy is not dismissal but rather to grant costs to the other party who applies for such costs.

The case was adjourned to Tekemt 8, 1959, for the purpose of the crossexamination of the expert witness, Franz Schneider, (PW-5); on the said date the advocate for the plaintiffs did not appear but sent a message to Court to the effect that the said witness had not returned to Ethiopia from abroad, or so the advocate was informed by the Haile Sellassie I University, where the witness is a Professor; the advocate for the plaintiffs was himself out of Addis Ababa. The advocate for the defendant prayed the Court that all evidence of the plaintiffs be ignored and that a decision be given; he referred to articles 69, 73 and 74 of the Civil Procedure Code.

It is to be mentioned that this case has been pending for some time and several documents have been submitted by the plaintiffs and the defendant and also several witnesses have been called by the plaintiffs whose testimony has been recorded. It is not for the Court to say at this stage whether the evidence produced by the plaintiffs is sufficient to justify a decision in their favour or a decision against them; but the fact remains that there is evidence before the Court and such evidence cannot, as the advocate for the defendants prays, be just ignored. Article 69 quoted by the defendant does not support his prayer for a decision with or without ignoring the evidence before the Court; under that article a suit may be struck out (not a decision given) when neither party appears on the date fixed for hearing. Article 73 quoted by the advocate for the defendant provides that
when the plaintiff does not appear on the date fixed for hearing, the court shall make an order dismissing the suit; this article, however, applies where there is no evidence whatsoever before the Court; in other words this article can have application when on the first date of hearing or on any subsequent hearing the plaintiff does not appear and there is no evidence before the Court. Let us assume for example that a plaintiff brings a suit in Court and after a defence has been filed he produces documentary and oral evidence which shows clearly that, on that evidence, he is clearly entitled to a judgment in his favour; it would be unjust if the Court were to give a decision dismissing the claim simply because he fails to appear in Court; it is open to the defendant to bring such evidence as he considers necessary and sufficient to rebut the evidence of the plaintiff; when, in such circumstances the plaintiff does not appear and an adjournment is for some reason or other necessary then the proper remedy is to grant costs to the other party who applies for such costs.

For the above mentioned reasons the Court rejects the prayer of the defendant to have a judgment and as there has been no prayer for costs there shall be no order for costs.

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## HIGH COURT

Addis Ababa, Civil Division No. 1

Judges:
(Judges' names not reported)

## IN THE MATTER OF THE GUARDIANSHIP AND TUTORSHIP OF <br> ALMAZ FUFA, A MINOR.

Civil Case No. 132/56

Capacity of persons - Guardians and tutors - Cessation of the functions of guardian and tutor - Appointment by Court of guardian and tutor-Removal of guardian and tutor - Civil Code Arts. 210, 211, 212, 217, 218, 223, 234(1).

In a petition submitted by the Attorney General by virtue of the powers vested in him under Art. 234(1) of the Civil Code, moving this High Court to quash its order of Tahsas 8, 1956, in which it appointed a guardian and tutor for a minor.
Held: Petition allowed and order quashed.

1. Under Art. 234(1) of the Civil Code, an application for the removal of a guardian or of a tutor may be made only by a relative by consanguinity or by affinity of the minor, or by the public prosecutor.
2. Guardianship is a duty of parents and not simply a right or a privilege which can easily be waived. The courts are enjoined by Art. 233 to declare only with extreme caution the removal of the father or mother or other ascendants as guardians or tutors of their children or descendants.
3. Arts. 217 and 218 do not apply to the appointment of a guardian. Guardianship remains with the parents of a minor.
4. Art. 215 does not allow a person in whom the duty of guardian and tutor is vested to renounce such duty, or be presumed dead, as a result of not fulfilling it.

By an Order dated Tahsas 8, 1956, this Court appointed Mr. Leslie H. Cramer as the guardian and tutor of Almaz Fufa, a minor, the legitimate daughter of Fufa Deressa and Woizero Zerfinesh Lemma. This Order was made on the application of Mr. Leslie H. Cramer, who, in his application, stated that the said child was placed in his custody on Hidar 1950 (Eth.Cal.) by her father, 33 years old, a peasant residing in the village of Metti, as he was divorced from his wife and had no means of supporting the child; that since the said Mr. Cramer had taken custody of the child, he had looked after her as his own child and had fed, clad and sent her to school, and moreover he had made financial arrangement for her future; that the child was then about nine years old and had been living with him for five years or more and as he had no child of his own he wished to keep the child indefinitely and as her parents were satisfied with the care and treatment given to the child they had agreed that the child be entrusted to Mr. Cramer in the interest and welfare of the child.

The Court heard the evidence of the father of the child, Ato Fufa Deressa who stated that the child, AImaz Fufa, was his child born on February 11, 1955 (Gr.Cal.) in wedlock with his wife Woizero Zerfinesh Lemma, that the child remained with the parents for two years and as his sister was a maidservant employed by Mr. Cramer the child was brought to Mr. Cramer who had taken responsibility for the child; he (the witness) and his wife were divorced. The mother, Woizero Zerfinesh Lemma, confirmed the statement made by her husband and both parents said they were satisfied that the child continue to be under the responsibility of Mr. Cramer.

It should also be stated that Mr. Leslie H. Cramer had applied to the Court for the adoption of the child, but as he is married and his wife had not given her consent, Article 798 of the Civil Code was an objection to the making of an order of adoption. The record shows that Mr. Cramer stated that there may be a divorce from his wife and then he will adopt the child.

The Deputy Attorney General has now submitted a petition to this Court moving the Court to quash the order made on Tahsas 8, 1956. The petition is made in virtue of the powers vested in bim by Article 234(1) of the Civil Code and the grounds of the petition may be summarised as follows:
(a) under Article 223 of the Civil Code guardianship is a duty of parents and not simply a right or a privilege which can be easily waived; guardianship is a duty and he who is vested with it can only relinquish it in rare and exceptional circumstances.
(b) Article 233 enjoins the Court to declare only with extreme caution the removal of the father or mother or of the other ascendants as guardians or tutors of their children or descendants;
(c) under Article 217 the father or mother may, where they think fit, appoint a tutor to the child, reserving to themselves the functions of guardian, and under Article 218 the Court may for good cause appoint as tutor a person other than the guardian, where it has the right to make such appointment; these articles provide for the appointment of a tutor but not of a guardian.

Mr. Leslie H. Cramer, duly notified of the petition of the Acting Attorney General, submitted a reply dealing with questions of fact and with questions of law. As to questions of fact he submitted that the Court in making the Order of Tahsas 8, 1956 had ascertained that the child Almaz Fufa had been abandoned by her parents and since the age of two she has been looked after by Mr. Cramer who provided care, maintenance and education; that the parents were divorced and had no means to look after the child, that Mr. Cramer not having a child of his own wanted to adopt the child and as there was not the consent of his wife he had no alternative left to secure the future of the child, by acquiring property, for her until he divorces his wife and is able to adopt the child officially. On points of law Mr. Cramer submitted that as the parents had not shown any interest in the child they had ceased to exercise the functions of tutors and guardians and under Article 215 they were to be presumed dead and therefore as the child remained without a guardian and tutor such functions devolved on persons appointed by the Court under Article 212 and it was under this article that the Court appointed Mr. Cramer as the guardian and tutor of Almaz Fufa; for these reasons the Order of Tahsas 8, 1956 should be upheld in its entirety.

## IN RE ALMAZ FUFA

It should be mentioned that the Deputy Attorney General stated in the oral argument before the Court that his petition was made because in his opinion the Court was wrong in making the Order of Tahsas 8, 1956, and that, as this was the first case of its kind since the promulgation of the Civil Code, the Order of Tahsas 8, 1956 would create a bad precedent in the interpretation of the Code.

Now, the petition of the Deputy Attorney General is not concerned with the facts, or with the question whether the Court investigated the facts fully and thoroughly to find out whether it is in the interest of the child that the Order be made. The petition of the Deputy Attorney General is attacking the legality of the Order on purely legal grounds. But as the reply to the petition mentions certain facts it is expedient to deal with these points.

In the first place it is stated that the parents of the child have no means to provide for the child; the record of the Court does not show that any evidence was available to show that this is so; it may be that the child is better looked after now than if the parents fulfilled their duties within their means; secondly it is stated that Mr. Cramer has made financial arrangements for her future; again there is no evidence what arrangements have been made. The Court seems also to have borne in mind that Mr. Cramer had stated that he was about to get a divorce from his wife; but there is nothing on the record to indicate that there is a ground for divorce or that proceedings have been initiated; the Court assumed that a divorce would be granted and that then the adoption of the child would be possible. The Court seems also to have been influenced by the declaration made by the parents to the effect that they were satisfied with the existing situation and that they had no objection to being relieved of any future responsibility for the child. The father of the child said the he was divorced from his wife; it is not clear when the divorce took place but it seems to have taken place before the coming into force of the Civil Code, before the institution of the family arbitrators with power to decide about the custody of children had been established.

As stated above, however, the opposition of the Deputy Attorney General is based not on the question whether the facts on which the Court relied were correct or not; his opposition is on points of law, procedure and substantive. In the first place Article 234(1) of the Civil Code provides that the removal of the guardian or of the tutor may be made by any relative of the minor, by consanguinity or by affinity, or by the public prosecutor. The reason for this is obvious; the relatives of the minor are the persons who are closely acquainted with the manner in which tutorship or guardianship is exercised and it is in the interest of the child that the lawful guardian or tutor be removed when those functions are exercised to the detriment of the child's moral or material interest. The public prosecutor is given the same rights as the relatives because it is in the interest of society at large and of the family institution in particular that there should be some authority to protect the moral welfare and the material interests of all minors when there are no relatives who can take action or where the relatives through negligence or for fraudulent motives or for some other reason do not move. In this particular case the application for removal of the guardian and tutor was made by Mr. Cramer who is not one of the persons contemplated in Article 234(1) of the Civil Code.

Secondly, Article 223 of the Civil Code provides that the functions of a guardian or tutor of a minor are compulsory for the person who is vested with them. As the Deputy Attorney General rightly pointed out this article and the spirit of other articles particularly Articles 217 and 218 show clearly that guardianship is a
duty, and a heavy duty at that and he who is vested with this duty cannot relinquish it at his pleasure; a person can be removed from such duties only in rare and exceptional circumstances, that is when the duty is exercised against the moral and material welfare of the minor. It is not sufficient, therefore, for the parents of a child to say that they do not mind being relieved of any responsibility for their child; if it were so the whole concept of the family insitution, as established in Ethiopia, would collapse.

Thirdly, Articles 217 and 218 provide for the appointment of a tutor by the parents or, in certain circumstances, by the Court, these articles do not deal with the appointment of a guardian. There may be cases where the parents are not competent to administer properly any property which the child may have; then in such cases a tutor may be appointed to safeguard the material interest of the child, but the guardianship remains with the parents.

In his reply to the Deputy Attorney General's motion, Mr. Cramer submitted various points; he stated that the parents of the child had ceased to function as guardians and tutors of the child and therefore under Article 215 they are presumed to be dead. What that article says is that when the parents become incapable of performing their duties as guardians and tutors then they are presumed to be dead; that article does not allow a person in whom the duty of guardian and tutor is vested to renounce such duty simply by not exercising it. The article referred to above, that is Art. 233, makes that very clear. Article 215 is intended to cover those cases where a tutor or guardian, becomes incapable of exercising the functions by reason of illness, judicial interdiction and similar cases. In such cases, under that article, a person is to be deemed to be dead and the procedure for the appointment of a guardian and tutor shall apply as specified in the previous articles, (particularly Articles 210 and 211, which deal with the order amongst relatives, to be followed in the appointment, and with modifications to be made to such order by the family council). It is not correct to say that in this case the child remained without a guardian and tutor after applying the said articles, simply because the said articles were not put into operation; therefore, it cannot be said that the original petition for guardianship and tutorship made by Mr. Cramer was made under Article 212. For the above reasons, the objections are not valid at law.

It may be that in making the Order of Tahsas 8, 1956, the Court was guided by the worthy motive of the material welfare of the child, but the fact remains that in doing so the Court side-stepped clear and definite provisions of law, which take into consideration not only the material benefits of minors but also the institution of the family.

For the above reasons the Court alfows the petition of the Deputy Attorney General and quashes the Order made on Tahsas 8, 1956. A copy of this Order shall be served on Ato Fufa Deressa and Woizero Zerfinesh Lemma by Mr. Leslie H. Cramer without delay.

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## ARTICLES

"DE FACTO" AND CUSTOMARY PARTNERSHIPS IN ETHIOPIAN LAW<br>by Paul McCarthy*

In 1960, the Empire of Ethiopia adopted for the furst time a comprehensive Commercial Code, based for the most part on Continental European law. This Code introduced a number of new concepts into Ethiopian law and profoundly modified a number of others. Falling into the latter category is the concept of a partnership. Arrangements under which a business is carried on by two or more persons jointly have long existed in Ethiopia. These "partnerships" may vary a great deal with regard to the forms which they may take or the local customary rules which may govern them. Before 1960, no attempt to bring all such organization under a single set of rules met with any success. As early as the 15 th century the Fetha Negast" or "Law of the Kings" devoted an entire chapter to the regulation of partnerships. Based upon Byzantine legal concepts, the Fetha Negast was the "official" law of the Empire but it is doubtful whether it was ever applied very far from the Imperial capital. The Law of Companies, adopted in 1933, and largely copied from French law, represented an attempt to introduce modern legal regulation for business organizations, including partnerships. However, with the outbreak of the war with Italy, little real effort was made to apply this law to local business.

These business arrangements may no longer ignore, or be ignored by, the modern law. The concept of a code (commercial or otherwise) implies that it is to govern all of the legal relationships which fall within its scope and we may safely assume that this was the intention of the parliament in adopting a Commercial Code. In the preface to the Commercial Code, Emperor Haile Sellassie I speaks of the code as "regulating the constitution and activities of all business organizations. ..." All businesses created prior to the coming into force of the Commercial Code had to comply with it within six months of that date. Commercial relationships which may not have been formed with the Commercial Code in mind, must now comply with it in order to comform to the law; customary rules may no longer be applied by the courts. On the other hand, customary institutions do still exist. The problem is, therefore, to provide legal rules which may accommodate such institutions which at the same time are consistent with the Commercial Code.

Persons may form "partnerships" with the intention of complying with the Commercial Code yet fail to do so for one reason or another. Usually, they will fail to comply with some required formality such as a written contract or the rules relating to registration and publicity. The consequences of this failure will be discussed below. For the moment, we can say at least that the parties to this contract have intended to form a partnership as defined by the Commercial Code and so it should be treated a such. When one deals with a contract between two (or more) persons who have only some customary institution in mind, the situation

[^11]is somewhat different. Here we must pose the "there should" question of whether the organization which they intended to form qualifies as a partnership within the meaning of the Commercial Code. If it does, then it should be treated the same way as a partnership created by two persons who intended to have their organization governed by the Code. Is it likely that this would be true of Ethiopian customary institutions which resemble partnerships?

## The Present Situation in Ethiopia

Very little field research has been done into the commercial relationships existing in Ethiopia. The author has investigated the system of relationships prevalent among Gurage merchants in Addis Ababa. This is probably not the only such institution in Ethiopia nor is it necessarily typical. There are several reasons for this choice. As indicated above, very little has been written about this subject and so one must rely on personal interviews. In the present case, such interviews were in fact available with Gurage merchants. Second, while partnerships probably exist among other groups of Ethiopians and are fairly common among Arab and Indian merchants, among the Gurage they are the most common way of doing business. Third, while the Gurage constitute a rather small percentage of the total population of Ethiopia, they are extremely important in the commerce carried on in Addis Ababa. In any case, the legal tests herein discussed would apply in analogous fashion to other institutions. The Gurage institution will serve as an example.

As mentioned above, partnership is the predominant way of doing business among the Gurage. A merchant who wishes to invest in a new business will seek someone who knows how to run such a business and in whom he has confidence. When he can find such a person, they will enter into an agreement whereby the one will contribute the necessary capital to start the business and the other will actually operate it. If the merchant cannot find such a person, he will hire someone to manage the business for him. If this arrangement proves satisfactory to both parties, they will often then conclude the same type of agreement. ${ }^{2}$

Under such an agreement, the two men involved will share both profits and losses, usually equally. The parties consider themselves to be joint owners of the business (building, inventory, etc.) and both may participate in decisions. Upon termination of the arrangement, after all debts are paid, the capital contribution will be returned to the contributor, not in kind but in value. The remainder, including any increase in the value of the business as a whole or of any given asset, is shared by both parties according to the agreement. Variations may occur. For example, both parties may contribute capital in equal or unequal proportions; where a large undertaking is involved, more than two persons may join. However, even
2. This process of converting an employment relationship into one "partnership" is not automatic but the Gurage show a marked preference for the latter. While it is impossible to know exactly why this is the case, a partial explanation may be inferred from the form that a partnership agreement will take. Such an agreement will usually be in the Gurda. This institution will be more fully discussed below; however, this term is usually translated as a "bond of friendship." Any act taken by one of the parties against the interest of the other is considered as a very serious breach of one's obligations, incurring penalties of a quasi supernatural nature such as illness to one's family, loss of possessions, even death. If such a bond is too serious for a mere employment situation, this may explain the advantage to the merchant in making his employee a partner. On the other hand, the fact that a "bond of friendship" is involved would preclude its use between strangers.

## DE FACTO AND CUSTOMARY PARTNERSHIPS

in this case, there will usually be one party whose contribution consists solely in the actual management of the business.

It is the author's contention that this institution is a partnership within the meaning of the Commercial Code and must therefore be governed by it. The Commercial Code defines a partnership agreement ${ }^{3}$ as "a contract whereby two or more persons who intend to join together and to cooperate undertake to bring together contributions for the purpose of carrying out activities of an economic nature and of participating in the profits and losses arising out thereof, if any." ${ }^{1}$ This definition contains several elements, all of which are satisfied by the Gurage cuistomary institution.

First, one must have the intention of the parties to "join together and cooperate."s This implies that the parties may both actively participate on a level of equality in the affairs of the business. Even where one party manages the business, both participate in important decisions. The institution may be distinguished from a lease or a loan. Though either a lease or a loan may satisfy some of the other elements of a partnership agreement, the lender or lessor's role is always passive as regards the business. ${ }^{6}$ Also, with a loan or lease, the objects sought by the parties are essentially different; that is, one party may very well work against the interest of the other. A partnership implies that all parties collaborate and work towards a common goal. A partnership agreement may also be distinguished from an employment contract since the latter implies a subordination on the part of the employee, which is not to be found between partners. ${ }^{7}$

Second, all parties must contribute to the undertaking. As indicated above, among the Gurage one party normally contributes capital while the other contributes services. Both of these acts are recognized as valid contributions by the Commercial Code. ${ }^{8}$ Third, the purpose of the organization must be to carry out activities of an economic nature. This is certainly true of the Gurage "partnerships" we have been describing which normally are engaged in commerce. ${ }^{9}$ Finally, a partnership agreement must envisage the sharing of profits and losses. This is certainly true of the Gurage institution. These relationships are not mere associations, institutions which envisage "a result other than the securing or sharing of profits." 10 One might also point out that while loans, leases or employment contacts often involve the sharing of profits they seldom involve the sharing of losses.
3. A "partnership agreement" is a contract which forms any business organization, not just a partnership. See, Comm. C., Art. 210(1).
4. Id., Article 211. In Professor Escarra's original draft, there was but a single definition (a "business organization") but this was altered by the Codification Commission to distinguish the organization and the contract which establishes it.
5. Often referred to as the "affectio societatis." See Escarra, Cours de Droit Commercial (2d ed., 1952), p. 312.
6. It is true that where a large loan is made to financially unsound companies, the Iender often plays a very active role in the direction of the company. It is probable, however, that the "lender" would be treated as a partner. See, Escarra, cited above at note 5, p. 312,
7. For a full discussion of these distinctions, see Escarra, cited above at note 5, pp. 310-313.
8. Comm. C., Art. 229 (1).
9. Usually, they carry on one or more of the activities described as "commercial" under article 5 of the Commercial Code.
10. Civ. C., Art. 404. Associations do not carry out activities of an economic nature and are not formed to secure profits.

The foregoing discussion shows that the Gurage commercial relationships satisfy the definition of a partnership agreement and may be distinguished from other types of contract. This in fact agrees with the intention of the parties, who consider themselves to be "partners." They should therefore be considered as business organizations, and more specifically partnerships, ${ }^{11}$ and so are governed by the Commercial Code. However, such partnerships normally fail to comply with two provisions of the Commercial Code.

In the first place, most of these partnership agreements are not in writing as required by article 214 and therefore are invalid. ${ }^{12}$ Gurage partnerships are formed through a contract called a "Yeket Gurda" (literally, "bond of friendship"). This is as much a ceremony as a contract, and is always bilateral. The two (or more) parties repeat three times a series of promises before a "judge" who is usually an elder. ${ }^{13}$ In case of a dispute over the performance of the contract, the parties will go to this judge. Thus he is more than just a witness. The sanction for breaching the contract will be a misfortune of spiritual origin visited on the breacher. ${ }^{14}$ Such oral partnership agreements are probably not limited to the Gurage. For example, Fetha Negast states that "A partnership is formed by word, by work and by service ...", never mentioning a written contract. ${ }^{15}$ Since these partnerships are not supported by a written agreement, the partnersip agreements themselves are invalid. Under the Civil Code, this normally means that the existence of a contract is ignored and the parties are returned to their pre-contract positions. Yet the "partnerships" will often have operated for a considerable period of time. In such a case, the rules of invalidity will have to be applied in such a way as to take account of the complex relationships of the parties.

In the second place, none of these partnerships are registered or publicized as required by article 219. The Ministry of Commerce and Industry has made a considerable effort to get businesses to register. As a result, in Addis Ababa, there

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## DE FACTO AND CUSTOMARY PARTNERSHIPS

are some 10,000 businesses registered, of which 400 are partnerships. ${ }^{16}$ This is certainly far fewer than the total number of partnerships in existence and may perhaps be explained by a tendency of traders to register as individuals rather than as partners. Registration is new to Ethiopia and it will require a certain time before it can be put into full effect. ${ }^{17}$ The result of non-registration, however, is that these partmerships "shall have no legal existence nor personality," according to Article 223 of the Commercial Code.

The remainder of this article examines the consequences of a failure to put a partnership in writing or a failure to register. The thesis presented is that such organizations are partnerships within the meaning of the Commercial Code. However, the failure to comply with all the provisions of the code means that they cannot be treated in exactly the same way as other partnerships. We may refer to them as "de facto" partnerships. Since an unwritten partnership agreement may not be registered, we may conveniently discuss the legal position of unregistered "de facto" partnerships and then the effects of an unwritten partnership agreement.

Article 223: " $A$ business organization shall have no legal existence nor personality until all the provisions of this code relating to publicity have been complied with and registration is pubiished in accordance with Art. 87 of this Code."
Legal Personality - Under the Civil and Commercial Codes, only "persons" may be the subject of rights or obligations. The term "persons" as used in the Codes is not limited to human beings however. The law has attributed some aspects of personality to certain organizations. For example, the State is considered as a person and so may exercise rights and be subject to obligations. ${ }^{18}$ Since these organizations are considered "persons" by creation of the law, they are referred to as "legal" persons. If it fuliflls the conditions imposed by the Commercial Code, a partnership is deemed to be a legal person. ${ }^{19}$ As such, the partnership is not identical with the partners who created it; rather, it is in itself a separate entity. As a consequence, it may accomplish certain things, such as owning or disposing of property, which the law requires to be done by persons.

In the case of partnerships, the greatest practical significance of legal personality arises upon the dissolution and liquidation of the partnership. ${ }^{20}$ Because it is a person, the partnership, and not the individual partners, can be the owner of assets. Parties who deal with a partnership become creditors or debtors of the partnership -a legal person. While such partnership creditors may ultimately have a claim against the partners as individuals, this claim is indirect; they must first claim against the partnership, ${ }^{21}$ the person with which they have dealt.

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When a solvent partnership is liquidated, the claims of partnership creditors are first paid out of the partnership's assets. ${ }^{22}$ The partners are then paid the original value of their contributions (but not the actual property contributed), ${ }^{23}$ whatever assets may be left are profits and are distributed to the partners in equal shares provided that no other proportion is specified in the partnership agreement. ${ }^{24}$ Where the assets of the partnership are not sufficient to pay the claims of creditors, the liquidators may call upon the partners for contributions. ${ }^{25}$

The most important aspect of this sequence of distribution is that the creditors of the partnership are paid before the partners. Thus, these creditors have a priority as to the assets of the partnership over the partners and anyone claiming through the partners. This priority is based on the idea that the partnership is an entity separate from its members. The result is that partnership creditors also enjoy a priority as to the assets of the partnership over creditors of the partners themselves ('personal creditors"). A creditor of an individual partner is given no direct claim against partnership assets. Rather, his claim is against the assets of his debtor, the individual partner. Among his debtor's assets is his interest in the partnership. As has been seen above, this interest gives the partner a claim against partnership assets but a claim which is inferior to that of partnership creditors. A personal creditor may exercise the partner's claim but in doing so, he stands in the place of the partner and acquires no claim superior to that of the partner.

For example, let us suppose that $A, B$ and $C$ have formed a partnership, complying with all the requirements of the Commercial Code, including Article 223. A has dealings with $X$ in the name of the partnership; as a result, a debt of $\$ 1,000$ is incurred. The debtor in this situation is the legal person, the partnership, and not A, B or C. X's claim is against the assets owned by the partnership. Let us further suppose that $A$ owes $Y \$ 1000$ and that this is a debt which he has incurred in his personal capacity. A has no assets other than his interest in the partnership. As far as $X$ is concerned, as a partnership creditor, he will be paid before any assets are distributed to $A$ (or the other partners). $Y$ may claim A's interest in the partnership but, in doing so, he is exercising A's right. Therefore, Y will have only the right of a partner and this claim is inferior to that of X , who is a creditor. The result is that Y will not be paid if there are no assets left after $X$ is paid. If there are assets left over, $Y$ will receive that part which is due to $A$. Y's claim is still only equal to that of $B$ and $C$, the other partners. $Y$ is a creditor vis-a-vis $A$; he is treated only as a partner vis-a-vis the partnership, partnership creditors or the other partners. If the partnership were to have assets of $\$ 3000$, X would first be paid $\$ 1000$, leaving $\$ 2000$ for the partners. In the absence of any agreement to the contrary, each partner would receive $1 / 3$ or about $\$ 666$. Therefore, since A received $\$ 666$, $Y$ will ultimately receive only this much, if A has no other assets.

Lack of Legal Personality - To say that a partnership is denied legal personality, as in Art. 223, is to say that it will not be considered as a legal person, an

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entity separate from its members. The effect of this is twofold. First, as there is no legal person to be the owner of the assets of the partnership, the partners themselves must retain ownership of them. Second, since third parties did not deal with the partnership as a separate entity, they must have a direct claim against the partners, the only "persons" with whom they dealt.

To illustrate, let us suppose that $A, B$ and $C$ have formed a partnership but have not complied with Article 223. A has dealings with $X$ in the name of the partnership as a result of which a debt to $X$ of $\$ 1,000$ is incurred. If the partnership were a legal person, X's claim would be against it. But in our case, the partnership is not a legal person, and therefore X's claim is directly against A, $B$ and C as individuals. A B, and C are the only "persons" with whom X has dealt. Each would ultimately be liable in the amount of $\$ 333$.

Let us look at the liquidation of a partnership which has been denied legal personality. In this case, there is no question of distribution of assets to the partners since they are already the owners of them. Rather, it is of a question of allocation. Each partner is allotted the value of his original contribution. Any excess of assets is allotted equally among the partners in the absence of any agreement to the contrary. If there are only partnership creditors, such as $X$ in our previous illustration, their position will not be significantly different from the case of a partnership with legal personality. Partnership creditors may present their claims directly against the partners themselves. However, the denial of legal personality is a penalty imposed on $A, B$ and $C$ for their failure to register and publicize their partnership. It is not a penalty directed at $X$, who is a third party in good faith. In this situation $A, B$ and $C$ should not be allowed to use the lack of legal personality against $X$. Thus, if $X$ wishes to treat the partnership as a normal one, that is, treat it as a legal person and sue it directly rather than the partners as individuals, he should be allowed to do so in spite of the fact that the partnership would not be allowed to sue in its own name. On the other hand, $X$ has the option to claim directly against the partners themselves. In either case, he will be able to satisfy his debt from all available assets.

The real significance of a lack of legal personality lies in a situation where personal creditors of the partners are involved. Returning to our illustration, let us also suppose that A owes Y S 1,000 and that this is a debt which he incurred in his personal capacity. We saw previously that where a partnership has legal personality, a creditor of the partnership such as $X$ would have priority over a creditor of one of the partners such as Y, as to partnership assets. But where there is no Iegal personality, we have seen, there are no "partnership assets" as such. The partners - - not the partnership - own all assets and X's claim is against the partners - not the partnership. Thus, part of X's claim is against the personal assets of $A$, one of the partners. $Y$ has exactly the same type of claim against the assets which A owns. Thus, even as regards the partnership assets, $X$ no longer has a priority over $Y$. Although we have said that $A, B$ and $C$, being responsible for the lack of registration, may not take advantage of the lack of legal personality against $X, Y$ is not responsible for this situation. Therefore, he may take advantage of it and have the "partnership" treated as lacking legal personality. Let us assume again that our "partnership" has assets of $\$ 3,000$. In fact, since there is no legal person, the situation is really that each of the partners owns $\frac{1}{3}$ of this $\$ 3000$. Thus, A has assets of $\$ 1000$. Against these assets, $X$ has a claim of $\$ 333$ ( $\frac{1}{3}$ of his total claim against the "partnership") and $Y$ has a claim of $\$ 1000$. Assuming

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that A has no other assets, $Y$ will ultimately receive $3 / 4$ or $\$ 750$ (compared with $\$ 666$ in our previous example) while $X$ will receive $\$ 250$.

Policy reasons for requiring partnerships to register - We have so far interpreted article 223 in a highly conceptual manner. To be certain that our analysis makes sense, we must examine whether the result reached may be justified by any of the possible policies or value judgements which the legislature might have has in mind when it adopted Article 223.

The primary consequence of a denial of legal personality is to place personal and partnership creditors on an equal footing where both claim against partnership assets. Since this result is in turn a consequence of a failure to register and publicize, one may infer that one policy ${ }^{26}$ behind the registration of partnership is to protect personal creditors, even at the expense of partnership creditors. Apparently it is felt that non-registration may be more harmful to the interests of personal creditors than to those of partnership creditors. Is this true?

Persons who deal with a partnership may derive some benefit from the fact that it is registered and publicized because certain information may be readily available by consulting the commercial register. Thus, they may verify that there really is such a partnership, who the partners are, the value of the original contributions, etc. ${ }^{27}$ Of crucial importance to a person who is dealing with an intermediary, which is always the case with a partnership, ${ }^{28}$ is the extent of the intermediary's authority. The powers of the manager of a general partnership extend to all juridical acts which fall within the purpose of the partnership. ${ }^{29}$ A third party will find this purpose set out in the commercial register. Any ${ }^{30}$ further restriction placed upon these extensive powers is only binding on third parties where it has been entered in the commercial register or is in fact known to the third party in question. In practice, this rule works more to the advantage of the partnership than the third parties since it allows the partners to restrict a manager's powers and to make the restriction effective against all third parties, even those who have no actual knowledge of the restriction. ${ }^{31}$ In this case, the lack of registration will not affect a third party since he will not be bound by that which is not published. He will lose nothing as a result of non-registration. Even though the commercial register could provide useful information for third parties who wish to deal with a partnership, the denial of legal personality for failure to register seems to be ineffective as a sanction.

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The case is rather different when we examine the position of personal creditors of the members. As stated previously, where a partnership enjoys legal personality this means that the organization itself may own property. Where a member contributes a personal asset to a partnership, it becomes the property of the partnership. From the point of view of the member's personal creditors, property which was available for the payment of debts owed to them is no longer available. In its place, there is the member's interest in the partnership. As we have seen, although the personal creditors may exercise the member's interest, this claim is inferior to the claim of partnership creditors. One might say that from the creditor's point of view, the partner has exchanged an asset for something inferior in value.

Article 223 offers personal creditors some protection from this situation. The asset in question will only pass out of the hands of his debtor (that is, become the property of a legal person) where this fact has been registered and publicized. In this case, the personal creditors may not prevent the formation of the partnership but they may make an immediate claim against their debtor's partnership interest. The advantage lies in the fact that at the moment of formation and before the partnership has begun to operate the value of the partner's interest should equal the value of the assets contributed before the commencement of the business. That is, the partnership will not yet have incurred any losses which could diminish the value of their debtor's interest in the partnership. As a pratical matter the personal creditor's claim will not have to compete with that of partnership creditors since the latter do not yet exist.

Legal Existence - In addition to denying legal personality to an unregistered and unpublicized partnership, Article 223 also denies it "legal existence." In this case, the consequences of Article 223 are far from clear since, unlike "legal personality," the term "legal existence" does not have a fixed or technical meaning in Anglo-American law. Nor does the term "existence légale" have a technical meaning in French law. This is not to say that the term is never used. One may in fact say that where a partnership lacks legal personality, it may still actually exist but it is not recognized by the law as a separate entity and so has no "legal" existence. The effect of such an interpretation is to make the addition of "legal existence" to "legal personality" purely redundant. One should presume that the legislature did not intend to be redundant and so one must search for other possible meanings of the term.

The use of the terminology "no legal existence" might indicate that the law should completely ignore the situation arising out of the partnership. An example of such an approach is to be found in American law. Where a partnership was formed for an illegal purpose, such as illicit gambling or robbery, courts have refused to deal with it at all, even to the extent of ordering an accounting between the partners. ${ }^{32}$ The partners are left in the position in which they are found. Although this might be rather unfair to some of the partners, the illegality is considered to so taint the partnership that a court will not even recognize that it exists. A failure to comply with the rules of publicity is a far less serious offense than a partnership with an illegal purpose and so such a penalty seems rather extreme.

Another possible interpretation might be that the term "no legal existence" is meant only to emphasize the fact that the partnership exists in contravention of the law, so long as it has not been publicized. However, the fact that the partnership has not complied with the law is so obvious that there is no reason to reemphasize it. Neither of the interpretations so far discussed seems reasonable.

More troublesome is the possibility that the denial of "legal existence" is meant to indicate that the want of publicity makes the partnership agreement itself invalid. This interpretation also has the advantage of giving the term "legal existence" a meaning distinct from that of "legal personality". Such a rule would hardly be unusual since invalidity is the penalty for lack of registration in such countries as France ${ }^{33}$ and Lebanon. ${ }^{34}$ The consequences of invalidity will be discussed in detail below. The primary consequence is that the partnership agreement cannot be enforced in the future. As will be seen, invalidity is a more serious "penaity" than lack of legal personality.

There are two arguments which militate against this interpretation. First, the Civil Code states the principle that "unless otherwise provided, a contract shall be valid not withstanding that prescribed measures of publication have not been complied with." ${ }^{35}$ The general rule is clearly stated. An exception to the rule should be equally clear. This is certainly not the case with the term "no legal existence," an ambiguous term with no set or technical meaning. Since an exact word was available (i.e. "invalid" or "null") one would expect the legislator to use it if that was what he meant.

Second, Article 214 of the Commercial Code, in clear terms, provides that any partnership agreement not in writing is invalid. If the legislature wishes to provide the same penalty for lack of registration as for lack of writing, they would have used the same terminology. Furthermore, interpreting article 223 to require invalidation would itself create a redundancy. By its very nature, an unwritten partnership agreement cannot be registered. Article 223 encompasses all unwritten partnership agreements as well as those written agreements which have not been registered. If Art 223 required invalidation, then, there would be no need for a special article dealing with unwritten agreements.

In view of these considerations, it is more reasonable to conclude against the presumption, against redundancy. One must infer that in referring to "legal existence" the legislature only intended to give emphasis to the fact that unregistered partnerships are not to be considered as entities separate from the members themselves.

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## Effect of Lack of Legal Personality on Other Aspects of Partnership Law

As mentioned above, the major significance of legal personality, or lack of it, comes during the distribution of assets to creditors at dissolution. At this time, or during the operation of the partnership, certain questions may arise to which legal personality could be significant. These will primarily involve the matter of contributions, powers of the manager and limited liability.

Contribution - Where a partnership attains legal personality, the partnership, as a separate entity, may own property. Among the property owned by the partnership will be the contributions it receives from the partners; the partners do not retain ownership of their particular contributions, but have only an undivided interest in the partnership as a whole. If the partnership is not treated as a separate entity, it cannot own property. The partners themselves must be the owners of what appears to be partnership property. The question is whether each remains the owner of his particular contribution or, rather, becomes a joint owner of all contributions. ${ }^{36}$ One way to solve this problem is to begin with the proposition that the partnership agreement itself is valid as between the contracting parties, that is, the partners. We have already concluded that in the case of a written partnership agreement this statement is true whether or not the partnership is registered. As discussed above, one of the elements of a partnership agreement is the pooling of resources. If the partners have agreed among themselves to pool their contributions and this agreement is valid, it should be given effect. In cases where the partnership lacks legal personality because of a failure to register, it can be given effect by treating each partner as a joint owner of all contributions. This solution is more equitable than the alternative solution of considering each to remain owner of his own contribution from two points of view.

First, it honors the expectations of the contracting parties, the partners. Under a normal partnership agreement, although each partner may contribute specific assets to the partnership, he has no right to receive back that specific contribution. He has a claim only to its value. ${ }^{37}$ If the partnership incurs losses so that some of these contributions are lost, this loss must be borne by all the partners, ${ }^{38}$ and not just those who contributed the lost assets. This shating of losses is of the essence of a partnership agreement. The effect of holding that each partmer retains individual ownership of his contribution would violate this basic principle of a partnership agreement. The partners whose property was used up (usually the contributors of fungible goods, such as money) would bear all the loss. To illustrate, let us assume that A, B and C are parties to a written but unregistered partnership agreement. A and B each contributed $\$ 5,000$ in cash while $C$ contributed machinery worth $\$ 5,000$. At a latter point in time, the business has, as assets, the machinery and $\$ 3,000$ in cash. If C has a right to receive back his contribution in kind (the machinery), only $A$ and $B$ would bear the $\$ 7,000$ loss incurred by the business. In this illustration, $C$ would only share the loss where, and to the extent that, it exceeded $\$ 10,000$. This runs counter to the expectations of all.

[^17]Second, in discussing the policy behind registration, the point was made that it protects the interests of personal creditors. One effect of holding that the partners remain owners of their individual contributions, rather than joint owners of all of them, is to protect some personal creditors at the expense of others. To return to our previous illustration, suppose that $B$ and $C$ have no other assets and that previous to formation of the partnership $B$ owed $X \$ 5,000$ and $C$ owed $Y$ the same amount. The partnership is then formed and suffers the losses described. If $B$ and $C$ are treated as the owners of their individual contribution, $Y$ will collect the full amount he is owed $(\$ 5,000)$ since his debtor, $C$ will get back the machinery while $X$ will only be able to collect $\$ 1,500$, that is, B's one-half of the remaining $\$ 3,000$, in spite of the fact that $X$ and $Y$ are equally third parties in good faith.

Powers of the Manager - The powers of the manager of a partnership extend to all acts which fall within the purpose of the partnership. ${ }^{39}$ This scope of authority is considerably broader than would normally be inferred by civil law, where the designation of one as "manager" would be considered to be an authorization "expressed in general terms." Such authority would normally be intrepreted as being restricted to "acts of management." 40 Does the fact that a partnership is not registered mean that the "manager" is only an agent in the sense of the Civil Code and not the Commercial Code? If so, a third party who dealt with a person whom he assumed to have the broad powers of the manager of a partnership might find himself in the position of having dealt with one who acted beyond the scope of his powers. In this case, the "partnership" would not be bound.

Where the partners clearly intended their agent, the manager, to have the powers of the normal manager of a partnership, there is no problem. The relevant rules of the Civil Code are only rules of interpretation. The scope of an agent's authority is normally set in accordance with the actual intention of the parties. ${ }^{41}$ A problem may arise where the parties intended to limit the scope of the manager's authority. The Commercial Code provides that any restrictions on the extent of the powers of a manager "shall only affect third parties where such provisions have been entered in the commercial register of if it is shown that the third parties were aware of such provisions." 42 This provision states a policy in favor of commercial certainty which should be respected. Since the partnership is not registered, restrictions on the manager's powers should affect only these third parties having actual knowledge of them.

Eimited Liability - If a limited partnership is formed but not registered, this raises the question whether the resulting lack of legal personality will make all the partners fully liable.

A limited partnership is an organization in which some, but not all of the partners enjoy limited liability. ${ }^{43}$ Unlike the identity of participants in a joint venture, ${ }^{44}$ the existence of limited partners is normally made known to third parties

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and they are listed in the registered memorandum as such. ${ }^{45}$ The law allows limited partners to limit their liability for the firm's undertakings only so long as they do not act in a manner that might mislead third parties into considering them to be general partners with unlimited liability. Where a limited partner involves himself in the management of the partnership, he becomes "fully jointly and severally liable for any liabilities arising out of his activities." ${ }^{36}$

Here we are dealing with a clear policy in favor of the protection of third parties who deal with a partnership. On the other hand, there seems to be no connection between limited hiability and legal personality. In spite of the fact that a joint venture never enjoys legal personality ${ }^{47}$ and is not registered, ${ }^{48}$ some of its members may enjoy limited liability ${ }^{49}$ so long as third parties are not misled as to their status. ${ }^{50}$ There is no reason to deny limited liability to partners in an unregistered partnership so long as the policy of protecting third parties is safeguarded. Whether third parties might have been misled in a given case will depend on the factors of that case. It must be admitted, however, that where the partnership is not registered, it will in fact be more likely that third parties will be misled. Almost any dealings with third parties will probably make a limited partner fully liable.

## Lack of Registration and Publicity as "Good Cause" for Dissolution of a Partnership

As indicated above, most of the problems involved with unregistered partnerships arise at dissolution and liquidation. Moreover, a lack of registration may in itself be a reason for dissolution of a partnership. The Commercial Code provides that a partnership "may be dissolved for good cause on the application of a partner." ${ }^{51}$ A member of a partnership which exists in violation of the law has an interest in extricating himself from the situation. Dissolving the partnership is one way of doing this.

To say that a partner has "good cause" for dissolving the partnership is not to say that the partnership agreement may be invalidated. As indicated above, the agreement itself is valid (assuming it is in writing). It is only the organization which will be dissolved; there should be no question of any retroactive effect, such as might arise if the agreement were considered void from the start. As will be seen below, any interested party may attack an invalid partnership agreement whereas only a partner may request the dissolution of a partnership for "good cause."

When a partnership is attacked for lack of publicity, French law permits this defect to be "cured" by the registration and publication of the partnership agree-
46. Comm. C., Art. 301(3). "Where appropriate, he may be declared jointly and severally liable in respect of some or all the firm's undertakings."
47. Comm. C., Art. 272 (3).
48. Comm. C., Art. 272(2).
49. Comm. C., Art. 276(2).
50. Comm. C., Art. 272(4). In this case, merely revealing the existence of the joint venture might cause third parties to rely on the personal credit of the revealed members.
51. Comm. C., Art. 218(1).

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ment even after court procedings have begun. ${ }^{52}$ This should be equally true in Ethiopia. The defect is trivial and may be cured easily. Of course, registration has no retroactive effect. The partnership will acquire legal personality only from the day of registration. ${ }^{53}$ Third parties from the previous period, whether creditors of the partnership or personal creditors of partners will be thoroughly protected by the operation of Article 223 of the Commercial Code. Therefore, the only effect will be to halt the dissolution of the partnership and to give it a legal personality for the future.

Article 214: "The formation of any business organization other than a joint venture shall be of no effect unless it is made in writing."
Invalidity of the Partnership Agreement - We have been dealing until now with written but unregistered partnership agreements. In moving on to a discussion of unwritten partnership agreements, one must bear in mind that these agreements are necessarily unregistered. ${ }^{54}$ In addition to the penalties imposed for the lack of a writing, the partnership will be denied legal personality.

The consequence of an unwritten partnership agreement is that the agreement itself is invalid. ${ }^{5 s}$ This is not to say that the agreement does not exist at all or that it is "automatically" null and void. When we say that the agreement is invalid, we mean that someone may go to court and request that the contract be invalidated. Depending on the circumstances, the "someone" may be one or all of the parties to the contract or even an "interested third party."s6 Until invalidation is granted by a court, the contract remains in effect. An "invalid" contract may very well be acceptable to the persons involved or no one may be aware of the fact that some ground for invalidation exists. As a practical matter, such a; contract will be indistinguishable from a valid contract, so long as it is not invalidäted.

The issue is the time when invalidation takes effect; that is, whether the agreement is invalidated retroactively from the moment it was made or only for the future, as from the moment it is invalidated by the court. As a general rule, the effect of invalidation is to return the parties to the position which would have existed had the contract not been made and to nullify all acts done in performance of the contract. ${ }^{57}$ This means that contracts are invalidated retroactively from the time they were made and so are considered as having never existed. For example, let us suppose that $X$ and $Y$ entered into an invalid contract for the sale of an automobile with $X$ as seller and $Y$ as buyer. If $X$ later invalidates the contract, the effect will be to return the automobile to $X$ and the price to $Y$. $X$ will be considered to have always been the owner of the automobile.

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However, there are two exceptions to the rule of retroactivity. Where the interests of third parties are concerned, acts done in performance of the contract are not invalidated. ${ }^{58}$ For example, if $Y$ had already resold the automobile to $Z$, it would be unfair to force $Z$ to return it to $X$. The account between $X$ and $Y$ would be settled by the payment of money only. Nor are acts nullified where this is not possible or would involve serious disadvantages or inconveniences. ${ }^{59}$ For example, if the automobile had been destroyed, it could no longer be returned: The court would have to order $Y$ to pay an appropriate sum of money to $X$.

If one considers the invalidation of a partnership agreement which has not been executed, that is, where the partnership has never operated as such, one may apply the general rule. The parties may conveniently be returned to their previous positions. However, very often, the partnership will have actually operated, perhaps for a long period of time, and this fact will be difficult to ignore. The interests of third parties who dealt with the partnership will be involved. The situation among the partners themselves may be quite complicated and so it may be difficult or even impossible to restore them to their original positions. These practical considerations will mitigate against retroactive invalidation to such an extent that it will be the exception rather than the rule when dealing with partnerships. The partnership will in effect be treated as valid up to the moment of invalidation and only be nullified for the future; those things done in the past will be enforced. ${ }^{60}$

When the partnership agreement is prospectively invalidated, the partnership can mo longer exist since there will no longer be an underlying contract to support it. The partners are no longer bound by any contract; their affairs must be sorted out and the assets held in common must be apportioned. The practical effect of invalidation of the partnership agreement is to dissolve the partnership, which will, in turn, lead to liquidation of the partnership assets.

The same practical consideration, that is, the interests of third parties and the complexity of the arrangements between the partners, has led the French jurists to develop a theory of "de facto" partnerships ("sociétés de fait") to deal with a partnership which is subject to invalidation, ${ }^{61}$ and which has operated over a period of time. ${ }^{52}$ Under this theory, the partnership agreement is considered as valid up until the time that a court pronounces its invalidation. Both third parties and the partners themselves may prove this "de facto" existence by any means, where it is a question of liquidating the partnership rather than of enforcing the agreement in the future. ${ }^{63}$ We have just suggested the same solution for Ethiopia by an application of the rules of the Civil Code.

In developing a special theory for partnerships, French law recognized that partnership agreements are especially complicated contracts and, as such cannot always be subject to the normal rules of the Civil Code. One result of this analysis is to treat an unwritten partnership agreement in the same way as a written

[^20]but unregistered agreement, provided that the partnership has operated and that the enforcement of the agreement in the future is not involved. However there are two significant differences between the two situations.

First, under the Civil Code, a contract not made in the prescribed form may be invalidated by the parties to it or by any interested third party. ${ }^{64}$ The effect of this is to allow interested third parties to force the dissolution and liquidation of any partnership not supported by a written agreement. Among "interested third parties," we may include partnership creditors and probably personal creditors of the partners. In the case of a written but unregistered partnership, only the partners may force dissolution.

Second, the partnership assets will often be distributed according to the Commercial Code rather than according to the partnership agreement. Normally, the partners may freely agree in the partnership agreement on the proportional distribution of profits. ${ }^{5}$. In the absence of such a provision in the partnership agreement, profits are to be distributed equally. ${ }^{66}$ When the partnership agreement is invalidated, the parties must be considered to have failed to agree since liquidation according to the invalid agreement would be enforcing one part of the agreement in the future. The entire agreement will have been invalidated. One cannot enforce one part of it. However, it is very important to note that this latter statement is based on the assumption that the partnership agreement has been invalidated. As stated above, invatidation is not automatic; the partnership may be dissolved without invalidation, for example, by agreement among the partners. In this situation, the assets would be distributed according to the agreement. ${ }^{67}$


#### Abstract

"Apparent Partnerships" and Third Parties - A related problem arises where a third party has dealt with what he supposed to be a partnership and he now wishes to hold someone liable as a partner. To do so, need he only show that the individual in question held himself out to the public as a partner, that is, that there was ostensibly a partnership, or must he prove the actual elements of a partnership contract that is, that the persons involved really intended to be partners? Ethiopian law has no specific provision on this subject but possible solutions may be suggested by the rules applied in other countries.


American law has gone the farthest in dealing with this situation. Recognizing a need to protect the innocent third party who has relied even where no genuine
64. Civ. C., Art. 1808(2)
65. Comm. C., Art. 270(3).
66. Ibid.
67. A disagrement may arise over whether to invalidate or not. The conflict may be resolved according to the following two principles. As between any third parties and the partners themselves, the third parties should prevail. The partners are responsible for the invalidity and should not be allowed to use it against third parties. As between third parties or as between partners, those seeking invalidation should prevail.

What would be the practical effect of these priaciples in a case where the partners wished to invalidate their partnership agreement while third parties did not? The partnership agreement would be treated as valid until all litigation involving the third parties was conpleted. At this point, the partners, or any one of them, would be free to bring an action to invalidate the contract. Thus, no partwer could use the invalidity of the partnership agreement as a defense to an action brought by a third party.
partnership was formed, the doctrine of partnership by estoppel has been developed. Under this doctrine, when a person 'represents himself, or consents to another representing him to anyone, as a partner in an existing partnership or with one or more persons not actual partners," he may be held fully liable as if he were a partner. ${ }^{68}$

In Ethiopian law, a person who permits his name to be used in the firm name will be liable as a partner even though he may not actually be a partner. ${ }^{69}$ Although there is no general rule corresponding to partnership by estoppel, the above provision demonstrates a policy in favor of protecting third parties who may be misled as to a person's status in a partnership even though that person may not actually be a partner. This policy may lead Ethiopian courts to develop a doctrine similar to that in American law.

Even if the courts decline to follow the American solution, the results reached in actual cases may not be very different. An alternative approach may be illustrated by a French case, ${ }^{70}$ since French law does not accept the doctrine of estoppel. In this case, a "de facto" partnership for the operation of a bank was found to exist between a father and a son. Typical of the evidence presented was the fact that the son often referred to himself as a banker, that the firm name of the bank was "Charles Dorient \& Co., bankers" (indicating a partnership), that the son often signed for the bank without indicating that he did so by a power of attorney, etc. The court completely ignores the internal relations of the two men and relies wholly on external appearance. The result is justified since, as a general principle of contract law, one may rely on a person's manifested intention and ignore any unexpressed reservations. The result is curious in one respect; the court finds a real partnership as regards third parties whereas it might not find a partnership in a suit between the "partners." The "partners" themselves would have to show that in their internal relation, they really operated as a partnership.

The result under this French approach is very close to that reached under American law. The advantage of the American rule is that it is more realistic in that it recognizes that the real interest at stake is the protection of third parties. One is not really interested in the intention of the parties except where dealing with a dispute between the partners. If one follows the French approach, since we have assumed that the third party cannot produce a written partnership agreement, he will have shown the existence of an invalid partnership. This will be treated in the manner described above, that is, valid in the past but unenforceable for the future.

## Conclusion

In dealing with agreements by which a business shall be operated by two or more persons, the courts must first deal with the question of whether the agreement is a "partnership" within the meaning of the Commercial Code. Where the agreement does satisfy these conditions, it should be treated as a partnership even where the parties were not aware of the Commercial Code, followed customary rules or
68. Uniform Partnership Act, cited above at note $31, \S 16$.
69. Comm. C., Art. 281(3).
70. Dorient c. Caubit ès qualité (Bordeaux, Fra., July 5, 1932), Rev. des Sociétés, 1932, p. 220.
forms, or where the formalities of a writing or of publicity were ignored. The lack of compliance with formalities raises special problems but problems not peculiar to "customary parterships." The same problems arise where persons who intended to comply with the Commercial Code nonetheless omit some formality. All of these problems may be solved by considering these partnerships to have a "de facto" existence.

We have examined two varieties of "de facto" partnership, the unregistered partnership and the partnership established by a contract not in writing. In both cases, we have seen that a mere lack of a written contract or lack of publicity does not preclude treating them in some respects as partnerships provided that they otherwise conform to the definition of a partnership as found in the Commercial Code. Further, in both cases, the prior acts of the partners must be recognized by law and given effect, whether these acts concern third parties or only the partners themselves. However, neither type of "de facto" partnership may enjoy legal personality. This is the very meaning of the term "de facto". Nonetheless, certain differences exist between the two types. Where the "de facto" partnership is not supported by a written agreement, its existence may only be recognized in the past. The agreement itself is not valid and so may not be enforced in the future. Where there is a written but unregistered partnership agreement, the contract itself is valid and so may be enforced prospectively. Any partner may convert the partnership into a "de jure" organization simply by registering it. There are two practical consequences to this difference. First the relations between the partners, even where third parties are concerned, will be regulated by their valid agreement in the case of an unregistered partnership. Where the partnership agreement is not in writing, the relations between the parties must be regulated by the rules of the Commercial Code. Second, only the partners may force the dissolution of a partnership which is supported by a written contract; any "interested" third party may attack an unwritten partnership agreement and thus bring about the dissolution of the partnership.

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# THE ERITREAN EMPLOYMENT ACT OF 1958: ITS PRESENT STATUS 

by Robert C. Means*

One of the important pieces of legislation enacted by the Eritrean Assembly during the Federation ${ }^{1}$ was the Employment Act of 1958. ${ }^{2}$ This act, superseding a miscellany of Eritrean legislation going back into the Italian colonial period, ${ }^{3}$ established a broad range of minimum labour conditions and a system of labour inspection to enforce them and provided for the registration of employers' associations and labour unions.

The Employment Act was several years in advance of similar legislation in the rest of the Empire. Outside of Eritrea the first Ethiopian legislation establishing minimum labour conditions was the Civil Code of 1960,4 and it was probably not until promulgation of Legal Notice No. 302 of $1964^{5}$ that minimum conditions were established for the Empire as a whole that were generally as favourable to employyees as those of the Employment Act for Eritrea. ${ }^{6}$ The first statutory reference to labour unions outside of Eritrea appears also to have been in the Civil Code, ${ }^{7}$ and the first Empire-wide system of labour inspection ${ }^{8}$ was established by the Lab-

[^33]our Inspection Service Order of $1964^{\circ}$ and the Labour Standards Proclamation of $1966 .{ }^{10}$

At least by 1966, however, there did exist general Ethiopian legislation covering substantially the same ground as the Eritrean Employment Act. The purpose of this note is to consider the legal effect of this Ethiopian legislation, and of the termination of Federation, on the Employment Act: whether the Act still has legal force in Exitrea and, if so, to what extent. This question raises issues that are of general importance to Ethiopian public law. It also has importance in its own right for its bearing on the rights and duties of Eritrean employers and employees. To take only one example, the Ethiopian Civil Code and the Eritrean Employment Act differ in their provisions concerning paid sick leave. The Civil Code allows employees up to one month of sick leave at half pay, ${ }^{11}$ while the Employment Act allows virtually no paid sick leave at all. ${ }^{12}$ In the case of an Eritrean employee absent from work by reason of sickness, the obligation of the employer to pay the employee wages during his absence may be defined by the Civil Code or the Employment Act, but not by both.

## The Employment Act daring the Federation: 1958-1962

Before the end of the Federation, two pieces of Ethiopian legislation partly matching the coverage of the Employment Act were enacted, the Civil Code of 1960 and the Labour Relations Decree of $1962 .{ }^{13}$ Both laws included broad repeals provisions. The Code repealed "all rules whether written or customary previously in force concerning matters provided for in this Code." ${ }^{14}$ In similar terms the Labour Relations Decree repealed "all legislation, regulations or orders previously in force concerning matters provided for herein."15 By these provisions all earlier legislation on matters dealt with in the Code or the decree was repealed wherever the Code and decree applied. Neither Code nor decree applied in Eritrea, however.

During the Federation, legislation in the Empire fell into three classes with respect to territorial application. There was federal legislation, which applied to both Ethiopia and Eritrea; such legislation was limited by Article 3 of the Federal

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Act ${ }^{16}$ to certain designated fields, such as defense, foreign affairs, and commerce with foreign countries and between Ethiopia and Eritrea. There was also Ethiopian legislation, which applied only to Ethiopia and not to Eritrea, and Eritrean legislation, which applied only to Eritrea.

The Labour Relations Decree fell within the category of purcly Ethiopian legislation; the Decree was not applicable as a matter of law in Eritrea. Nor was there anything in the legislation that was federal in application that could be construed to repeal or modify the Employment Act. At least to the end of the Federation, therefore, the Employment Act remained in full force in Eritrea.

## The End of the Federation: 1962

Five weeks after the Labour Relations Decree became effective, the Federation was ended by Imperial order, ${ }^{17}$ and Eritrea became part of a unified Ethiopian Empire. The legislative jurisdiction of the Emperor and Ethiopian Parliament was extended to all parts of the Empire; their future enactments would apply to Eritrea as elsewhere. But what of existing legislation-legislation that had been applicable previously to only one part of the former Federation?

The Imperial order dissolving the Federation dealt explicitly with this problem. As interpreted, the order essentially preserved the status quo. Existing Eritrean legislation was to continue to apply in Eritrea, and, as a necessary corollary although not stated in the order, existing Ethiopian legislation dealing with the same subject matter was not to be extended to Eritrea, This result followed principally from the broad interpretation given to Articles 4 and 6 of the order, ${ }^{18}$ which provided as follows:
"4. All rights, including the right to own and dispose of real property, exemptions, concessions and privileges of whatsoever nature heretofore granted, conferred or acquired within Eritrea, whether by law, order, contract or otherwise, and whether granted or conferred upon or aequired by Ethiopian or foreign persons, whether natural or legal, shall remain in force and effect. ...

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6. All enactments, laws and regulations or parts thereof which are presently in force within Eritrea or which are denominated to be of federal application, to the extent that the application thereof is necessary to the continued operation of existing administrations, until such time as the same shall be expressly replaced by subsequently enacted legistation, remain in full force and effect and existing administrations shall continue to implement and administer the same under the authority of the Imperial Ethiopian Government."

Article 4 and 6 preserved Eritrean legislation to the extent that it conferred rights on any person or was "necessary to the continued operation of the existing administration." Both articles are susceptible to widely varying interpretations. Article 4, for example, might be limited to the preservation of rights already immediately possessed by particular individuals ${ }^{19}$ or extended to the less definite and more general right to take advantage of legal provisions at some future time. Applied to the Employment Act, the first interpretation might at most preserve the Act's minimum labour condition provisions for persons subject to the provisions as of the end of the Federation; the latter interpretation would preserve them in full force for the benefit of anyone wishing to take advantage of them in the future. In practice, the order has been construed broadly to include all or virtually all existing Eritrean legislation. The Employment Act and other Eritrean legislation in force immediately before the end of the Federation still remained in force immediately after the Federation's end.

## The Employment Act since the Federation

We have now to consider the effect of post-1962 Ethiopian legislation on the Employment Act. The Imperial order terminating the Federation has been interpreted to save most or all Eritrean laws then in force from being repealed as an automatic consequence of the end of Eritrea's autonomous status. But the Order did not-and, indeed, constitutionally could not-protect Eritrean laws from repeal or modification by Ethiopian legislation enacted after the end of the Federation.

Since the Federation there have been four important labour law enactments apart from those dealing with government employees: the Labour Relations Proclamation of 1963,20 the Labour Inspection Service Order of 1964, the Labour Standards Proclamation of 1966, and Legal Notice No. 302 of 1964. Their combined effect appears to have been to repeal much but not all of the Eritrean Employment Act.

The Labour Relations Decree had been proclaimed by the Emperor while Parliament was not in session, pursuant to His powers under Article 92 of the Revised Constitution. ${ }^{21}$ As required by Article 92, the decree was submitted to the next session of Parliament, which approved it with minor amendments. The law then was reissued as the Labour Relations Proclamation of 1963.

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Reissuance of the former decree as a proclamation was in legal effect a reenactment of the law; what had previously been a 1962 decree became a 1963 proclamation. The significance of this change goes beyond a mere change in the title of the law and the minor amendments that were made. As we have seen, when the decree was enacted in 1962 it did not extend to Eritrea, and, as a result, the repeals provision did not apply to the Eritrean Employment Act. Before it was reenacted as a proclamation, however, the Federation bad ended, and the proclamation, unlike the decree, therefore extended to the entire Empire. The repeals provision that had not applied to the Employment Act in 1962 did apply to it in 1963, and the provisions of the Employment Act that concern matters dealt with in the Labour Relations Proclamation - in particular, the Act's provisions concerning labor unions and employers' associations ${ }^{22}$ - were thereby repealed.

That all this should follow from reenactment of the law after the end of the Federation seems plain enough. What perhaps does not appear quite so plain is why Parliament's approval of an Imperial decree with minor amendments should be regarded as a reenactment of the entire law, and not merely as amendment of an existing law. The reason lies in the relationship between the Imperial decree power on one hand and the power to enact proclamations shared by the Emperor and Parliament on the other hand. We have already said that Articie 92 requires that Imperial decrees be submitted to the next session of Parliament. Article 92 itself contemplates only two courses of action on the part of Parliament. Parliament may disapprove the decree, in which case the decree ceases to be law, ${ }^{23}$ or it may approve the decree, in which case the decree continues in force as a decree. ${ }^{24}$ Whether Parliament's unqualified approval of a decree should be treated as reenactment of the law is not entirely clear, ${ }^{25}$ but it seems that it probably should not.

But what if Parliament's action is not merely to approve the decree as it stands but rather to approve it with amendments? Parliament then is no longer acting pursuant to Article 92. Rather, it necessarily is acting pursuant to its power to enact proclamations (subject to Imperial veto) under Articles 88-90. No matter how minor the amendments, Parliament's action constitutes enactment of a new proclamation to replace the old decree. ${ }^{26}$

This distinction between approval of a decree with amendments and unqualified approval of a decree is reflected in the form given to each as published in the

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Negarit Gazeta. The preamble and first two articles of the Labour Relations Proclamation read as follows:
"Whereas on September 5, 1962, the Labour Relations Decree was promulgated as Decree No. 49 of 1962; and

Whereas Parliament has introduced certain amendments into said Decree, and approved a revised text of the low;

Now, therefore, in accordance with Article 34 and 88 of Our Revised Constitution, We approve the resolutions of Our Senate and Chamber of Deputies, and we hereby proclaim as follows:

1. This Proclamation may be cited as the Labour Relations Proclamation, 1963.
2. The Labour Relations Decree (Decree No. 49 of 1962) is hereby renumbered as Proclamation No. 210 of 1963, and incorporated herein, subject to the changes set forth below." (Emphasis added.)
As indicated by the reference of the preamble to Article 88 of the Revised Constitution and by the title given to the law by Article 1, the law constitutes a new proclamation and not merely a continuation of the old decree. And, as indicated by Article 2, the proclamation enacts the entire text of the old decree except those provisions amended in Parliament.

This form may be contrasted with the one used to announce Parliament's unqualified approval of a decree, for example, its approval of Decree No. 23 of 1957:27
"Decree No. 23 of 1957 having been duly transmitted to Parliament for consideration pursuant to Article 92 of the Revised Constitution, and due notice having been given by Parliament of the approval of said Decree, "The Annual Highway Renovation Expenditure (Amendment) Decree, 1957", pursuant to said Article 92, continues in force in law."

To return now to the other post-1962 legislation referred to above. This legislation, taken together, raised the minimum labour conditions established by the Civil Code, ${ }^{28}$ established minimum conditions with respect to matters not dealt with by the Code, ${ }^{29}$ created a system of labour inspectors, ${ }^{30}$ and took steps to ensure that the inspectors were able to carry out their work effectively. ${ }^{31}$ In all these respects it parallelled provisions of the Eritrean Employment Act. Not all the corresponding provisions of the Employment Act were repealed, however.

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It appears that this legislation did have the effect of repealing the provisions of the Employment Act regarding labour inspection, both those establishing a system of labour inspectors for Eritrea and those intended to facilitate the inspectors' work ${ }^{32}$ The laws establishing a system of labour inspection for Ethiopia repealed all earliex legislation on the same subject, ${ }^{33}$ and there is nothing, in these laws that would save the Eritrean labour inspection provisions from the general repeal. The law applicable in Eritrea in this respect appears now to be the Labour Inspection Service Order of 1964 and the Labour Standards Proclamation of 1966, not the Eritrean Employment Act.

So far as minimum labour conditions are concerned, however, it appears that important parts of the Employment Act remain in force. There are two reasons for this. First, Legal Notice No. 302 and the Labour Standards Proclamation both contain provisions saving any statute or other legal arrangement that creates labour conditions more favourable to employees than those of the legal notice and proclamation. ${ }^{34}$ Some provisions of the Employment Act are more favourable to employees than the corresponding provisions of the Ethiopian legislation, and those provisions of the Act have been saved from repeal. ${ }^{35}$

Defining exactly which of the Act's provisions meet this "more favourable" standard is not without its difficulties, however. First, there is the problem of what to do with related provisions. To illustrate this problem, we will take a hypothetical case that presents the problem in more extreme form than do the actual provisions of the Act. Suppose that the Employment Act provided for a nine-hour work day and a five-day work week, but that Legal Notice No. 302 provided for an eight-hour work day and a six-day work week. A literal application of the "more favourable" standard would allow employees in Eritrea the best of each set of provisions: an eight-hour work day from Legal Notice No. 302 and a five-day work week from the Employment Act. In consequence, they would have a fortyhour work week - shorter than that provided by either law.

One strongly suspects that such a result would not reflect the intention of the draftsmen or legislature. Presumably, where provisions are as closely related as those fixing the number of hours to be worked each day and the number of days to be worked each week, the related provisions must be taken together - either the ninehour day and the five-day week or the eight-hour day and the six-day week. Yet, this principle cannot be taken too far. Extended to the limits of its logic, it would leave the saving provisions of Legal Notice No. 302 and the Labour Standards Proclamation with virtually no legal effect as they apply to the Employment Act. In one important sense every minimum labour condition provision within each of the two systems of law - Ethiopian and Eritrean - is related to every other. Virtually any improvement in working conditions increases employers' costs at least in the
32. Arts. 66-67, Employment Act.
33. The Labour Inspection Service Order contained no explicit repeals provision, but it presumably did implicitly repeal any earlier legislation establishing a labour inspection service. In any event, the repeals provision of the Labour Standards Proclamation did explicitly repeal "all... laws previously in force concerning matters provided for in the Proclamation." (Art. 2)
34. Art. 10., L. Not No. 302, and Art. 15, Labour Standards Proclamation.
35. One of the few provisions that seem clearly to fall into this category is Article 21 of the Employment Act, allowing employees to take religious holidays without pay in addition to the six national holidays with pay.
short run. This is true not only of higher wages but also of longer paid vacations, shorter working hours, or increased employer's liability for accidents and sickness. The minimum labour conditions provisions as a whole are, or at least should be, the outcome of balancing this increased cost against the need to protect the interests of workers. A substitution of a "more favourable" provision for any existing provision shifts that balance, giving greater total benefits to workers and imposing greater total costs on employers. The shift is not usually so obvious as in the above hypothetical case of the number of hours of work per day and days of work per week, but it is not any the less real for that.

There appear to be three possible solutions. One is to allow the substitution of any provision that taken by itself is more favourable to employees, without regard to its relationship to other provisions. The hypothetical case of daily. and and weekly work hours suggests the kind of result that this solution may produce in some instances. A second solution is to recognize that all of the minimum labour condition provisions of each legal system - Ethiopian. and Eritrean -are related to one another and therefore to choose between the Ethiopian provisions as a whole and the Eritrean provisions as a whole. The logic of this solution cannot be faulted, but it cannot casily be squared with the saving provisions of the Labour Standards Proclamation and Legal Notice No. 302, which seem to contemplate that at least some more favourable provisions could be applied in preference to particular provisions of those laws. Finally, a more or less arbitrary distinction can be drawn between provisions that are very closely related and those that are less so. This, it appears, is what has to be done if reasonable effect is to be given to the saving clauses.

The complexity of this process can be understood by viewing a concrete problem likely to arise - a problem requiring the analyst to answer also the questions, more favourable to whom and under what circumstances? The saving provisions refer to labour conditions more favourable "to employees." But employees are not a homogeneous group; what may be more favourable for one employee may be less favourable for another. Also, even for a single employee, which of two provisions is the more favourable may vary according to the circumstances.

This problem is illustrated in both of its aspects by the severance pay proyisions, Article 36 of the Employment Act and Article 9 of Legal Notice No. 302. Article 36 divides employees into two classes: those earning more than one hundred dollars per month, and those earning one hundred dollars per month or less. Severance pay for the first group of employees who have been employed for five years "or more is three months' pay plus an additional half month's pay for each year of service over five; for those who have worked less than five years, it is reduced proportionately. For the second group of employees, severance pay is one quarter of a month's pay for each year of employment.

Article 9 of Legal Notice No. 302 makes no distinction between employees on the basis of the amount of their wage. For any employee who has been employed for one year or more, severance pay is thirty times the employee's average daily wage, with a twenty-five per cent increment for each year of employment after

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the first one. Regardless of the length of service, however, an employee is not entitled to more than 180 times his average daily wage.

In comparing these two provisions, there is an initial problem as to the meaning of "average daily wage" in Legal Notice No. 302-whether it means the employee's wages during a period of time divided by the total number of days in the period or his wages during the period divided only by the number of work days. It seems that it probably was intended to mean the former, but on either interpretation the general conclusion is the same: Legal Notice No. 302 provides greater severance pay for employees earning one hundred dollars per month or less and also for employees earning more than one hundred dollars per month who have been employed for less than a certain number of years - on the interpretation of average daily wage suggested here, that number is approximately two. ${ }^{37}$ For employees earning more than one hundred dollars per month who have been employed for longer than this, the Employment Act provides the greater amount of severance pay. Thus, whether Article 36 of the Employment Act or Article 9 of Legal Notice No. 302 is the more favourable to employees depends on which employees one means.

The two provisions also present the question of under what circumstances. The amount of severance pay fixed by law is of no concern to an employee whose employment is terminated under circumstances that do not meet the requirements of the severance pay provision. Although Legal Notice No. 302 provides for the greater amount of severance pay for what is probably the majority of employees, the Employment Act entitles employees to severance pay under a broader range of circumstances.

The Employment Act provides for severance pay in all circumstances with two exceptions. The exceptions are (1) where the employee is dismissed for certain kinds of misconduct, which are enumerated in Article 33 and (2) where the employee himself terminates the employment contract. The first exception applies to all employees. The second, however, does not apply to employees earning more than one hundred dollars per month with at least five years of service or to other employees with at least two years of service; these employees are entitled to severance pay even when they, rather than the employer, terminate the employment contract.

Legal Notice No. 302 in effect works from the opposite direction; rather than specifying the cases in which an employee is not entitled to severance pay, it specifies the one case in which he is entitled to it, which is where the employer dismisses the employee without good cause. Comparing this case with the circumstances under which an employee would be entitled to severance pay under the Employment Act, Legal Notice No. 302 appears to be less favourable to employees in two respects. First, under the legal notice an employee is never entitled to severance pay if he terminates his employment himself. Second, good cause for dis-

[^40]missal exists in at least two instances in which the employee is guilty of no misconduct. These are where, "in the circumstances, it would not be reasonable to expect the contract to be extended or renewed," and where "the situation filled by the employee is abolished in good faith." ${ }^{38}$ In both of these instances, it appears, an employee would be entitled to severance pay under the Employment Act.

Now, how does one apply the more favourable standard to this mixture of advantages and disadvantages on each side? One alternative is to take the best of each: the Employment Act to control on the question whether any severance pay is due and also on the amount of severance pay where it is the more generous in that respect; Legal Notice No. 302 to control on the amount of severance pay where it is the more generous. This alternative requires, however, not merely the separation of one related provision from another, but the selection of only the most favourable parts of single provisions and their combination to form a hybrid provision that is like no provision in either law. That this is what this alternative requires does not make the alternative clearly wrong - the questions of eligibility for severance pay and of the amount of severance pay for each group of employees could have been dealt with in separate provisions, and the fact that they were not may be regarded as merely a problem of form. But the same sort of doubts about the intent of the draftsmen and legislature that would arise in the hypothetical case of daily and weekly work hours arises here in the actual case of eligibility for and the amount of severance pay.

A second alternative is somehow to weigh the advantages and disadvantages of each provision and declare one or the other the more favourable on the whole. The difficulty with this alternative is that a standard of measurement is lacking. It is not difficult to compare an eight-hour day and six-day week with a ninehour day and five-day week, because there is an obvious standard against which each can be measured - the total number of hours per week. But there is no very obvious standard against which to measure a greater amount of severance pay for some employees on one hand against a greater amount for others and a greater number of cases in which severance pay will be due on the other; and such standards as do suggest themselves - such as the average amount of severance pay for all employees discounted by the likelihood that no severance pay will be due-are neither possible of application with the data available nor, probably, suitable for judicial application in any event.

Considering the legal and practical problems raised by both of these alternatives, there may be an understandable temptation to meet the problem by a kind of local option - allow the workers of each enterprise to decide which provision they think is more favourable. Despite the practical advantages of this course, however, it seems of doubtful legality. From the combination of Article 36 of the Employment Act and Article 9 and the saving provision of Legal Notice No. 302, certain severance pay rights are conferred on Eritrean employees. As the preceding discussion has shown, it is not easy to determine what those rights are, but difficulties of interpretation do not relieve a court of law of its obligation to make the interpretation and decide the case accordingly. Let us suppose, then, that in an enterprise it is decided by the employees that Article 9 of Legal Notice No. 302 should control. However; a minority of employees-presumably those with higher monthly

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wages and long service-disagree. If one of this minority of employees is dismissed and goes to court to obtain the severance pay that would be due to him under the Employment Act, would the court be justified in dismissing his case simply on the ground that a majority of his employees had chosen Legal Notice No. 302 ? It seems that it would not. Rather, the court would be obligated to determine whether, under the court's interpretation of the relevant provisions, the Employment Act does govern as the employee claims. If the court determines that it does, the employee would be entitled to judgment accordingly, the decision of a majority of his fellow employees notwithstanding. ${ }^{39}$

The second reason for concluding that not all of the Employment Act's labour condition provisions were repealed is that some establish minimum standards on points not dealt with at all by either Legal Notice No. 302 or the Labour Standards Proclamation. ${ }^{40}$ Such provisions may be regarded as being of necessity "more favourable" to employees than the corresponding provisions of Legal Notice No. 302 and the Labour Standards Proclamation-since there are no such corresponding provisions-or as simply not being within the ambit of the Ethiopian laws' repeals provisions in the first place. On either view, such provisions have not been repealed.

## Summary

In considering the present legal status of the Eritrean Employment Act of 1958, the history of the act falls into three parts. The first is the period from enactment of the law to the end of the Federation. During this period, the law could have been repealed or modified only by subsequent Federal or Eritrean legislation. Since there appears not to have been any such legislation dealing with the subject matter of the Employment Act, the act apparently remained in full force to the end of the Federation.

The end of the Federation constitutes the second part of the act's history. The Federation's end could have had the effect of repealing all Eritrean legislation, and even the provisions of the Imperial order ending the Federation probably would not have saved more than a part of such legislation if those provisions had been interpreted narrowly. In any event, however, the provisions have been broadly interpreted to save all or nearly all Eritrean legislation from repeal, and the Employment Act continued in force after the end of Federation.

Since the end of Federation, there have been four pieces of Ethiopian legislation dealing with the subject matter of the Employment Act.

The effect of this legislation on the Employment Act appears to have been as follows:

[^42]1. Three kinds of provisions appear to have been repealed:
a. Provisions relating to labour unions and employers' associations, which appear to have been repealed when the Labour Relations Dectee was reenacted as the Labour Relations Proclamation in 1963;
b. Provisions relating to dabour inspection, which appear to have been repealed in part by the Labour Inspection Service Order of 1964 and in part by the Labour Standards Proclamation of 1966; and
c. Minimum labour condition provisions that are not as favourable to employees as corresponding provisions of Legal Notice No. 302 or of the Labour Standards Proclamation, which appear to have been repealed respectively, by the promulgation of the legal notice in 1964 by the enactment of the proclamation in 1966.
2. Two kinds of provisions appear not to have been repealed:
a. Minimum labour condition provisions more favourable to employees than corresponding provisions of either Legal Notice No. 302 or the Labour Standards proclamation; and
b. Minimum labour condition provisions for which there are no corresponding provisions in either Legal Notice No. 302 or the Labour Standards Proclamation.



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# THE DOCTRINE OF "SUBSIDIARITY OF THE ACTION FOR RECOVERY OF AN UNJUST ENRICHMENT" IN FRENCH AND ETHIOPIAN LAW. 

by Semereab Michael *

## INTRODUCTION

The purpose of this atticle is to make a comparative study of the doctrine of "subsidiarity" of the unjust enrichment action in French and Ethiopian law. The following is an outline of the overall organization of the paper.

In order to provide background for our discussion of the "subsidiarity" doctrine, we will touch on the subject of unjust enrichment in general in Roman law and on what the French Civil Code has to say about it. We will then trace briefly the establishment by French courts and writers of the principle of unjust enrichment as an autonomous source of obligations in French law.

The second major section examines the doctrine of "subsidiarity" of the unjust enrichment action in French law. It is preceded by a short consideration of the doctrine of "just cause" because of the interplay that exists between the two doctrines. An understanding of both doctrines as they appear in French law is essential for our discussion of Ethiopian law.

Because the term "subsidiarity" encompasses several principles, it has been analysed from the point of view of four different situations, or type-cases. With respect to each type-case, French judicial decisions and the solutions proposed by legal theorists have been considered. That in turn is followed by a discussion of the major theories developed to explain the doctrine of "subsidiarity" and the overlap between it and the doctrine of "just cause". Proceeding in the manner indicated here serves a dual purpose. To begin with, it will obviously serve as an exposure of the doctrine of subsidiarity in French law. More important though, as we are handicapped by a complete silence in the Ethiopian Civil Code as regards the doctrine of "subsidiarity", our analysis of French law will provide us with a starting point for our discussion in Part II of the doctrine in Ethiopian law and elucidate the points one ought to bear in mind in considering the doctrine.

## PART I : FRENCH LAW

## I. Historical Development of the Notion and of the Action.

## 1. Roman law

The civil law notion of "enrichment without just cause", originated in Roman law" although "it cannot be said that there was any such general rule" ${ }^{2}$ that prohibited all forms of unjust enrichment. What the Romans did was to establish

[^58]a number of personal actions, or conditiones, which in particular instances allowed the victim of an enrichment realised by another at his expense to claim pecuniary compensation for the prejudice he suffered.

In addition to the conditiones, Challies states that "Roman law recognized some other actions the purpose of which was to obtaix the restitution of unjust enrichment." ${ }^{3}$ One of these, the actio de in rem verso, lay where a slave, without the authorization of his master, made a contract with another and transferred to the owner the enrichment that resulted from the other party's performance of his obligations under the contract. The impoverished party could bring the said action and recover the enrichment which the master derived from the contract.

This aetion de in rem verso, orighally of such a narrow seope, was later extended to cover many other cases of unjust enrichment.

Nicholas explains the development thus:
"The basis for an extensive interpretation (of the actio de in rem verso) was provided by a few interpolated texts (in the Codes and Digest) which appeared to allow the actio de in rem verso in situations in which the defendant had benefltted as a result of a contract between the plaintiff and a (free) third party. On this slender basis later commentators built up a remedy, first for any enrichment arising through a third party's contract and then for any enrichment whatever." ${ }^{4}$

## 2. The French Civil Code and After

One does not find in the French Civil Code a stated general principle to the effect that no one may unjustly enrich himself at the expense of another, ${ }^{5}$ but there are found in the Code a number of provisions ${ }^{6}$ which are particular applieations of the broad prineiple of unjust enrichment. According to Colin and Capitant,
"The most important and the most usual (application of the principle of unjust enrichment) can be stated thus: Whenever a person is obliged to restitute a thing, be it because his title of acquisition is annulled or because it is null, he is entitled to reimbursement of the necessary expenses he incurred as well as his useful expenses to the extent of the value added to the thing. That is what Articles $861-862$ provided for where an immovable is returned to the estate by a hereditary donnee; Article 1673 where the seller avails himself of a right of redemption; Article 1381 wheae the person to whom the thing is returned must compensate the possessor even if the latter is in bad faith; Axticle 1947 which provides for the reimbursement of expenses a depositor incurs to preserve the thing deposited with him; article 2080 which provides for the reimbursement of the expenses incurred by a creditor to preserve a pawn; and Article 2175 which provides
3. G. Challies, the Doctrine of Uniustified Enrichmen in the Law of the Proviace of Quebec (2nd ed. 1952), p. 2.
4. B. Nicholas, "Unjustified Enrichment in the Civil Law and Louisiana Law, Triane L. Rev., vol. 36 (1961-62), p. 619.
5. Planiol et Ripert, Traité pratique de aroit civil fratçais (2nd ed. by P. Esmein), vol. 7, no. 752, p. 47.
6. Planiol et Ripert, op. cit., footnote (3) to No. 752, p. 47 enumerates the provisions as being Article $548,554-5,520-71,861-62,1241,1312,1381,1437,1673,1864,1926,1947,2080$, 2102(3), 2175.

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for reimbursement where the third party possessor relinquishes a mortgaged immovable or where it is expropriated from him." 7
Articles 548, 554, 555, 570, 571 and 577, which deal with various cases of accession, and Article 1437, which governs the community of property between spouses are also, they say, applications of the same principle.

In the second half of the nineteenth century, some authors began a movement to set up unjust enrichent as a source of obligations and to make the actio de in rem verso an autonomous action. Among its foremost proponents were Aubry and Rau, who considered paiement de lindu and gestion d'affaires as but two instances of unjust enrichment and proposed that the actio de in rem verso be open whenever one's patrimony is enriched at the expense of another. ${ }^{8}$ The Court of Cassation ignored these proposals for quite some time, ${ }^{9}$ but in 1873 it gave in to the extent of allowing an action based on a theory of gestion d'affaires anormale. ${ }^{10}$

In a later case, ${ }^{11}$ the Court of Cassation fell back upon the same technique to prevent a case of unjust enrichment. ${ }^{12}$ In the Boudier case, the Court abandoned the above practice and established the unjust enrichment action as an independent source of obligations. Its definition of the nature and scope of the action for the recovery of an unjust enrichment differed markedly from Aubry and Rau's, from whose formula it was inspired. ${ }^{13}$ The Court espoused the said authors' formula in two subsequent cases. ${ }^{14}$

As spelled out fully in the Brianhaut case, the unjust enrichment action may be instituted if the following elements are shown to be present;
(a) Defendant's enrichment;
(b) Plaintiff's impoverishment;
(c) A causal relationship between the impoverishment and enrichment;
(d) Absence of a just cause for the earichment;
(e) Plaintiff does not or did not have any action arising from a contract, a quasi-contract, a delict or quasi-delict or the law.
The last condition was taken by legal writers ${ }^{15}$ to be a manifestation of the "subsidiary character of the action de in rem verso." In Section II we will try to determine what exactly this dactrine of subsidiarity connotes.
7. A. Colin et H. Capitant, Cours élémentaire de droit civil francais (7th ed. 1932), vol. 2, no. 238, p. 223-334.
8. Mazeaud et Mazeaud, op. cit. No. 694, p. 637.
9. Ibid. No. 695, p. 637, They add that the Court was prevailed upon by Rau to grant the action.
10. Commune de Saint-Chinian c. Guy, D. 1873.1.457.
11. Lemaire c. Chambon, Syndic de la faillite Lamoureux, D. 1891.1.49, note by Planiol.
12. Julien-Patureau-Miran c. Boudier, D. 1892.1 .596 for possible explanations of the Court's move see Nicholas, op. cit., and Planiol et Ripert, op. cit., No. 752, p. 49.
13. The author's formula as stated in Aubry et Rau, Cours de droit civil frangais (4th ed.), No. 578 is reproduced in F. Gore, L'enrichissement aux dépens d'cutrut (1949), по. 183, p. 188.
14. Clayette c. Liquid. de la congrégation des Missionaires de la Salette, S. 1918.1.41 and ville de Bagnères-de-Bigorre c. Brianhaut, D. 1920.1.102.
15. Planiol et Ripert, op. cit., no. 761, p. 66.

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By contrast with the detailed enunciation of the requirements for the exercise of the unjust enrichment action in French law, Ethiopian law merely states that the action lies where a person is enriched without just cause by the work or property of another and no mention of subsidiarity is made. ${ }^{16}$

## II. "Subsidiarity"

This article is primarily concerned with the doctrine of the subsidiarity of the unjust enrichment action. It is preferable, however, to precede our study of "subsidiarity" by a brief look at the "cause" requirement. This is for two reasons. First, in our analysis of the doctrine of "subsidiarity" in French law, we will see that one aspect of the doctrine is assimilated with the "cause" requirement. Second, we will have to rely mainly on the "cause" requirement to determine the presence or absence of the doctrine of "subsidiarity" in Ethiopian law. To see the overlap between the two doctrines in French law and to proceed with our consideration of the existence or non-existence of the doctrine in Ethiopian law, we must have some idea as to what sources constitute a just cause for an enrichment. That done we will move on to the central theme of the article as far as French law goes, i.e., the doctrine of "subsidiarity", which in turn is followed by a look at the justifications proffered for the existence of the doctrine and the overlap that exists between it and the doctrine of "just cause."

1. "Just Cause"

In the opinion of Planiol and Ripert,
"Enrichment has a just cause when it is obtained in conformity with the stipulations made in a contract by onerous or gratuitous title or in the performance of a legal or natural obligation.'" ${ }^{17}$
Thus any enrichment or impoverishment which flows from the terms of a valid contract concluded between the impoverished and enriched parties has a just cause.

Similarly an enrichment has a just cause where it is obtained pursuant to the terms of a valid contract concluded between the enriched party and a third party even if the latter obtained the means for the performance of his obligations under the contract from the impoverished party and did not compensate him for it. ${ }^{18}$ By way of illustration they cite a case ${ }^{19}$ where a lessee bired a labourer to do some work on the immovable he held under the lease but failed to pay him the agreed sum. Since it was provided in the contract of lease that the lessee would not be entitled to any indemnity for improvements he might make in the immovable, the labourer's action brought against the lessor to recover the sum the lessee failed to pay him was dismissed by the Court. ${ }^{20}$

The enrichment of a person resulting from the generosity (intention libérale) or the performance of a natural obligation by the impoverished party has a just

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cause and cannot give rise to an action de in rem verso. ${ }^{21}$ Any contrary solution, they argue, would for all intents and purposes abolish donations and deny the existence of natural obligations.

The last source of just enrichment is the law itself. If a person discharges an obligation imposed upon him by the law, the recipient of the benefit is not enriched without just cause, 22

We need not consider the opinions of other authors separately, because they merely reproduce the sources enumerated by Planiol and Ripert, and the slight variations they introduce here and there are inconsequential. ${ }^{23}$

## 2. "Subsidiarity"

The requirement that the plaintiff have no other course of action or must have had no other action does not convey anything explicit and it could be taken to mean any one of several things. For instance Bartin ${ }^{24}$ pointed out that
"the term "subsidiary" could mean three things: first, that the plaintiff in
the action cannot succeed unless the facts giving rise to the enrichment of the defendant have given him no other possible action against either defendant or a third party; secondly, that the plaintiff must, if another action was open to him, have lost that recourse; or third, that the other possible action must have been rendered useless by the insolvency of the person against whom it might have been taken".
In order to clear up doubts like these and to determine the exact purport of the said requirement, it is proposed to take four different situations and consider the solutions offered both by doctrine and jurisprudence.
(1) The plaintiff had another action at his disposal but it is blocked by a legal obstacle, i.e. a provision of law. Can he take the action de in rem verso? To give an illustration, the plaintiff could have brought a contractual action to vindicate his claim but it is now barred by prescription.

The authors agree unanimously that the action de in rem verso does not lie. "The reason for such unanimity is that contrary view would permit the enrichment action to upset the established legal order." ${ }^{25}$

The following excerpts from Planiol and Ripert, and Mazeaud and Mazeaud, are typical of the view entertained by other authors.

Planiol and Ripert, after reviewing with approval court decisions which held the unjust enrichment action inadmissible whenever an alternative action is rendered ineffective by a provision or provisions in the law, justify the court's holdings thus:
21. Ibid.
22. See for instance Mazeaud et Mazeaud, op. cit., nos. 702-705, p. 640-641; Colin et Capitant, Traité de droit civil (1959), vol. 2, nos. 1321-1323, p. 749-750.
23. Note 10, p. 361, para. 578 in Aubry et Rau, op. cit., (5th ed.) vol. 9; quoted in Challies, op. cit, p. 120.
24. This is a more or less standard pattern of analysis and is used by most authors. See for example Maxeaud et Mazeaud, op. cit., nos. 707-709, p. 642-643.
25. Challies, op. cit., p. 128.

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"The obvious reason which in all these cases moved the courts to declare the action de in rem verso inadmissible is that by granting it they would set at naught established rules of our written law, such as those dealing with proof, prescription, forfeiture and res judicata. Even if the effect of these rules is to sanction an entichment without counter-part (contre-partie), they should not be abrogated by this circuitous course, as, for instance, saying that a borrower would not be freed by the process of prescription on the ground that he is unjustly enriched by not paying back the amount he borrowed. One may contemplate abolishing the institution of extinctive prescription or the requirement of written proof. But doing so by the circuitous means of the action $d e$ in rem verso would constitute a scheme which amounts to (perpetrating) a fraud on the law.י'י26
Unlike Planiol and Ripert, Mazeaud and Mazeaud do not make a broad gencral statement to the effect that the unjust enrichment action does not lie in these circumstances, rather they deal with specific instances where an alternative action is blocked by some rule of law. They say, "where the action the law had put at the disposal of the impoverished person has prescribed, one cannot possibly allow him to institute the action de in rem verso. Holding otherwise would, in effect, be evading the rules on prescription. By the same token, the action de in rem verso could not serve as a means of getting around the rules on usucaption or C. Civ. Article 2279.י17

With that, let us turn to a study of decisions given by the courts, particularly the Court of Cassation, when confronted with this situation.

Decisions wherein the unjust enrichment action was dismissed if brought when another action was blocked by a legal provision are quite numerous. ${ }^{28}$

In the Clayette case, the widow's unjust enrichment action was thrown out because upholding it would have been tantamount to allowing her to get around Articles 1341 and 1347, failure to meet the requirements of which had caused her original action based on the loan to fail.

Similarly the unjust enrichment action was dismissed in the Brianhaut case because the plaintiff resorted to it only to get around the requirements of Article 1793. A similar case is Demoiselle d'Auguste de Sinceny c. Grumbach et Cie. ${ }^{29}$ The plaintiff brought an unjust enrichment action against a firm for 17,000 francs, that being the sum she paid out to recover the ownership of her jewel-box from the person who had it in his possession. The possessor bought it from the thief who stole the box from the plaintiff. Her claim was dismissed because she could not have met the requirements of Articles 2279 and 2280 if she had brought another action, presumably one based on the extra-contractual liability of the firm; she could not have proved the commission of a fault by the intermediary seller, the firm that is, on which sole ground she could have recovered the sum she paid the possessor from the company.
(2) The plaintiff could have brought another action but it is blocked by an obs-

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tacle of fact which was brought about by his fault. May he bring an unjust enrichment action? The obstacle to the exercise of the alternative action lies in the fact that he did not take all the measures prescribed by the law for the exercise of the action. This in turn was due to his fault which consists either of his ignorance of the requirements laid down by the law or sheer negligence to comply with them. ${ }^{30}$ We have found no author who maintains that the unjust enrichment action should lie in these circumstances. Planiol and Ripert seem to make no distinction between an obstacle of fact and a legal obstacle as they consider both obstacles in terms of circumvention of the law. They state:
"But there are instances where faced with interrelated enrichment and impoverishment one cannot be certain whether or not an imperative rule of law obstructs (the payment of) an indemnity. This may happen in certain cases where a person who has a claim against another for the payment of the price of supplies he provided him with and who could have got a security entitling him to a right of preference (over other creditors) and thereby make sure that he would get paid fails, by his negligence, to take this measure so that the other creditors rank equally with him or even get a priority over him. Would the action de in rem which he institutes against them to recover the gain that he procured for them at bis expense, find an obstacle in the principle of the equality of creditors which provides that a right of preference subjected by the law to certain formalities does not exist unless the latter have been met? The answer should, we believe, be in the affirmative." (Citation to D. 1924.1.129) ${ }^{31}$
Marty and Raynaud as well are of the opinion that the unjust enrichment action cannot lie. Like Planiol and Ripert, they make no distinction between an obstacle of fact and a legal obstacle and cite the same case cited by Planiol and Ripert in support of their contention. They say, "if the normal action is rendered ineffective by an obstacle of law, one may not resort to the action de in rem verso to make up for the loss (of the normal action). Thus ... a creditor with a right of preference or a mortgagee who has let his security be lost, as for example by failing to register it as he ought to have done, cannot act against the equally ranked creditors who benefit from this situation by alleging that they are enriched (without just cause)." (Citation to D. 1924.1.129). ${ }^{32}$

And Rouast put it succinctly when he wrote "le caractère subsidiaire s'oppose à ce qu'elle soit utilisée comme une bouée de sauvetage par celui qui a fait naufrage par sa faute. ${ }^{33}$ (The subsidiary character (of the unjust enrichment action) is

[^61]opposed to the notion that it can be used as a lifebuoy by someone who was shipwrecked by his fault).

There are a number of judicial decisions which dismissed the unjust enrichment action where an alternative action was blocked by an obstacle of fact. ${ }^{34}$ In a 1924 decision, ${ }^{35}$ the plaintiff loaned his son-in-law money to pay for the supply of materials and labour required for the erection of a building on land which belonged to the latter. Upon the completion of the works, both the building and the land were contributed to a partnership which the son-in-law had joined. After a while the partnership become bankrupt and its assets were liquidated. The plaintiff then instituted an enrichment action against the other creditors of the partnership and alleged that be should be given preference over thema as regards the increase in the value of the land brought about by the erection of the building thereon. That, he contended, was made possible by the money he loaned his son-in-law and the other creditors were therefore enriched without just cause at his expense. The claim was rejected because the plaintiff had failed to secure for himself a right of preference over other creditors by complying with the requirements of Article 2103 (4) and (5).
(3) The plaintiff could institute another action but it is rendered ineffective by an obstacle of fact which was not brought about by his fault. For all practical purposes, ${ }^{36}$ this situation can arise only where a contractual action is rendered useless by the insolvency of one of the contracting parties. Hence the enrichment action is aimed at a third party, and the question is whether or not it can be taken against him.

With very few exceptions, practically all authors are of opinion that the enrichment action can be brought against the third party. This situation can be distinguished from the preceding and subsequent situations in that it involves three persons instead of two and the question of giving the plaintiff a choice as to what action to exercise does not arise because the normal action and the unjust enrichment action are not directed to the same person. Moreover it should be noted that the matter of exercise of the action cannot come up if the third party was enriched with just cause. It is only where the plaintiff's performance of his obligations under the contract have benefitted a third party without just cause that the authors say that the enrichment action can be taken. As pointed out by Planiol and Ripert, ${ }^{37}$ even if the third party's enrichment is related to the plaintiff's impoverishment, most often the latter could not institute an action de in rem verso against the former because the third party's enrichment has a just cause.
"But it may that he (the enriched third party) had no good cause. Then the unpaid creditor may certainly act de in rem verso against the third party. By granting it no contravention like that mentioned above (fraud on the law) is perpetrated on the written law. (Here) no one is looking for a roundabout means of attaining a goal which cannot be had through the normal course, as, in theory, the contractual action is (still) open."
Drakidis too, would grant the action because, he says, equity demands it and the enrichment action in this instance does not jeopardize the legal order.

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Chevalier, ${ }^{3 s}$ an author who is a proponent of the theory that the enrichment action should be denied only if it is used as a means of circumventing the law, finds it only natural that the action should lie in this case. He says "it is only if this (contractual) action runs into the debtor's insolvency that the supplier can, in a subsidiary action, act against the third party to recover from the latter the enrichment which he had no right to keep."

Esmein, ${ }^{40}$ as well, in a commentary on a decision given by the Court of Cassation, where the action was granted under these circumstances said, in part, "Nothing obstructs the granting of the action de in rem verso in this instance. ... No imperative provision of the law is circumvented by the institution of this action against a third party...."

In contract to Esmein and the great majority of authors, Gore asserts that the enrichment action should not lie, for otherwise it would violate an imperative rule of law. He reasons thus $:^{41}$ Should the action be granted under the circumstances in question, it world amount to giving the impoverished party a direct action against the enriched third party. A direct action can however, only be brought by the creditor against the debtor of his debtor, whereas here the action is brought not against the debtor of the impoverished party's debtor but against a third party intermediary.

Another author who has qualms about granting the unjust enrichment action is Almosnino. ${ }^{43}$ He states that the impoverished party can take the enrichment action against the enriched third party only if the mass of the creditors of the insolvent party cannot sue the third party. In other words, the impoverished person can institute the unjust enrichment action if he is the insolvent party's sole creditor. But if there are other creditors, he cannot claim from the third party an indemnity corresponding to his impoverishment because that would be confering a privilege upon him. In the absence of an express provision confering such a privilege, he must be treated like any other creditor and take whatever portion of the third party's assets accrues to him.

The stand taken by the courts agrees with that of the majority of the authors. They grant the impoverished party an unjust enrichment action against a third party enriched without just cause by his performance of his contractual obligations, provided that the insolvency of the other contracting party is established. In 1940, the Court of Cassation affirmed a Iower court's decision given along these lines. ${ }^{44}$

A person who bought a house from a company engaged a contractor to do some work on the building. Sometime later he became insolvent and was unable to
39. J. Chevalier, "Observations sur la répétition des emrichissements non causés" in Le droit privé français au milieu du $X X^{e}$ siècle (1950), vol.2, p. 248.
40. Quoted in footnote 181 in Goré, op. cit., p. 185.
41. Goré, op. cit., no. 180, p. 184.
42. Art. 1165 provides that contracts produce effects only as between the contracting parties, but under Art. 1166 a creditor is entitled to sue the debtor of his debtor directly as long as that right is reserved to the creditor's debtor.
43. Almosnino, L'entichissement sans cause et son caractère subsidiaire (1931), no. 83, p. 166 et seq., cited in Challies, op. cit., p. 122-123.
44. Société des habitations bon marché de Saint-Servan c. Gorge, D.H. 1940.150, reproduced in part in Mazeaud et Mazeaud, op. cit., pp. 642-643, 648, 649.

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pay off the company or the contractor, whereupon the company took back the building. Admittedly, the contractor had a contractual action against the buyer, but it was no use bringing one because the latter was insolvent. He then instituted an unjust enrichment action against the company on the ground that it had benefitted from the labour and materials he had provided to the buyer, and the action was held admissible. On appeal the Court of Cassation affirmed.
(4) The impoverished party has at his disposal another effective action. Can he leave that aside and bring an unjust enrichment action?

The preponderance of doctrinal opinion is that the plaintiff cannot do so. For instance, Mazeaud and Mazeaud say, "if the impoverished person can bring an action arising from a contract, a delict or a quasi-delict, an undue payment, unauthorized agency or a real right, there is no question but that the principle of subsidiarity leads to the dismissal of the action de in rem verso: the impoverished person need only resort to the normal action put at his disposal." 45

According to Marty and Raynaud, "... the rules of unjust enrichment which are judge-made and a characteristic display of the judge's intervention to fill in gaps in the law can come into play only to the extent that there are gaps (in the law) and are excluded if there are (other) applicable provisions." ${ }^{46}$

To the question: "What is the exact consequence or significance of subsidiarity," they answer that such a question never arises where the other action can be effectively exercised. They point out that the normal action is usually more advantageous than the enrichment action, however "if the question does arise, the action de in rem verso must be denied.

Similarly Goré would allow the plaintiff no option. He justified his stand on a theory of hierarchy of sources of law ${ }^{47}$ in the French legal system. According to this theory decisions of courts and custom, vis-à-vis legislatively enacted rules, are a subsidiary source of law. And as the principle of unjust enrichment was expounded by the courts, the action arising from it cannot be taken where the law provides the impoverished person with another action. ${ }^{48}$ Planiol and Ripert ${ }^{49}$ say that the question of choice of action does not arise as regards contracts and that it is inconceivable if the other action is one based on unauthorized agency. The question of option may arise, in theory that is, if the other action is based on extra-contractual liability, but the action for unjust enrichment is ruled out by the requirement of a causal connection between the enrichment and impoverishment.

With that, let us turn to the authors who advocate that the plaintiff should be left free to choose what action to bring.

Challies ${ }^{50}$ tells us that it is the recent writers who hold such a view. The gist of their arguments is "that the only limitation upon the (enrichment) action

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arising from subsidiarity is the requirement that no imperative law be contravened or circumvented or in other words that there be no "fraude à la loi."

For example he says ${ }^{51}$ that Esmein in his note to S. 1941.1.121 criticized the subsidiarity formula of Aubry and Rau and suggested that the requirement of subsidiarity should be expressed as follows:
"It is better to say that the action de in rem verso cannot be taken where it is instituted to replace another action which the plaintiff cannot exercise because of prescription, a forfeiture or forclusion or because it is res judicata, or because he cannot produce the proof the action requires or because of another legal obstacle.
As the situation in Belgium is analogous to that prevailing in France as regards the enrichment action, ${ }^{52}$ the opinions of Belgian writers on the question of choice of actions can be relevant to our discussion here. Rutsaert, ${ }^{53}$ in discussing the issue of choice of actions wrote, "but if, the intention of fraud aside, the requirements for the exercise of the action de in rem verso are met at the same time that the requirements of another action are, one cannot at all see why the choice between those actions should be prohibited..." Almosnin. ${ }^{54}$ and Beguet, ${ }^{55}$ we are told, entertain the same view.

Unlike doctrinal opinion, the courts are unanimous in rejecting the unjust enrichment action where the plaintiff has another action at his disposal. Beginning with the Clayette and Brianhaut cases, the courts have repeatedly and consistently held that the unjust enrichment action must give way to the other action. For instance, in 1949, the Court of Cassation said:
"The theory of unjust enrichment applies where it is sufficiently shown that no contract was concluded between the parties, and that the impoverished person does not have an action arising from a delict, a quasi-delict..."56
And as late as 1959 , the same court reiterated its position in the following words:
"By virtue of its subsidiary character, the action de in rem verso must not be granted except in cases where the patrimony of one person being enriched without just cause at the expense of the patrimony of another, the latter does not have any action arising from a contract, a quasi-contract, a delict, a quasi-delict or the law to recover what is owing to him."57
The trouble with assertions like these, however, is that they were not made in cases that denied the plaintiff an option of actions where he could bring another action arising from some other ground. They were merely made by way of dicta, because in all these cases the enrichment action was dismissed on some ground

[^64]other than the concurrence of actions. For example, the Clayette and Brianhaut cases were both dismissed to prevent a circumvention of imperative legal provisions. It is difficult to find a case where an enrichment action was dismissed for the precise reason that an action based on, say, a contract, should be instituted rather than the enrichment action.

Though one reads in the Encyclopédie Dalloz ${ }^{58}$ that an enrichment action was dismissed on this ground, others, Challies ${ }^{59}$ for one, claim that the decision turned on some other point. Be that as it may, the courts do seem to subscribe to the notion that the action de in rem verso, being an action in equity created by jurisprudence, cannot be ranked equally with actions arising from other sources. And the implication of dicta like those quoted above is clearly that they would bar the action if some other action could be instituted.
(5) To the above four situations we may add a fifth one, which in fact is so obvious that the authors rarely bother to consider or even mention it. ${ }^{60}$ It is the situation where the impoverished person has no action whatsoever at his disposal; i.e., he can invoke no contract, quasi-contract, delict or quasi-delict or rule of law to base his action upon. In other words, there simply is nothing in the law to govern the fact situtation and the granting of the action does not give rise to any controversial issues. In fact the action was primarily established to give the impovershed party a relief in such instances. It serves the useful purpose of filling in voids in the law and sees to it that a person who is enriched without just cause does not get away with it. Besides, the phrasing of the formula itself, be it Aubry and Rau's or the modified version adapted by the courts, dictates that the action should lie.

The following two decisions illustrate what is meant by absence of any other course of action.

In the first, ${ }^{61}$ a woman died intestate in France and her estate was partitioned among her collateral heirs. A genealogist did some research on his own and discovered that the deceased was survived by nephews living in America. He contacted and informed them, without disclosing anything specific, that there was a succession to which they could be called. A few days later, he told them that if they made a contract with him promising him a certain percentage of the succession, he would disclose to them the place where the succession could be claimed and provide them with details as to how much it was worth etc. In the meantime however, they had contacted the American Consul in France and were assured that they could have any information that was obtained regarding their lineage free of charge. Armed with that assurance they told the genealogist they would have nothing to do with him. In due time, they were declared heirs of the deceased and came into the succession. The genealogist then brought suit against them claiming compensation for the information he supplied them with. The defendants argued that he had no ground on which he could make such a claim, as no contract of any sort was concluded with him and as he could not be considered as an unauthorized

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agent. The court of first instance conceded that much, but held that because he had helped them trace back the succession and claim it, he should be indemnified for it, as otherwise, it said, "le principe d'équité qui veut que nul ne s'enrichisse aux dépens d'autrui serait violé; que ce principe ouvre à Antoine l'action dite de in rem verso." On appeal the Court of Cassation affirmed the lower court's decision.

In the other case, ${ }^{62}$ the plaintiff, initially employed as the defendant's housekeeper, became his mistress and went on attending to the house work, but without any wages as of the moment she became his mistress. She was given to understand that the defendant, who had divorced his wife, would marry her when he became free to do so. After seven years, the defendant breached his promise and put an end to their relationship. The plaintiff instituted an action wherein she claimed 35,000 francs on two grounds: (a) damages for the breach of the promise of marriage and (b) compensation for the services rendered during the seven years. The first ground need not concern us here. ${ }^{63}$ As for the second ground, the Court of Cassation said that in default of any contract concluded between them, the plaintiff could seek recovery by way of the action de in rem verso. It held that the defendant had been enriched by the plaintiff in that she served him for seven years without remuneration; and thereby spared him the trouble of hiring other maids. And since his enrichment could not be justified on any ground, the Court ruled that he had to idemnify her for her services.

## 3. Justifications of The Doctrine of Subsidiarity

From the foregoing study of doctrine and judicial decisions, we may discern two theories behind the doctrine of subsidiarity which are offered as justifications of the doctrine.

We may call the first the theory of hierarchy in the sources of law. The proponents of this theory maintain that legislatively enacted laws are the primary source of law in the French legal system and other sources are subordinate or inferior to them. ${ }^{64}$ The principle of unjust enrichment, and the action deriving therefrom, they say, are based on custom and enunciated by judicial decisions. Consequently the role of the unjust enrichment action is supplementary and subordinate in that it can be taken only where the plaintiff can bring no action based on an express provision of the law. According to Rouast, the customary source of the unjust enrichment action is a principle of natural law. In other words, it was inspired by that sense of justice or equity which is opposed to one person's unjustified enrichment at the expense of another. This principle was in turn given effect by the courts which established it as a source of rights and obligations and defined the scope of its application. Gore ${ }^{65}$ is of the same opinion. He says there is no doubt that unjust enrichment is a source of obligations which is derived from customary law. His definition of customary law is elastic and embraces "all sources of law other than (legislatively enacted) law, taking the last word in its widest application." ${ }^{66}$ The only point on which he takes issue with Rouast is as

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to the way this customary law came into existence. He disagrees with Rouast's statement that "the right of the impoverished person to be indemnified for his impoverishment was not created by the courts, but rather by a usage which was given effect by the former."67 Grore argues that it was the courts that declared the existence of the principle, because the mere existence of the usage on which it was based would have remained ineffective as it could only inspire the legislator to enunciate a principle based on it. The courts did not stop at that; their decisions became a source of law.

That said, Goré proceeds to defend Rouast's, and his own theory against the criticism levelled at it by Bonnecase. ${ }^{68}$ The essence of Bonnecase's criticism is that one cannot invoke the inferior position of custom vis-à-vis legislatively enacted laws to justify the subsidiarity of the unjust enrichment action. Rouast never said, Goré points out, that custom by contrast to the written law is an inferior source of law. He merely said that custom has a subsidiary role or function in French law and cannot come into play in those situations which have been covered by legislation. An action based on customary law cannot rank equally with an action arising from written legal provisions where the two actions lead to the same result. Custom merely fills in voids in the law. ${ }^{69}$

After thus defending and elaborating on the theory of hierarchy in the sources of law, Goré proceeds to discuss the Courts' stand on the question of the respective roles of customary and legislatively enacted rules. There is a school of thought, he points out, that maintains that legislatively enacted rules are replaced by customary law as they fall into disuse. On the other hand, the courts have always been hostile to such opinions and have often decided that a legislatively enacted rule will stay in force as long as it is not abrogated by a new one. "In light of the courts" stand," he concludes, "one must admit that from the point of view of case-law, custom is a secondary source of law. One may therefore say, as M. Rouast did, that the subsidiary character of the action de in rem verso, is a logical result of the subsidiary character of custom as a formal source of law. ${ }^{70}$

Finally, Goré points out that this theory has nothing to do with prevention of "circumvention of the law"; it merely means that an action arising from custom must give way to an action arising from legal provisions if both serve to vindicate the same claim. ${ }^{71}$

Bonnecase ${ }^{72}$ arrives at the same conclusion by a slightly different route. He analyzes the matter in terms of separation of powers. As a matter of principle, judges must, he says, apply the laws enacted by the legislature in adjudicating cases. They may resort to custom or equity by way of filling in gaps in the law, where legislatively enacted rules are lacking. From that it follows that custom or equity is subsidiary to legislation. Logically, actions based on the former are subsidiary

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to those based on the latter, and their subsidiarity derives fron the subsidiary character of the sources they emanate from.

The other theory behind the doctrine of subsidiarity is that of prevention of "fraude a la loi." The gist of this theory is that the unjust enrichment action cannot be taken where another action asserting the same or substantially the same claim is rendered ineffective by the law. The rationale is that granting the earichment action in such instances would simply amount to "evading" (tourner) an imperative rule of law and defeating its purpose. Two common examples of such an "evasion" are granting the unjust enrichment action where an alternative action fails for lack of conformation with the requirements of form of contracts or where it is barred by prescription. As Drakidis ${ }^{73}$ put it, "since the legislator did not want the plaintiff to achieve his aim (by instituting the alternative action), it is improper that he should be able to achieve it by a strategem, thanks to the devious means (provided by) the action de in rem verso." Obviously if the rules and institutions of the written law are to be maintained intact and remain meaningful, such sleights of hand cannot possibly be tolerated. Planiol and Ripert ${ }^{74}$ rightly point put that the law cannot at the same time provide for the institution of prescription and allow the exercise of the unjust enrichment action by someone who has let the period of prescription expire; for a self-contradictory stand like that would strip the institution of prescription of any effect. In short it is, in the words of the same authors, "logical and practical considerations" ${ }^{75}$ that lead both doctrine and jurisprudence to deny the exercise of the unjust enrichment action in these circumstances.

Whereas the theory of prevention of "fraude à la loi" is accepted by all authors, the theory of "hierarchy in the sources of law" does not find any favour with recent writers. As far as the dissenters are concerned then, the two theories are competing. The preponderance of the authors and the courts on the other hand, treat the two theories as supplementary and employ both of them to define the reach of the unjust enrichment action.

## 4. Overlap Between The Doctrines of "Just Cause" and "Subsidiarity"

It will be recalled that we preceded our study of the dactrine of "subsidiarity" by a brief look at the doctrine of "just cause." One of the reasons given for so doing was that "subsidiarity" is often analysed in terms of "just cause" and that we would not be able to see the relationship between the two doctrines unless we knew sources constituted a just cause for enrichment. Now that we have considered both doctrines we will examine where and how the overlap between them occurs.

Mazeaud and Mazeaud take it as a self-explanatory proposition that there is an overlap between the two doctrines. They say, "undoubtedly, in all cases where an enrichment has a just cause, the principle of subsidiarity overlaps (fait double emploi) with the requirement of absence of just cause ..."76

Now, if we were to talk in terms of the theories behind the doctrine of subsidiarity, which of them could they have had in mind when they made the above

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statement? It certainly could not be the theory of "hierarchy of sources of law" because (a) it deals with cases where the enrichment is without just cause and (b) the unjust enrichment action is excluded simply because it lies concurrently with another action arising from a contract, a delict etc. Whereas here we are concerned with cases where an enrichment has a just cause, wherefore the unjust enrichment action cannot be taken because the requirement that it be without a just cause is not met. Since the other theory has been eliminated, it means it is the theory of "fraude à la loi" that coincides with the requirement of "just cause."

This conclusion is borne out by the examples Mazeaud and Mazeaud give to illustrate their above quoted assertion and by their subsequent discussion of the reach of the respective doctrines of "just cause" and "subsidiarity."

For further corroboration of the conclusion we reached, let us take another author who deals with the overlap between the two doctrines from another angle.

Chevalier holds the view that the "subsidiarity" requirement is superflous and meaningless because the scope of the actio de in rem verso can be determined by the sole analysis of the "cause" requirement. He writes:
"Authors (la doctrine) explain the exclusion of the action for the recovery
of an enrichment only in terms of the subsidiary character they attribute to
it. That is obscuring the reason for the exclusion. The action is excluded.
because the defendant has a right to retain the enrichment and because this
enrichment finds a cause to justify it in the application of rules of law as
well as in agreements (concluded between the parties). This definition of
(just) cause for enrichment suffices to harmonize (the exercise of) the
action for recovery (of an enrichment) with (the functioning) of our judi-
cial system. It serves to assure that the action for the recovery of an en-
richment is not used as a means of modifying imperative rules of law by a
rule of idemnity left to equity or to the discretion of lower court judges."
According to him, the just causes for enrichment are contracts ${ }^{78}$ or legal provisions "which allow a defendant in an action (for unjust enrichment) to retain the enrichment. As the enrichment is conferred by the law, it is not without a just cause.י ${ }^{79}$ By way of illustration he cites several cases wherein the unjust enrichment action was dismissed because an alternative action was blocked by an imperative rule of law. That is to say they were dismissed to prevent a "fraude à la loi." Hence far from rejecting the doctrine of "subsidiarity" in its entirety, Chevalier concedes that it is present in French law to the extent that it overlaps with the "cause" requirement. His criticism of the doctrine of "subsidiarity" then really comes down to a rejection of the theory of "hierarchy of sources of law," which excludes the unjust enrichment action for considerations other than the presence or absence of just cause. From his statement that Rouast's theory of the primacy of legislation over custom as a source of law is "too good to be true," 80 it is clear that that is what he is really opposed to.

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It is submitted that the incorporation of the theory of "fraud on the law" with the doctrine of "cause" is a tenable one. The former bolds that an enrichment action cannot lie where another action is barred by a legal provision. The doctrine of "just cause" in turn states that the action cannot be taken where the enrichment has a just cause. Whereas in the case of the theory of "fraud on the law" it is the rule that bars the alternative action which acts as the just cause for the enrichment, it is the source of the enrichment itself which acts as the just cause for the enrichment in the case of the doctrine of "just cause." Therefore, except for the fact that it intervenes one step later, it is the law that acts as the just cause for enrichment where the enrichment action is excluded to prevent a "fraud on the law." To that extent then, there is an overlap between the doctrines of "subsidiarity" and "just cause."

## 5. Conclusion

The doctrine of "subsidiarity" connotes the following things in French law:
(a) The action for the recovery of an unjust enrichment does not lie where another action arising from a contract, a quasi-contract, a delict, a quasi-delict or from the law is blocked by a legal obstacle or an obstacle of fact brought about by the plaintiff's fault. Both the courts and authors agree unanimously on this point.

An obstacle of fact is distinguished from a legal obstacle in that the former consists of a plaintiff's failure to meet the conditions laid down by the law for the exercise of an action arising from any of the sources enumerated, above, either through his ignorance of the existence of those requirements or through mere negligence to comply with them. A legal obstacle, on the other hand, is a rule of law that operates independently of the plaintiff's ignorance or negligence. The distinction is obscure at best and most authors lump both types of obstacle into one and talk of a legal obstacle. But the reasons given for the exclusion of the action vary. The courts and the great majority of authors exclude it or advocate its exclusion in order to prevent a "fraud on the law," i.e., to prevent the evasion of imperative rules of law. Others hold that the action should be excluded simply because the enrichment in these instances has a just cause.
(b) The unjust enrichment action cannot be taken where the plaintiff bas another effective action arising from a contract, delict, etc. at his disposal. This is the clear implication of the courts' opinions, expressed by way of dicta, in discussing the conditions under which the action can lie. Most authors entertain the same view. The underlying reason is that they consider the unjust enrichment action as one that arises from a subsidiary source of law. Recent authors, on the contrary, reject this theory of hierarchy of sources and maintain that the plaintiff is free to choose between the concurrent actions at his disposal.
(c) The unjust enrichment action lies where the plaintiff is faced by an obstacle of fact which was not brought about by his fault. For all practical purposes this means that if the plaintiff is confronted by the insolvency of the person he contracted with, he may sue a third party who was enriched without just cause by the plaintiff's performance of his contractual obligations. Fere the unjust enrichment action is subsidiary in the procedural sense of the term because it can be taken only if his normal, and therefore his primary course of action, is ineffective.
(d) The unjust enrichment action lies where the plaintiff has no action arising from a contract, a quasi-contract, a delict, a quasi-delict or from the law. Neither the authors nor the courts contest this because the action was primarily established to

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give the impoverished person a relief in such cases. Moreover there can possibly be no perpetration of a "fraud on the law" or the replacement of actions arising from sources based on legislation by an action arising from a customary source of law.

## PART II: ETHIOPIAN LAW.

## I. Source of the Law

Our starting point in the consideration of the doctrine of "subsidiarity" of the action for the recovery of an unjust enrichment is Civil Code Article 2162. For the purposes of this paper, we will use Professor Krzeczunowicz's corrected English translation ${ }^{81}$ of the French version of Title XIII of the Civil Code firstly because it presents a more faithful rendition of the master text drafted in French and second$1 y$ because the latter is much closer to the prevailing Ambaric version of Article 2162 than the English version. ${ }^{82}$ Professor Kzreczunowicz's translation runs: "Whosoever has derived a gain from the work or property of another without a cause justifying such gain, shall indemnify the person at whose expense he has enriched himself to the extent of the latter's impoverishment and within the limit of his own enrichment." The source of the provision is not, as one would be prone to assume, French law per se, rather it is Article 67 of the Moroccan Code of Obligations ${ }^{83}$ which provides, "Celui qui de bonne foi a retiré un profit du travail ou de la chose d'autrui sans une cause qui justifie ce profit, est tenu d'indemniser celui aux dépens dequel il s'est enrichi dans la mesure où il a profité de son fait ou de sa chose." ${ }^{84}$

However, the mere fact that the principle was introduced to Ethiopian law by a circuitous route, does not render a comparison between French law and Ethiopian law any less valid. Considering France's colonial presence in Morocco, it is fairly safe to assume that it was responsible for codifying the Moroccan law of obligations. That aside, the fact that the said Article 67 reflects closely the French position on the question of unjust enrichment bears out the above assumption. Hence for all intents and purposes, Article 2162 traces back its source directly to French law.

But our law is distinguishable from its French counterpart in two important respects: (1) Unlike the judge-made French law, a general principle prohibiting unjust enrichment has been expressly incorporated in the Civil Code and (2) there is no mention of the subsidiarity of the enrichment action in Article 2162 or elsewhere. As it stands, the elements of Article 2162 are,
(a) the plaintiff's impoverishment;
(b) the defendant's enrichment;
(c) a causal connection between the two;
(d) absence of cause justifying the enrichment.

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## II. Consideration of "Subsidiarity"

In this section we will consider whether the doctrine of "subsidiarity" exists, or should exist, in Ethiopian law despite the conspicuous absence of any mention of it in the Code. A convenient way of doing that is to take up the two theories behind the doctrine in French law and consider
(a) whether the argument of hicrarchy in the sources of law holds good in Ethiopian law;
(b) whether the doctrine of subsidiarity exists in Ethiopia to the extent that it is compelled by the "fraud on the law" theory.

## (a) Hierarchy of Sources.

We noted above that as regards unjust enrichment, our law differs markedly from the French in that it incorporates a stated general principle which provides for the payment of indemnity for unjust enrichment. Unlike the French Code, the Ethiopian Civil Code does not confine itself to enumerating a few specific applications of the principle. Rather it states the principle expressly in such a way that it covers the whole range of unjust enrichment. The principle of unjust enrichment then has not developed as an "extra-codal" product of jurisprudence, ${ }^{85}$ because it was legislatively enacted. Thus the source of the unjust enrichment action is on an equal footing with all other sources of actions provided by the law, such as contracts, delicts etc. Like all other principles, of course, the principle of unjust enrichment is designed to cover specific situations and whenever a situation is such that it falls within the purview of the principle, an unjust enrichment action can be brought without further ado about the existence or non-existence of other actions arising from other sources. Therefore the doctrine of subsidiarity as expressed by the "hierarchy of sources" theory in French law cannot exist in Ethiopia.
(b) Fraud on the Law.

Does or should the "fraud on the law" theory prevail in our law? To begin with, this principle or theory is not stated anywhere in the Ethiopian Civil Code; nor for that matter is it ever stated in any other code. Still the principle is inherent in the idea of law itself. The stand taken by French doctrine and case-law brings home this point very well. We have seen how concerned all the theorists and courts are about preserving the established legal order and how they argued that it would be fallacious and meaningless to enact some provision or set up some institution if it could be contravened with impunity. Similar arguments can be put forth in the context of Ethiopian law in favour of the exclusion of the unjust enrichment action where an alternative action is barred by a legal obstacle Take for example a contractual action that is barred by prescription. If the plaintiff could turn around, institute an unjust enrichment action and succeed in his action what would happen to Article 1845? It would for all intents and purposes be reduced to naught as would all the provisions which for some reason or other prevent the exercise of an otherwise valid action. Now, if we are to assume that the legislator wanted to enact a coherent and working code, we must hold that he did not intend the enrichment action to lie where another action asserting the
85. Nicholas, op. cit., p. 639.

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same or substantially the same claim is blocked by a legal provision. Any other conclusion would be neither logical nor practical.

A less rhetorical and more convincing way of making the same point though, is to analyse the doctrine of subsidiarity in terms of just cause. We have seen that in French law, there is an overlap between the doctrine of "subsidiarity" and that of "just cause" to the extent that the former connotes that the enrichment action cannot lie where an alternative action is barred by a legal obstacle. The rationale was that the law confers the enrichment on the defendant and therefore acts as just cause for the enrichment by blocking the plaintiff's alternative action. We will here consider whether or not that line of reasoning can be validly utilized in Ethiopian law. According to Article 2162, the unjust earichment action does not lie if, among other things, the enrichment has a just cause. A study of the Civil Code discloses that in Ethiopian law the just causes for enrichment are either contracts or the law itself.

The question here is whether or not a rule that bars another action is a just cause for enrichment in the same way that a contract or a provision that expressly confers an enrichment is. Before deciding either way let us consider a hypothetical case. Suppose a succession devolves on a minor, and his tutor, pursuant to Article 282(1) prepares an inventory specifying the value of the succession. Let us also assume that something was due to the tutor from the succession but he fails to state it in the inventory. After some time he is removed from his office and he institutes a petitory action under Article 1206 to claim that part of the succession which was due to him. His action will fail because the requirement of Article 282(2) is not met. The minor of course keeps his ex-tutor's share of the succession and is thereby enriched some more. Now what was the cause for his enrichment? It is definitely not a contract, so that leaves us with the law.

In this fact situation we can distinguish between two ways in which the law operates as a just cause for enrichment. The minor's enrichment which resulted from that part of the succession which devolved upon him personally is directly confered upon him by the law, namely the law of successions. His enrichment which resulted from his ex-tutor's default on the other hand, is confered upon him only indirectly because it depends on his ex-tutor's failure to comply with the requirement of Article 282(1). Thus, but for the matter of directness or indirectness the law is the just cause for the minor's enrichment in both instances. The same can be said of all other cases where a legal provision, such as prescription, modes of proof etc., bars an otherwise valid action. It follows from that that the unjust enrichment action cannot lie in such instances because the requirement that the defendant's enrichment be without just cause cannot be met. Hence the doctrine of "subsidiarity" is present in Ethiopian law to the extent that it overlaps with the doctrine of just cause.

## CONCLUSION

Nothing is stated in the Ethiopian Civil Code as regards the doctrine of "sub" sidiarity" of the action for the recovery of an unjust enrichment. In our effort to determine whether, despite the Code's silence, the doctrine prevails in Ethiopian law in some form or other, we analysed the question in terms of the two theories behind the doctrine in French law, from which it results that
(a) The doctrine of "subsidiarity" does not hold good in Ethiopian law in so far as it connotes the exclusion of the unjust enrichment action on the basis of a

## SUBSIDIARITY OF UNJUST ENRICHMENT

theory of "hierarchy in the sources of law." The principle of unjust enrichment is a product of legislative enactment, and the action arising therefrom cannot be subsidiary to other actions arising from other sources.
(b) The doctrine, as expressed by the theory of "fraud on the law," is present in Ethiopian law. Logical and practical considerations militate for its presence. That aside its presence is compelled by the "cause" requirement in Article 2162. In the last analysis, this theory stands for the proposition that the unjust enrichment action cannot be taken where the defendant's enrichment has a just cause. ${ }^{86}$

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## CASE COMMENT

INTERNATIONAL LAW : STATE SUCCESSION TRINGALI CARMELO TERESA v. MALTESE VINCENZE<br>Supreme Court of Eritrea - Civ. Case No. 590/62<br>by Fasil Nahum*

In 1958,** the plaintiff, Tringali Carmelo Teresa, and the defendant, Maltese Vincenze, celebrated a marriage in Eritrea following the rites of the Roman Catholic Church. The marriage was subsequently registered by the officer of civil status of the municipality of Asmara. In August 1962, Plaintiff petitioned the Supreme Court in Asmara to declare the marriage juridically non-existent for purposes of the civil law, to declare null and void of any juridical power the entry of the marriage in the register of civil status of the municipality of Asmara, and to order the officer of civil status to correct the register accordingly.

To understand the problems raised by this petition, one must bear in mind the relevant historical background. In 1929 Italy and the Holy See entered into a Concordat (treaty) under which Italy agreed to recognise religious marriages celebrated in Italian territory following the rites of the Roman Catholic Church for civil law purposes. The Italian Government subsequently promulgated a law, No. 847 of 1929, to enforce the Concordat. This law also extended the application of the Concordat to all Italian colonies, including Eritrea.

Formal Italian sovereignty over Eritrea came to an end through the Peace Treaty of September 15, 1947, signed by Italy and the four allied powers. ${ }^{1}$ In reality Italy had ceased to exercise any control over Eritrea in 1941. "The final disposal ... (of Eritrea was to be) determined jointly by the governments of the Soviet Union, of the United Kingdom, of the United States, and of France within one year from the coming into force of the present Treaty, in the manner laid down in the joint declaration of February 10, 1947, issued by the said Governments...." ${ }^{2}$

Since these powers did not agree as to what was to happen to Eritrea, the responsibility to decide its future status was transferred to the United Nations General Assembly following the procedures laid down in the declaration. In December 1950, the United Nations General Assembly passed a resolution which became the basis for the federation between Ethiopia and Eritrea. This legal instrument was adopted by Ethiopia and Eritrea in September 1952. Later, on November 15, 1962,

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Order No. 27 of $1962^{3}$ was issued by Ethiopia, terminating the federation and thus making Eritrea part of a unified Empire.

The major issue raised by this case is whether the Concordat of 1929 entered into by Italy and the Holy See was still in force in Eritrea at the time of the parties' marriage in 1958. Under the Concordat, civil courts would be bound by the religious rules of the Catholic Church regarding, for example, dissolution of marriages. Thus, if the Concordat was in effect, an annulment could be granted only if sanctioned by Church authorities. It appears that no such sanction had been given in this case.

By 1958 Eritrea and the federation had succeeded to the sovereignty formerly exercised by Italy. Whether Eritrea was still bound by the Concordat depends on the principles of the law of nations governing the rights and duties of such successor states. In dealing with this issue, the Supreme Court stated that an "undisputed principle of public international law provides that in the succession of States, the successor State does not inherit ipso jure the treaties of the States from which it derives." Furthermore, the Court held that "a limitation on the jurisdiction of one State in favour of another may be admitted only if and to the extent that the State concerned agrees, and not as a result of a law existing before the State came into being."

The Court by this last remark simply means that the Concordat would be in force in Eritrea only if Eritrea had ratified it subsequent to assuming sovereignty. Under the Eritrean Constitution ${ }^{4}$ the power of ratifying international agreements is expressly reserved to the Emperor as Sovereign of the Federation. Since the Emperor never took steps to ratify the Concordat, the Court rightly concluded that the Concordat of 1929 between Italy and the Holy See had ceased to be in force in Eritrea by 1958

The Court did not determine at what point prior to 1958 the Concordat became ineffective, whether it did so with the end of de facto Italian presence and rule in 1941, or with the Peace Treaty of 1947, or with the termination of the British Civil Administration and the creation of the Federation with Ethiopia in 1952. Since the marriage in question took place in 1958, the Court did not have to commit itself to any of these possible choices.

In this respect the Court acted within the generally held principle that a court should not decide more than is necessary for the disposition of the case before it. Although the Court did not decide the issue, however, it did indicate some concern over the question, stating that, "Perhaps it can be argued that in the interim between the time when Italy gave up its sovereignty over Eritrea, and the time when the Ethiopian Crown assumed it on September 11, 1952, the Concordat and the related norms could be considered to have been in force."

There is, indeed, no question but that after 1952 the Concordat had ceased to be in force in Eritrea. Generally speaking, "a treaty only creates law as between

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the States which are parties to it." ${ }^{5}$ Eritrea had through the Federation assimilated itself to Ethiopia, thereby becoming part of a different international personality. Under the principles of the law of nations such international personality is not required to be bound by treaties entered into by another State; thus the Concordat had no force in Eritrea after 1952. But may one go further and conclude that even during the interim period before the Federation the Concordat had ceased to be in force?

The Court gave no reason why it thought that the Concordat might have remained in force in this interim period, and it appears that such an argument would be rebutted by the principles of the law of nations. There is general agreement among international jurists today on the principle that a State which succeeds another State in sovereignty over a territory is not a successor to the constitutional authority of the predecessor State. It follows from this that the public law of the predecessor State cannot survive the end of its sovereignty. ${ }^{6}$ Treaties entered into between States form part of the public law of such States. ${ }^{7}$ It thus follows that the Concordat ceased to have force in Exitrea from the time that the Italian State lost its sovereignty over it. This means that even during the interim period, the Concordat had lost its force because Italian sovereignty had given place to British effective sovereignty. ${ }^{8}$

So far we have been dealing with the effectiveness of the Concordat. There is a related and necessary question regarding the effectiveness of what the Court referred to as the "related norms," namely, law No. 847 of 1929. It was this legislation, rather than the Concordat itself that was the immediate basis of the claimed indissolvability of the religious marriage.

The Court held that once the Concordat became ineffective, law No. 847 of 1929 ceased to be in force in Eritrea. To support its view, the Court quoted an Italian authority's statement: "If a treaty is extinguished for any reason whatsoever, the norms set up as a result of the treaty also become extinguished, without the necessity of any declaration to this effect." The Court analogised the situation to a collapsing roof. A chandelier hanging from the roof would have to come down as the roof does. The chandelier analogy is colourful, but not very precise. It is not necessary, as a matter of logic, that the norms set up as a result of a treaty automatically become ineffective as soon as the treaty itself is extinguished. This was recognised by the German Reichsgericht, the highest German court, when it was confronted with the same issue. It held that, "even if it be admitted that the binding force of the Convention under international law ... ceases ipso facto ... the contents of the Convention, insofar as they have become part of our civil law, do not cease to be valid ... The international validity and the internal effectiveness are not necessarily interdependent." (Emphasis added).

[^77]One can see the basis for this position by taking a simple example. If a bi-lateral commercial treaty is entered into by which one State undertakes to amend its municipal regulations on custom duties and tariffs, these regulations, if enacted, are not necessarily and automatically made ineffective if the treaty is abrogated. If the contrary is argued, then the state may be left unexpectedly with no law at all on an important subject of tax regulation, if the former law must be treated as repealed.

It is not easy to make a general rule as to when such norms automatically become ineffective and when not. Each case has to be examined individually. Differences in fact may result in a difference of law. The Court should not have tried to create a universal principle but only solved the questions raised by the particular facts. In the particular circumstances of the Tringali case, the Court's reasoning and application of the principle seem sound. In the absence of the Concordat, law No. 847 is useless; the legisiation refers to the Concordat and the ineffectiveness of the Concordat results in the ineffectiveness of the legislation as well.

Since the Concordat and its related norms had, at the time of the parties' marriage, ceased to be effective, the Court granted the petition that the marriage be declared juridically non-existent for purposes of the civil law and ordered the correction of the register of civil status of the municipalty of Asmara accordingly.

While the conclusion that the Concordat no longer had effect at the time of the parties' marriage is unimpeachable, serious questions can be raised from the perspective of domestic law whether the marriage should have been declared "nonexistent." If the court really meant that the civil law status of the parties was as if their marriage had never occurred, it would seem to have adopted two rather troublesome sets of results. First, all Eritrean marriages entered into in the Catholic Church during the period of the Concordat's ineffectiveness would seem to be null and void; second, none of the civil incidents of marriage - for example, the right of the spouse to share communal property held with an intestate deceased spouse-would seem to apply. Such results are questionable. The opposite result would have been reached, for example, under the Civil Code of 1960 which became applicable in Eritrea in November 1962 upon dissolution of the Federation. Under the Code, any marriage celebrated in accordance with the rites of the parties' religion is by that fact valid, whether or not registered by the officer of civil status. ${ }^{10}$ In this case, however, the issue was only whether dissolution could be authorised despite the Concordat. While the Court's language may have been unfortunate, its result was correct. This paper has been concerned only with the International Law aspects of the case, and leaves to another court and another writer the troublesome problem of the domestic impact of this decision.

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## CURRENT ISSSUE

# EXPROPRIATION BY THE IMPERLAL HIGHWAY AUTHORITY 

Farrison C. Dunning*

The Imperial Highway Authority was established by proclamation in 1951. ${ }^{1}$ Although the reasons for transferring highway construction and maintenance activity to an independent authority are not altogether clear, the change was apparently motivated by a desire to increase administrative efficiency. ${ }^{2}$ Indeed it appears the International Bank for Reconstruction and Development, which has provided most of the external financing for Ethiopia's highway programs, made this reorganization a condition for extending in 1951 its initial loan of US $\$ 5,000,000 .^{3}$ Whatever the reasons for its creation, the IHA has proved itself one of Ethiopia's most active and important administrative agencies, contributing substantially to the development of the Empire. ${ }^{4}$

Since the IHA was constituted to carry out highway construction and maintenance throughout Ethiopia, ${ }^{5}$ it was natural to empower the Authority to acquire

[^85]land by expropriation. ${ }^{6}$ Section $5(\mathrm{~d})$ of the Highway Authority Proclamation provided that the IHA could "[t]ake by eminent domain any privately owned lands for public use and fix the compensation for any buildings, crops, vegetation or other fixtures on the lands so taken." 7 It thus omitted from the list of compensable items land, without question the most important form of property in Ethiopia. ${ }^{8}$ The omission was not accidental, and the practice of the IHA since 1951 has been to deny compensation for expropriated land. ${ }^{9}$ The refusal of compensation has been rationalized on the ground that the building of a highway increases the value of land in the region opened up by the highway and that this increase in value, along with other material benefits brought by the highway, is sufficient compensation to landowners who lose some of their land to the highway itself. ${ }^{10}$

Neg. Gaz., year 10, no. 5, Although the Minister of Communications and Public Works had been responsible "for the construction, manufacture and repair of government roads, bridges, and waterways," Section 25(b), Ministers (Definition of Powers) Order, 1943, Order No. 1, Neg. Gaz., year 2, no. S, municipalities under the control of the Minister of Interior had been given the power to decide on the "[1]aying out, closing and keeping of streets, squares, bridges, promenades and public gardens." Section 4(iii)(a), Municipalities Proclamation, 1945, Proc. No. 74, Neg. Gaz., year 4, no. 7. See also Section 4, Classification of Roads Proclamation, 1944, Proc. No. 66, Neg. Gaz., year 3, no. 10 (Supplement). In practice the municipalities have performed the function of road construction and maintenance within their areas of jurisdiction, except when special arrangements have been made with the IHA.
6. Although the Highway Authority Proclamation. following American practice, uses the term "eminent domain," "expropriation" will be used here as that is the term used in the Civil Code.
7. Section 5(d), Highway Authority Proclamation, 1950 , Proc. No. 115, Neg Gaz., year 10, no. 5. See also Corrigendum, 1954, Corrigendum No. 35, Neg. Gaz., ycar 14, no. 1 (Amharic only). Section 10 of the same proclamation provided that "[t]he right of the Authority to enter upon or take by eminent domain any privately owned lands pursuant to Section 5 (d) of this Proclamation, shall not be subject to review or approval by any court. Any person having an interest in any land so taken may bring an action against the Authority in the provincial courts of the province in which the land so taken is situated or in the High Court to review the fairness of the compensation fixed by the Authority for the buildings, crops, vegetation or other fixtures on such lands or the allocation of such compensation between the respective persons having an interest in such land."
B. Since Section $5(d)$ referred only to compensation for objects on land taken by expropriation, it has been taken to bar compensation for objects under the surface of the land such as stone or sand. The IHA takes a considerable amount of such building materials, and it compensates only for concomitant interference with the surface, e.g., the destruction of a house on or near a quarry site. This practice has in recent years led to increasing litigation, and not all judgments have favored the IHA. See, e.g., Taffa Segn v. Imperial Highway Authority (Sup. Imp. Ct., 1968, Civil App. No. 1291/56) (to appear in J. Eth. L.) The resolution of these quarry cases is complicated by Article 130 of the Revised Constitution of 1955 , which states inter alia that "(t)he natural resources of, and in the sub-soil of the Empire, including those beneath its waters, are State Domain." It is only if stone and other building materials found beneath the surface of the earth are held to be subject to private rights that the question of their "expropriation" arises.
9. Interview with Ato Kebede Beyene, Right-of-Way Officer in the 1HA, on July 24, 1968. Since Section $5(d)$ of the Highway Authority Proclamation is a provision granting power to the Authority to expropriate land and to compensate for certain specified objects, it has been construed by some MHA officials as denying the Authority the power to compensate for other objects - thus, according to this construction, the IHA could not change its compensation practices even if it wished to do so. In some cases, however, where all or part of a person's land has been taken to be used as a camp for the IHA a comparable amount of land has been given to the expropriated individual from state-owned property. Where the value of the new parcel is equivalent to the value of the old parcel, then in effect the individual has been compensated for land taken by expropriation.
10. Interviews with various officials of the IHA.

## EXPROPRIATION BY THE IHA

Despite this rationalization, the IHA has generally compensated for objects on the land such as houses, as it is empowered to do by Section 5 (d). ${ }^{11}$

## The Highway Authority Proclamation and the Revised Constitution

The Highway Authority Proclamation was issued pursuant to the Constitution of 1931, which did not explicitly require compensation in case of deprivation of property by expropriation. ${ }^{12}$ The Revised Constitution of 1955, however, does so in no uncertain terms. Article 44 of this constitution provides both that "[n]o one may be deprived of his property except upon a finding by ministerial order issued pursuant to the requirements of a special expropriation law enacted in accordance with the provisions of Articles 88,89 or 90 of the present Constitution" and that "just compensation determined, in the absence of agreement, by judicial procedures established by law" is a condition for the deprivation of property. ${ }^{13}$

Despite the prima facie incompatibility between the language of Article 44 of the Revised Constitution and the practice of the IHA, as based on its interpretation of the Highway Authority Proclamation, that practice did not change following promulgation of the constitution. Yet rarely was it subject to challenge. Landowners were generally pleased to have a highway come to their region and they seem to have been satisfied with compensation for buildings, crops and other "fixtures." In the only published case in which a landowner challenged on constitutional grounds the compensation provisions of the Highway Authority Proclamation, the $\mathrm{Su}-$ preme Imperial Court held these provisions to be constitutional, primarily on the ground that both Article 44 and the Highway Authority Proclamation are intended "to benefit

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society." ${ }^{14}$ This conclusion was reached without reference to Article 122 of the Revised Constitution, which in fact supplies the IHA with its strongest constitutional argument. Article 122, Ethiopia's "supremacy" provision, states that "[t]he present revised Constitution, together with those international treaties, conventions and obligations to which Ethiopia shall be party, shall be the supreme law of the Empire, and all future legislation, decrees, orders, judgments, decisions and acts inconsistent therewith, shall be null and void" (emphasis added). Since the legislation under which the IHA operates was promulgated before the Revised Constitution, the Authority can certainly maintain that it is not, according to Article 122, subject to that constitution. ${ }^{\text {Is }}$

## The Highway Authority Proclamation and the Civil Code

Aside from the constitutional question, a second ground for attack on the IHA practice of denying compensation for expropriated land is provided by the Civil Code of 1960. This not only repeals those provisions of the Highway Authority Proclamation on which the IHA relies but also replaces them with provisions specifically requiring compensation.

Articles 1460 through 1488 of the Civil Code lay down comprehensive rules covering the award of compensation as well as the procedure to be followed in case of expropriation of immovable property by "competent authorities." Although the term "competent authorites"-l'administration in the original French - is not defined in the Civil Code, it seems a fair interpretation to treat it as covering all bodies authorized to engage in expropriation, including the IHA. ${ }^{16}$ The
14. Highway Authority \& Eskaniska Co. v. Mebratu Fissiha (Sup. Imp. Ct., 1964), J. Eth. L., vol. 2, pp. 37, 39. This seems a fair reading of the opinion, even though this was a stone case and the Supreme Imperial Court, which declared null and void an order of the High Court enjoining the quarrying of stone on certain privately-owned land, at one point said its decision did not bar the landowner "from bringing an action in connection with the compensation to be given." Id. at 39 .
15. This reasoning, with regard to the Maintenance of Telephone Services Proclamation, 1950, Proc. No. 114, Neg. Gaz., year 9, no. 11, was used by a division of the High Court in Araya Abebe $Y$. Imperial Board of Telecommunications of Ethiopia (High Court, Addis Ababa, 1964), J. Eth. L., vol. 2, pp. 303, 305. For material on the meaning of Article 122, see Paul \& Clapham, cited above at note 12 , pp. 414-416; R. Means, "The Constitutional Right to Judicial Review of Administrative Proceedings: Threshold Questions," J. Eth. L., vol. 3 (1966), pp. 175, 179.
16. It is not entirely clear under Ethiopian law which governmental authorities have the power to expropriate. One interpretation is that ministries inherently have the power to expropriate, but that other governmental bocies must be given the power specifically if they are to have it. For some examples of grants of the power of expropriation to government bodies which are not ministries, see Section 6(a), Awash Valley Authority Charter, 1962, Gen. Not. No. 299, Neg. Gaz., year 21, no. 7; Section 4(e), Charter of the Ethiopian Electric Light and Power Authority, 1956, Gen. Not. No. 213, Neg. Gäz., year 15, no. 5; and Section 7(g), Board of Telecommunications Proclamation, 1952, Proc. No. 131, Neg. Gaz., year 12, no. 5. There have been, however, grants of the power of expropriation to ministries, e.g., Section 46, Maritime Proclamation, 1953, Proc. No. 137, Neg. Gaz., year 13, no. 1, which gave the Ministry of National Defence the power to expropriate in connection with maritime affairs. This power was impliedly transferred to the Ministry of Communications, except as to expropriation for maritime defence purposes, by section 19 of the Ministers (Definition of Powers) (Amendment No. 2) Order, 1966, Order No. 46, Neg. Gaz., year 25, no. 23. See also Section 10 of the Post Office Proclamation, 1966, Proc. No. 240, Neg. Gaz. year 25, no. 22, which gives the post office, stated to be an "independent Department" of the Ministry of

## EXPROPRIATION BY THE IHA

Civil Code unquestionably requires the competent authority to pay compensation, in cash or in kind, for land acquired by expropriation, whether that land has houses or crops on it or not. Thus Article 1474(1) states as follows: "The amount of compensation or the value of the land that may be given to replace the expropriated land shall be equal to the amount of the actual damage caused by expropriation."17 Where a market in land exists the market value of the expropriated land may be the surest indication of the "actual damage" to the landowner, but even where there is no market in land, there will generally be damage for which the Civil Code requires compensation.

That the Civil Code requires compensation for land, whether developed or not, is thus clear; it is equally clear that the Civil Code repeals those provisions of the Highway Authority Proclamation which deal with expropriation, with the exception of the provision giving the IHA the power to expropriate. ${ }^{18}$ Article 3347 of the Civil Code, a repeals article remarkable for its sweep, ${ }^{19}$ provides as follows: "Unless otherwise expressly provided, all rules whether written or customary previously in force concerning matters provided for in this Code shall be replaced by this Code and are hereby repealed." Expropriation is a matter provided for-in detail-in the Civil Code, Sections 5(d) and 10 of the Highway Authority Proclamation are rules previously in force concerning expropriation, and there is no express provision saving these earlier rules: the conclusion that they are therefore repealed seems inescapable.

The IHA has thus far resisted this conclusion. ${ }^{20}$ The ground of resistance seems to be the fear that if the Civil Code were followed the costs of land acquisition would soar, thus forcing a significant reduction in "productive" highway expenditure. This fear has apparently led some within the IHA to argue for new legislation which would exempt the IHA from the requirements of the Civil Code

[^87]and reenact the old rule that it need pay compensation only for buildings, crops and other fixtures on land it takes. ${ }^{21}$

It is submitted that this fear is exaggerated and that a closer look at the compensation requirements of the Revised Constitution and the Civil Code may prove reassuring to those concerned with the costs of a development program as important as highway construction. The crux of the problem is the manner in which compensation is calculated. Article 44 of the Revised Constitution simply requires "just compensation" for "property." Since land is the most important form of property in Ethiopia, it would be untenable to maintain that land is not property within the meaning of Article $44 .{ }^{22}$ This is as true of undeveloped land as of developed land. It is much less clear from Article 44, however, what amounts to "just compensation" when land is expropriated. The expropriation provisions of the Civil Code seem to strike a reasonable balance between the interests of the State and those of the private owner and therefore to satisfy this constitutional requirement, ${ }^{23}$ so that it is of critical importance to determine precisely what it is that the Civil Code requires by way of compensation.

The basic principle of the Civil Code, as already noted, is compensation equal to the amount of "actual damage" caused by expropriation. ${ }^{24}$ The expropriation of land obviously causes damage to any person whose rights on that land are thereby extinguished, so that one begins with the proposition that such persons are owed compeasation for their loss. However, this basic compensation principle is subject to several qualifications: the one of importance here is found in Article 1475(2), which states in the original French that in making its decision on compensation the arbitration committee shall take into account any increase in value for remaining property arising from the construction of public works. ${ }^{25}$ Such increase in value is

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## EXPROPRIATION BY THE IHA

taker into account in order to lower the total amount of compensation to be awarded-it is thus, in nature, a set-off. In highway expropriation it is rare that ail of a particular owner's land must be taken-generally only a strip sufficient for the highway itself and an adequate "right of way" on either side is needed. In most cases expropriated owners will be left with part of their original parcel of land and it is certain that the construction of a new highway will lead to a considerable increase in the value of that remainder. Little systematic data on land values in rural Ethiopia is available, but apparently land in most places if on a highway is worth at least two or three times what it would be worth if it were not on a highway. Such differences in value can be set off against amounts owed for property expropriated by the IHA. ${ }^{26}$

## Conclusion

In conclusion it is maintained that the expropriation provisions of the Highway Authority Proclamation, even if constitutional, have been repealed by Article 3347 of the Civil Code, with the exception of that provision giving the IHA the power to carry out expropriation; that the IHA, like other government agencies engaged in expropriation, is presently bound to use the Civil Code provisions on expropriation; and that, if proper use is made of the set-off provision of Article 1475(2), the costs of acquiring land for highway construction should not rise dangerously, if at all. The rationale for Article 1475(2) appears to be essentially the same as the rationalization which has been offered for omitting land from the list of compensable items under the Highway Authority Proclamation: that is, where landowners benefit greatly from public works constructed by the State at its expense, the State should not have to compensate those owners for loss which does not exceed their direct and immediate gain. The difference between the formula of the Highway Authority Proclamation and Article 1475(2) of the Civil Code lies in the precision with which this reasoning is applied: Article $1475(2)$ allows each case to be considered on its merits, whereas the Highway Authority Proclamation allowed only a very rough approach. No compensation was ever to be paid for land, yet compensation was always owed for buildings, crops, vegetation and other fixtures.

In addition to providing greater fairness in particular cases, Article 1475(2) offers another direct advantage to the IHA. It can be used to provide a setoff to amounts owed as compensation for those objects on the land for which compensation was owed under the Highway Authority Proclamation. ${ }^{27}$ A good

[^89]practical example is provided by the problem of compensating for coffee trees. Under the Highway Authority Proclamation, it is clear that compensation must be paid for coffee trees, as they are "crops, vegetation or other fixtures." 28 It is reported that in certain areas where coffee trees are plentiful and compensation for them at market value would be costly, the IHA in effect has said it will construct the new highway only if the landowners in the area agree to forego compensation for their coffee trees. This sort of coercive action to require individuals to waive rights they have under the law seems undesirable, even though these individuals do have a choice between a highway and no compensation for their coffee trees on the one hand and their coffee trees with no highway on the other. Social pressure, particularly as manifested through district governors, may frequently mean that this choice will not be entirely free. ${ }^{29}$ The advantage of Article 1475(2), again, lies in its precision: it can be used for individual cases so that the greatest fairness is achieved. For most landowners in a given area, the increase in value to remaining land might be far greater than the value of lost coffee trees, but for some landowners this might not be true. The latter would therefore receive an appropriate amount as compensation, an amount equivalent to their net loss of value. ${ }^{30}$

Finally, it is suggested that from the point of view of Ethiopian legal development as a whole it is desirable for the IHA to use the Civil Code in carrying out expropriation. One aim of the Civil Code was to bring uniformity in different areas of the law, including the law of expropriation. ${ }^{31}$ If the IHA "opts out"i.e., succeeds in having its own expropriation legislation and succeeds in upholding the constitutionality of that legislation-it seems likely that other agencies engaged in expropriation will attempt to follow suit. This would be most unfortunate both for clarity and for uniformity in what is one of the more important areas of contemporary Ethiopian law.

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[^0]:    Alumni. One of the most important developments during the year was the founding of an Alumni Association of the Law Faculty. A draft constitution for the Association was prepared by an able committee composed of Abiyu Geleta, Kebede Habte Mariam, Mesfin Fanta, Selamu Bekele and Shimelis Metaferia. Late in the spring, following an alumni luncheon, a group of two hundred alumni approved the constitution in a four-hour meeting at which the draft was debated section by section and some modifications adopted. All degree, diploma and certificate graduates of the Law Faculty are entitled to become members of the new alumni organization, whether resident in Addis Ababa or elsewhere. After approval of the Constitution at the founders' meeting, Abiyu Geleta was elected President of the Association.

    Of considerable interest to the Faculty are those alumni who went abroad for further law study. During the year, these included Mebratu Yohannes, who went to McGill University, Montreal, Canada; Eyassu Ayalkebet, Hailu Makonnen and Yacob Haile Mariam, who went to the University of California, Los Angeles; and Alexandra Hamawi, who went to the University of London. Accepted for foreign law study this coming year are Ababiya Abajobir at Mcoill University; Shimelis Metaferia at the University of Chicago, Chicago, Illinois; Yohannes Heroui at the Institute of Advanced Legal Studies, London; Zeray Habte Selassie at Ohio State University, Columbus, Ohio; and Zegay Asfaw at the University of Wisconsin, Madison, Wisconsin.

    Students. At the opening of the $1967-68$ school year, there were enrolled in the Law Faculty 192 degree students, 257 diploma students and 294 certificate students, including 52 new evening LL.B. candidates and 123 certificate students in a new course offexed in Harrar. Shortly after the regular school year opened, additional certificate courses, with total initial enrollment of 565 students, were started in Jimma, Asmara and Addis Ababa. Attrition in the first year of new evening courses was about 50 per cent, similar to previous years. Attrition among new day LL.B students was considerably less.

    At the close of the academic year, 17 students were granted LL.B. degrees and 99 were granted diplomas. No certificates were give, as no certificate classes were in their final year. Prizes for outstanding academic performance were awarded to the following students: Fasil Nahum, Chancellor's Medal; Billilign Mandefro, best aca-

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[^11]:    * Assistant Professor, Schooi of Law, Boston University, formerly Assistant Projessor, Faculty of Law, Haile Sellassie 1 University.

    1. Fetha Negast, Chapter XXXIV.
[^12]:    11. These arrangements do not include any set capital nor is the liability of all the parties limited, as is the case with share companies (Comm. C., Art. 304) or private limited companies (Comm- C., Art. 510 (1) ). The object is usually commercial within the meaning of Article 5 of the Commercial Code and so they cannot be ordinary partnerships (Comm. C., Art. 213) nor is the participation of any party normally kept secret as with a joint venture (Comm. C., Art. 272(1)). Therefore, they should usually be considered general partnerships and occasionally limited partnerships where some of the parties anticipated enjoying limited liability.
    12. Article 214 actually states that it shall be "of no effect." The argument that this means the same thing as "jinvalid" will be made below.
    13. Thus, the judge will ask, "why do you seek this Gurda?" The parties reply "So as to have a partnership." The judge then says "This is an 'Arger yewortin' Gurda" "Arger" and "Wortin" being the names of the two persons who are supposed to have originated the Gurda contract) which the parties then repeat. The judge asks "If you violate this gurda?" to which the parties reply, "On Maskal day (a Christian Ethiopian feast), let me wear rags, carry a basket and come to you (the judge) and beg." All of these questions and answers are stated three times. Finally, the judge, dismisses them with the blessing, "Let this Gurda keep you from violating your agreement."
    14. See note 2, above. See also, William A. Shack, The Gurage, Oxford University Press, 1966. "Yeket Gurda" is the contract used for important commercial contracts, such as the sale of land. There is also "Yedem" (blood) or "Anjet (intestine) Gurda" which is used to seal a reconciliation where one person has killed another and "Yerbret Gurda" in which the two parties promise in perpetuity not to injure each other in any way.
    15. Fetha Negast, Chapter XXXIV.
[^13]:    16. As compared to 200 share companies, 400 private limited companies and 9,000 individual proprietorships.
    17. The concept of registration of partnerships was first introduced in the Companies Law of 1933. However, these provisions were never enforced.
    18. Civ. C., Art. 394.
    19. Comm. C., Art. 210(2).
    20. G. Ripert, Traité Elémentaire de Droit Commercial (3rd ed. 1954), p. 268.
    21. Comm. C., Art. 294.
[^14]:    22. Comm. C., Art. 268. Where partners are owed money, they too are paid but only after third parties.
    23. Comm. C., Art. 269.
    24. Comm. C., Art. 270(1) (3).
    25. Comm. C., Art. 268(1).
[^15]:    26. There are probably several "policies" behind registration. For example, where all partnerships (and all businesses) are registered, this will provide needed information to the tax authorities. For this reason, penalties in the form of fines may be imposed for nonregistration (See Articles 115 of the Commercial Code and 428 of the Penal Code). Such a policy would not explain the denial of legal personality.
    27. Comm. C., Art. 216.
    28. Comm. C., Art. 289(1) (See the French or Amharic version of the code).
    29. Comm. C., Art. 216(4).
    30. Comma. C., Art. 289(2).
    31. In the United States, where there is no provision for the registration of partnerships, restrictions on the powers of a manager are only effective against a third party where the third party has actual knowledge of the restriction. There is no possibility of constructive notice. Uniform Partnership Act. (U.S.A.), § 9(4), in J. Crane, Handbook on the Law of Partnership (2d ed., 1952), p. 553.
[^16]:    33. Law of 24 July 1867 (France), modified by Décr. L. 30 October 1935, Art, 58 in Code de Commerce (Petits codes Dailoz, 58th ed., 1962) p. 52 . As the original drafter of the Commercial Code was French, one might argue that he probably followed French practice. However, Article 223, in its present form, was added to the draft code by Professor Jauffret, after the death of Professor Escarra, so as to avoid many of the difficulties which arise in French law.
    34. Code de commerce (Lebanon), Art. 44, E. Boustany, Codes Libanais en Textes Francais (1955). Contra, see Civil And Commercial Code (Thailand), Art. 1015 (1962) which provides loss of legal personality as the sole penalty for a failure to register.
    35. Civ. C., Art. 1720(3).
[^17]:    36. As for assets in excess of the value of contributions, these represent profits. Since they were acquired on behalf of all the members, they must be jointly owned.
    37. Comm. C., Art. 269.
    38. Comm. C., Art. 270(2).
[^18]:    39. Comm. C., Art. 289(1) (refer to French text).
    40. Civ. C., Art. 2203.
    41. Civ. C., Art. 2181(1).
    42. Comm. C., Art. 289(2).
    43. Comm. C., Art. 296.
    44. Comm. C., Art. 272(1).
[^19]:    52. Ripert, cited above at note 20, p. 434.
    53. The violation of penal provisions (See Comm. C., Art. 115) may not be retroactively cured.
    54. See the discussion as to the meaning of "no legal effect" at note 35 above.
    55. Although the English version of Article 214 says it is "of no effect", the better translation of the French term "nul" is "invalid". Lack of writing is not the only ground for invalidating a partnership agreement. Since the agreement is a contract, it is subject to the veneral rules of contract. For example, the contract may be invalidated for a defect in consent or lack of capacity on the part of one of the partners.
    56. Civ. C., Art. 1808.
    57. Civ. C., Art. 1815.
[^20]:    58. Civ. C., Art. 1816.
    59. Civ. C., Art. 1817(1).
    60. Professor David himself recognized that the exception might become the rule. See, R. David, Avant-Projet of the Ethiopian Civil Code (unpublished).
    61. Note that in French law, a partnership agreement may be invalidated for lack of registration as well as lack of a written agreement. Law of 1867, Art. 58, cited above at note 33 .
    62. A Moreau, Associations en Participation et Sociétés de Fait (1958), p. 863.
    63. Ripert, cited above at note 20, p. 292.
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    1. From 1952 to 1962, from the end of British military administration of Eritrea to the incorporation of Eritrea into a unified Empire, Eritrea was federated with Ethiopia as an autonomous unit under the sovereignty of the Emperor. For a discussion of Eritrea's legal status during and after the Federation, see Zaerabruk Aberra, "The Legal Status of Eritrea, Materials for Public Law II $1964-65$ (K. Redden, ed., unpublished, Faculty of Law Library, 1965).
    2. Eritrean Gaz., vol. 20 , no. 5 (supp.).
    3. See Schedule II of the Act, listing the legislation repealed wholly or in part.
    4. The Factories Proclamation, 1944, Proc. No. 58, Neg. Gaz., year 3, no. 8, empowered the Minister of Commerce and Industry to issue regulations with respect to labour conditions in factories, but this power never was exercised. G. von Baudissin, "An Introduction to Labour Developments in Ethiopia," J. Eth. L., vol. 2, p. 101, 103 (1965). When in 1964 the Minister did promulgate regulations of this kind to supplement and improve on those contained in the Civil Code, he did so under the Labour Relations Proclamation of 1963, Proc. No. 210, Neg. Gaz., year 23, no. 3, rather than under the Factories Proclamation. See L. Not. No. 302, 1964, Neg. Gaz., year 24, no. 5.
    5. Neg. Gaz., year 24, no. 5.
    6. Certain Civil Code provisions were more favourable to employees than corresponding provisions of the Employment Act, for example, the provisions for paid annual leave. Compare Civ. C., Art. 2562, with Employment Act, Art. 22. But taking each law as a whole, the Employment Act appears to have been the more generous of the two, if only because it is more detailed and deals with matters not touched on by the Code.
    7. See Civ. C., Arts. $406(2)$ (registration of labour unjons) and 2516 (negotiation of collective agreements between employers and labour unions).
    8. The Factories Proclamation, cited above at note 4, provided for the appointment of factory inspectors, but if does not appear that a factory inspection system was in fact put into effect under that law.
[^34]:    9. Order No. 37, Neg. Gaz., year 24, no. 4.
    10. Proc. No. 232, Neg. Gaz., year 25, no. 13.
    11. Civ. C., Art. 2542.
    12. Article 24(3) of the Employment Act entitles an employee to a full day's pay when he misses part of that day by reason of accident or sickness, but there is no provision in the Act for paid sick leave where the employee misses one or more full days or work. See Employment Act, Art. 25.

    Such general provisions for paid sick leave are to be distinguished from those making the employer liable in the special case where accident or sickness arises out of the employee's work. Under both the Civil Code and the Employment Act, the employer's liability in such a case includes some compensation for lost earnings; the provisions of the two laws differ, and which is the more favourable to an employee depends on the facts of the particular casc. Compare Civ. C., Arts. 2556-58, with Employment Art, Arts, 44-46.
    13. Dec. No. 49, Neg Gaz., year 21, no. 18.
    14. Art. 3347. Subsequent articles modify this general repeals provision, but the modifications are not relevant to this discussion.
    15. Art. 36.

[^35]:    16. Under the treaty of peace between the Four Powers (the United States, Great Britain, the Soviet Union and France) and Italy, the disposition of Eritrea, as a former Italian colony, was to be governed by recommencation of the United Nations General Assembly. Treaty of Peace, Annex XI, Para. 3, quoted in N. Marein, The Ethiopian Empire Federation and Laws (Rotterdam 1964), p. 354. The Federal Act consisted of the first seven articles of the General Assembly resolution of December 10, 1950, relating to the then proposed federation of Eritrea with Ethiopia. Ratification of these provisions by Ethiopia was a condition for United Nations approval of the Federation. Ibid., p. 356. Neither the Federal Act nor its ratification was published in the Negarit Gazeta, but its ratification was referred to in Order No. 6, 1952, Neg. Gaz., year 12, no. 1, and the text of the Federal Act may be found in Appendix II of the Marein book.
    17. Order No. 27, 1962, Neg. Gaz., year 22, no. 3.
    18. It is possible that Article 5 of the order might be construed to save some kinds of Eritrean legislation not saved by Articles 4 and 6. Article 5 provides that "all rights, powers, duties and obligations of the former Administration of Eritrea become . . . the rights, powers, duties and obligations of the Imperial Ethiopian Government."
[^36]:    19. Cf. Civ. C., Arts. 3348-49, distinguishing, for purposes of the Code's repeals provisions, between legal situations finally created at the time of enactment of the Code and those not then finally created.
    20. Proc. No. 210, Neg. Gaz., year 23, no. 3.
    21. Article 92 allows the Emperor to proclaim decrees "in cases of emergency that arise when the Chambers (of Parliament) are not sitting."
[^37]:    22. Employment Act, Arts. $82-85$ and $100-01$. It appears that Articles $77-781$, relating to the resolution of labour disputes, also were repealed wholly or in part by the Labour Relations Proclamation.
    23. See Not. of Disapproval No. 1, 1963, Neg. Gaz., year 22, no. 10, disapproving Dec. No. 41, 1960, Neg. Gaz., year 19, no. 11. This apparently is the only instance in which a decree has been disapproved.
    24. See, e.g., Not. of Approval No. 1, 1960, Neg. Gaz., year 19, no. 4, approving Dec. No. 23, 1957, Neg. Gaz., year 17, no. 1. The notice of approval is quoted in the text accompanying note 28 , below.
    25. The language of Article 92 points both ways. It states that, when Parliament approves a decree, (I) the decree "shall continue in force" and (2) the decree "shall become law upon publication, in the Negarit Gazeta, of said approval."
    26. One consequence of this distinction is that Parliament's approval of a decree with amendments is subject to Imperial veto under Article 88 of the Revised Constitution, while a simple parliamentary approval or disapproval of a decree under Article 92 is not.
[^38]:    27. Not. of Approval No. 1, 1960, Neg. Gaz., year 19, no. 4, approving Dec. No. 23, 1957, Neg. Gaz, year 17, no. 2.
    28. With respect to annual leave, for example, under Civil Code Article 2562 an employee with four years of service had been entitled to ten consecutive days of paid annual leave; under Article 5(1) (b) of Legal Notice No. 302 he is entitled to sixteen days.
    29. For example, the Civil Code placed no limitations on the employment of young persons apart from the few special provisions governing contracts of apprenticeship (Arts. 2594-97). Article 13 of the Labour Standards Proclamation now in general prohibits the employment of persons under the age of fourteen in industrial enterprises and allows the employment of persons of age fourteen up to eighteen only under specified conditions.
    30. Art. 5, Labour Inspection Service Order.
    31. Arts. 7 and 8, Labour Standards Proclamation.
[^39]:    36. "They certainly contemplated this where more favourable conditions were provided by agree-
    $\cdots$ ments between employers and employees, and such private agreements are classed together with legislation as "legal arrangements" by the saving provisions.
[^40]:    37. Under the Employment Act, an employee earning more than one hundred dollars per month with less than five years of service is entitted to severance pay equal to three fifths of a month's pay for each year of service. For an employee with only one year of service, this is clearly less than the amount provided by Legal Notice No. 302 (three-fifths of a month's pay versus a full month's pay); for an employee with two years' service the two amounts are nearly equal (one and a fifth months' pay versus one and a quarter months' pay); and a few months after completion of the second year of service the amount provided by the Employment Act becomes the greater.
[^41]:    38. Civ. C., Art. 2575.
[^42]:    39. It may or may not follow that, on this hypothetical court's interpretation of the law, judgment should go against one of the majority of employees who sought to enforce his alleged rights under Legal Notice No. 302 against the employer. Two questions would be presented: First, again the question of the interrelationships between provisions and, in this case, within a single provision: Can provisions be divided up so that some employees enjoy the advantages of one part of Article 36 of the Employment Act while other employees enjoy the advantages (to them) of one part of Article 9 of Legal Notice No. 302? Second, if the provisions can be divided up, does the court agree with the apparent judement of the majority of employees that for them Legal Notice No. 302 is the more favourable?
    40. E.g., neither the legal notice nor the proclamation deals with the liability of the employer for workconnected sickness and accidents.
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    1. Mazeaud et Mazeaud, Leçons de droì civil, Tome II, No. 693, p. 636.
    2. W. Buckland, A Text-Baok of Roman law (3rd ed. revised 1963), p. 545.
[^59]:    16. Civil Code Art. 2162.
    17. Planiol et Ripert, op.cit., no. 757 , p. 57.
    18. Id., no. 759, p. 61.
    19. Herbert c. Bois-Hardy et Chanson, D. 1900.2.154.
    20. Id., no. 760, p. 63-64.
[^60]:    26. Planiol et Ripert, op, cit., no. 761. p. 67.
    27. Mazeaud et Mazeaud, op, cit., no. 708, p. 643.
    28. See Planiol et Ripert, op. cit., no. 761, p. 66, footnotes (1), (3-7) p. 67, footnotes (1-3).
    29. D. P. 1931.1.129.
[^61]:    30. In addition to these obstacles, i.e., ignorance or negligence, there are some authors who allegedly treat "fortuitous error" as an obstacle of fact. According to Challies, op. cit., p. 121; Colin et Capitant, op. cit., ( 5 th ed.), vol. 2, p. 417; Josserand, Cours de droit civii positif français (2nd ed.), vol. 2, no. 574, p. 316 and Ripert, La Régle Morale, (2nd ed.), p. 150; would grant the action de in rem verso in such instances. Of the works cited only Ripert's is available in the library, an examination of which discloses that the page refered to deals with the rescision or modification of contracts. As that is something wholly different from unjust enrichment, I have disregarded Challies' assertion and excluded "fortuitous error" from my discussion of obstacles of fact.
    31. Planiol et Ripert, op. cit., no. 762, p. 68.
    32. Marty et Raynaud, Droit civil, Paris (1965), no. 353(2), p. 320-321.
    33. Rouast, "L'enrichissement sans cause et la jurisprudence civile", Rev. Trim. Dr. Civ., 1922, p. 86; quoted in Drakidis, "La subsidiarite, caractére spscifique et international de l'action d'enrichissement sans cause", Rev. trim. Droit civil, vol, 59 (1961), p. 585.
[^62]:    34. Crédit foncier de France c. Arrazat, D. 1889.1.393; Jacquin c. Lebel freres et Bertinot jeune, D. 1913.1.433. Several more are to be found in other reporters.
    35. Laurrens, syndic. de la faillite Soc. Miguel et Tarayre c. Marty, D. P. 1924.1. 129.
    36. Marty et Raynaud, op, cit., no. 353(2), p. 321.
    37. Planiol et Ripert, op. cit., no. 763(2), p. 72.
    38. Drakidis, op. cit., p. 586.
[^63]:    45. Mazeaud et Mazeaud, op. cit., no, 707, p. 642.
    46. Marty et Raynaud, op. cif., no. 353(2), p. 320.
    47. Gore, op. cit., no. 199-204, p. 202-209, This theory will be analysed in greater detail in a later part of this section.
    48. Id., no. 288, p. 300-301.
    49. Planiol et Ripert, op. cit., no. 763(1), p. 72.
    50. Challies, op, cit., p. 125.
[^64]:    51. Ibid., p. 126.
    52. Challies, id., p. 160.
    53. Rutsaert, "Du caractère non subsidiaire de l'action d'enrichissement sans cause," Revue du Droit Belge, 1937, no. 13, p. 40, quoted in Challies, op. cit., p. 128.
    54. Almosnino, op. cit., no. 86, p. 177.
    55. Béguet, "L'enrichissement sans cause," Paris, 1945, no. 147, p. 253, no. 154, p. 263.
    56. Bull. Cass. Civ. 1949. 614, quoted in Drakidis, op. cit., p. 601.
    57. Buil. Cass. Civ. 1951.1.26, quoted in Drakidis, op. cit., p. 601.
[^65]:    58. Dalloz, Encyclopédie juridique, répertoire de droit civil (1952), vol. 2, Enrichissement sans cause, no. 135.
    59. Challies, op. cit., p. 130.
    60. Drakidis, op. cit., is one of the few exceptions. See p. 588.
    61. Consorts Duourg c. Antoine, Db. 1908.2.332.
[^66]:    62. Leblanc c. Dame Vial, D. 1928.2.169.
    63. Court's ruling on procedural issues omitted.
    64. Rouast, op. cit., No. 38 and following, quoted in Drakidis, op. cit., no. 33, p. 604-605; Goré, op. cit., no. 204, p. 207-209; Planiol and Ripert, op. cit., no. 761, p. 67.
    65. $I d_{\text {., no }} 201$, p. 204 and following.
    66. Ibid.
[^67]:    67. Rouast, op. cit., no. 38, p. 104, note 1. Quoted in Gore, op. cit., no. 202, p. 205.
    68. Bonnecase, Supplément au Traité théorique et pratique de droit civil de Baudry-Lacantinerie (1926), vol. 3, p. 297; quoted in Gore, op. cit., no. 201, p. 204.
    69. Gore, op. cit., no. 203, p. 206.
    70. Ibid., no. 204, p. 207-208.
    71. Ibid., p. 209
    72. Bonnecase, op. cit., reproduced in narrative form in Goré, op. cit., p. 209.
[^68]:    73. Drakidis, op. cit., no. 8, p. 584.
    74. Planiol et Ripert, op. cit., no. 761, p. 68.
    75. Ibid.
    76. Mazeaud et Mazeaud, op. cit., no. 711, p. 644.
[^69]:    77. Chevalier, op. cit., p. 246.
    78. Id., p. 243-245.
    79. Id., p. 245.
    80. Id., p. 247.
[^70]:    81. Distributed as class materials in the Faculty of Law, H.S. I. U..
    82. Article 2162 of the English version reads thus: "Whosoever has derived a gain from the work or property of another without just cause shall idemnify the person at whose expense he has enriched himself to the extent to which he has benefitted from his work or property." Explanatory notes prepared by the Codification Commission, p. 56 "la formule du principe général admis par l'article 130 (Art. 2162) est empruntée au Code marocain des obligations (art. 67)."
    83. Reproduced in Challies, op. cit., p. 170.
[^71]:    86. The interpretations given to the doctrine of "subsidiarity" in Moroccan law are similar to those put forth here. Without going so far as to suggest that the interpretations given to a principle by the legal system of a country which was the source of a similar principle adapted by another country should be accepted invariably, it is submitted that in this particular case, there cannot be any divergence between the interpretations given to the doctrine of "subsidiarity" by Moroccan and Ethiopian law. This is so because the considerations underlying them are identical.
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    ** All dates are given according to the Gregorian Calendar.

    1. "Italy renounces all right and title to ... Eritrea." Art. 23 (1) The Peace Treaty.
    2. Art. 23 (3), The Peace Treaty.
[^76]:    3. An Order to Provide for the Termination of the Federal Status of Eritrea and the Appication to Eritrea of the System of Unitary Administration of the Empire to Ethiopia, Neg. Gaz. No. 3 Year 22nd.
    4. The Eritrean Constitution, Art. 5 (1).
[^77]:    5. The Permanent Court of International Justice, in the case of Certain German Interests in Polish Upper Silesia, P.C.I.J., Ser. A No. 7 p. 29 (1926).
    6. R.P. O'Connell, The Law of State Succession (1956). p. 211,
    7. Refer for instance to Art. 122 of the Ethiopian Revised Constitution of 1955.
    8. R.P. O'Connell, International Law (1965), vol. I p. 368.
    9. S.H.H. V. L.CH. in Paris (Reichsgericht, Germany, 1914), Entscheidungen des Reichsgerichts in Zivilsacken vol. 85 p. 374; as found in R. Stanger, Materials on Public International Law (1965, unpublished, Law Library, H.S.L.University), p. 496.
[^78]:    10. Civ. C. Arts. 577, 579, 605, 697 ff.
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[^85]:    * Assistant Professor of Law and Assistant Dean, Faculty of Law, Haile Sellassie I University. The assistance of the following persons, who granted the author interviews on expropriation by the IHA, is hereby gratefully acknowledged: Ato Shifferaw Bizuneh, Deputy Chief Engineer, IHA; Ato Zewdou Meshesha, Legal Officer, IHA; Ato Kebede Beyene, Right-of-Way Officer, IHA; Ato Seyfe M. Yeteshawork, Deputy Right-of-Way Officer, IHA; Major Lemma Gebretzadik, Right-of-Way Branch, IHA; Mr. Park Wilson, formerly Business Manager, IHA; and Mr. Robert D. Scott, Counsellor at Law, Addis Ababa.

    1. Highway Authority Proclamation, 1951, Proc. No. 115, Neg. Gaz., year 10, no. 5.
    2. Interview with Mr. Robert D. Scott, a draftsman of the proclamation, on July 11, 1968. For the first twelve years of the Authority's existence, management services and personnel were provided by the U.S. Bureau of Public Roads, which may have preferred to work with an independent authority.
    3. This condition is evident from the preamble to the proclamation, which reads as follows: "WHEREAS, it is Our desire to improve the transportation system of Our Empire and; WHEREAS, to accomplish this purpose We have accepted the cooperation of the International Bank for Reconstruction and Development, and; WHEREAS, to facilitate such co-operation it is necessary to reorganize the administration of Our highway development and maintenance program;" Highway Authority Proclamation, 1950, Proc. No. 115, Neg. Gaz., year 10, no. 5. An independent authority may have been regarded as providing greater fiscal integrity as well as greater administrative efficiency.
    4. In the first sixteen years of its existence the IHA built or reconstructed over 5,000 kilometers of all-weather highway, in addition to its extensive highway maintenance and improvement work. Imperial Highway Authority, Ethiopia: Progress in Highway Transport (1967), p. 2. During this period it expended nearly US $\$ 58,000,000$ on highway construction, of which about $72 \%$ was provided by foreign loans and grants, and nearly US $\$ 47,000,000$ on highway maintenance. $1 d$. at 4.
    5. In practice the IHA does highway work within municipalities only in special circumstances. Although Section 3 of the Highway Authority Proclamation imposes on the Authority "the duty of developing and maintaining the highway system of Our Empire," the specific functions transferred to it by that same section were those "hhefetofore performed by the Ministry of Public Works and Communications" (sic). Section 3, Highway Authority Proclamation, 1950, Proe. No. 115,
[^86]:    11. Although reliable statistics are difficult to locate, the amounts paid have apparently never been large. In the early years of the IHA, most major work consisted of highway rehabilitation, so that very little land had to be taken by expropriation. Indeed, the Right-of-Way Branch of the IHA was apparently formed only in 1957. Compensation figures reported for recent years, which appear to be typical, are Eth. $\$ 9,208.90$ for 1959 and Eth. $\$ 4,738$ for 1960. See the IHA annual reports for these years at, respectively, page 44 and page 40. Presumably in addition to this some compensation was paid in kind, through provision of land from that owned by the state.
    12. Article 27 of this constitution merely stated the following: "Except in cases of public utility determined by law, no-one shall be entitled to deprive an Ethiopian subject of the movable or landed property which he holds." The Constitution of 1931 is reproduced in J. Paul \& C. Clapham, Ethiopian Constitutional Development (1967), voi. 1, pp. 326-330 and in Eth. Observer, vol. 5 (1962), pp. 363-365. A contemporaneous but then unpublished "commentary" on this constitution stated, however, with regard to "exemption" from confiscation of land, that "if it is necessary for the Government to construct on another person's land installations for the public welfare, such as forts, roads, markets, churches, schools, hospitals, townships or any work of this kind, it is determined by law that if the Deliberative Chambers have declared it necessary, the landowner shall be given a fair price as determined by law, or, subject to the landowner's consent, he shall receive some other similar compensation, and he shall be compelled to surrender the property..." (emphasis added). Section 76, Demmissie Wolde-Amanuel, Constitution and Parliament of Ethiopia. A Hisiorical Record, as translated by S. Wright in Paul \& Clapham, cited above, pp. 331, 334.
    13. Rev. Const., Art. 44. Article 44 also requires that this ministerial order, "to be effective," must be approved by the Council of Ministers and published in the Negarit Gazeta. A division of the High Court has taken the sensible view that the expropriation provisions of the Civil Code constitute the "special expropriation law" referred to by Article 44 of the Revised Constitution. S.A.C.A.F.E.T., Societa Anonima v, Ministry of State Domains and Mines (High Court, Addis Ababa, 1962), J. Eth. L., vol. 2, pp. 60, 61. Before the enactment of the Civil Code there was no special expropriation law enacted pursuant to Article 44 of the Revised Constitution, which led at least one court to state that no expropriation could then be constitutionally carried out. See Haji Ali Ahmed Abogni v. Municipality of Addis Ababa (High Ct., Addis Ababa, 1961, Civil Case No. 832/50) (unpublished).
[^87]:    Posts, Telegraphs and Telephones, the power of expropriation, "Concessionaires," including those who have contracted to carry on a public service, can expropriate where the power to do so is explicitly granted by the concession agreement. Civ. C., Art. 1462.
    17. Article 1474(1) in the original French refers to compensation égale a la valeur du dommage actuel et certain. It should be noted that "actual" thus has the sense of "contemporary" or "current," rather than the sense of "real."
    18. The Civil Code does not give to the IHA, or any other particular administrative agency, the power to expropriate. It is important to treat the provision of the Highway Authority Proclamation giving the IHA the power to expropriate as unrepealed, for without it the Authority may lack that power. See supra, note 16.
    19. See G. Krzeczunowicz, "Code and Custom in Ethiopia," J. Eth. L., vol. 2 (1965), pp. 425, 427-429; G. Krzeczunowicz, "A New Legislative Approach to Customary Law: The 'Repeals' Provision of the Ethiopian Civil Code of 1960," J. Eth. Studies, vol. 1, no. 1 (1963), p. 57. See also R. Sedler, "The Development of Legal Systems: The Ethiopian Experience," Lowa L. Rev., vol. 53 (1967), pp. 562, 594-602; J. Vanderlinden, "A Further Note on an Introduction to the Sources of Ethiopian Law," J. Eth. Law, vol. 3 (1966), pp. 635; G. Krzeczunowicz, "Putting the Legal Clock Back?" J. Eth. Law, vol. 3 (1966), pp. 621, 623-625; J. Vanderlinden, "An Introduction to the Sources of Ethiopian Law from the 13th to the 20th Century," J. Eth. L., vol. 3 (1966), pp. 227, 244-246.
    20. This is so despite judicial recognition, on at least one occasion, that the expropriation provisions of the Highway Authority Proclamation have been repealed by Article 3347 of the Civil Code. See Taffa Segn v. Imperial Highway Authority, supra, note 8. The IHA has petitioned to His Imperial Majesty's Chilot for reconsideration of this judgment.

[^88]:    21. It is of importance to note that if the old rufe is reenacted the IHA will be on much less firm constitutional ground than previously, for it can no longer use Article 122 for support. Any legislation now promulgated will unquestionably be subject to the requirements of the Revised Constitution, including the requirement of Article 44 that just compensation be paid for property taken by expropriation. On Article 122, see supra, p. 222.
    22. The Revised Constitution, the Civil Code and Ethiopian tradition all indicate without any doubt that in contemporary Ethiopia urban land and rural agricultural land are subject to private rights, whether familial or individual in nature. There is some doubt about certain other categories of land, e.g. "grazing lands" as that term is used in Article 130(d) of the Revised Constitution.
    23. Frequently in the Revised Constitution rights are guaranteed "in accordance with the law," but it is important to note that this is not the case with the guarantee of just compensation. Articie 44 prohibits the deprivation of property unless, as noted previously, two conditions are satisfied: there must be a "finding" by ministerial order issued pursuant to a special expropriation law-the nature of this finding is not specified-and there must be payment of just compensation determined, in the absence of agreement, by judicial procedures established by law. Thus although other law astablishes the procedure for determining compensation, it appears the requirement of just compensation stems from the constitution itself. Presumably if a court were to exercise a power of judicial review of the constitutionality of legislation it could strike down a legislative formula for compensation if it found that the application of this formula did not result in "just compensation" being paid.
    24. Civ. C., Art. 1474(1).
    25. Unfortunately the English of Article $1475(2)$ is a poorly translated version of the original French. The latter states that the committee which awards compensation "tient compte de la plus-value procurcée par les travaux publics au surplus de $l a$ propriété" (emphasis added), whereas the English mexely states that the committee "shall take into account the increase of value arising from the construction of public works." The Amharic of Article 1475(2) apparently is a more accurate translation.
[^89]:    26. This suggests that it may be advantageous for the IHA to acquire at the time of original construction - when this great increase in value to remaining land oceurs - not only the property needed for the construction itself but also camp sites and quarry sites which will be needed for future maintenance work.
    27. It is interesting to note that the original "balance of benefits" rationale of the Highway Authority Proclamation was not applied to houses and crops as well as to land. Those engaged in IHA expropriation indicate that people would react much more sharply to the loss of a house without immediate monetary compensation than they do to the loss of a portion of their land without immediate monetary compensation. It should be remembered that, fair as the theory of "balance of benefits" or the theory of Article $1475(2)$ is when over-all values are considered, the increase in the value of a remainder is con paper" and perbaps not easily realizable at the moment of expropriation, whereas the loss against which that increase is set off is immediate and direct. Thus a man whose house is destroyed to make way for a new highway must find a new house, and in most instances he needs cash to purchase or construct one. He cannot pay for a new house with the increase in value to his remaining land resulting from the planned construction of a new highway, at least not unless be sells part of that remainder.
[^90]:    28. Section 5(d), Highway Authority Proclamation, 1951, Proc. No. 115, Neg. Gaz., year 10, no. 5.
    29. The author is aware of no such case thus far where the local people have opted against the new highway.
    30. One problem with a "balancing of values" approach, of course, is that it fails to consider those who gain but do not lose-i.e., owners in the region who lose nothing through expropriation, but whose land increases greatly in value because of the new highway, If landowners who lose some land are in effect charged for the highway, through having the compensation owed them reduced or eliminated, then fairness may require that their neighbours who do not lose land be charged as well. One way of doing this is through the use of "betterment" levies of some sort.
    31. Indeed, it has been suggested in some quarters that to achieve uniformity all expropriation for government agencies should be done by one government body, such as a department of the Ministry of Interior. Certainly such centralization would lead to greater uniformity and, probably, greater expertise, but those agencies engaged in expropriation may well resist centralization as likely to lead to still more bureaucracy and delay for their programs. If the function of land acquisition for government projects is to be centralized, it may in any case be preferable to place the function in the Ministry of Land Reform and Administration rather than the Ministry of Interior. It is the former which is now in the business of developing expertise on land matters in Ethiopia.
