THE SOURCES OF NIGERIAN LAW. By A. E. W. Park, B.A. [Lagos: African University Press; London: Sweet & Maxwell. 1962. xvii + 161 pp. £1 12s. 6d.]

This book written by a lecturer in law at the University of Lagos is the sixth in the series 'Law in Africa'. The object of the book, as the author states, is to examine the different sources of Nigerian law and the relationship between them (p. 2). He lists three categories of sources:

(i) English law, consisting mostly of the general law of England introduced into Nigeria and a few English Acts or Orders in Council which remain in force in Nigeria;

(ii) The products of the local institutions originally established by the British authorities, consisting of local legislation and Nigerian case law.

(iii) Indigenous customary law.

He devotes two chapters to the first category and a chapter to the second. The major part of the book is devoted to a discussion of customary law and its application. The last chapter entitled 'The Co-existence of English and Customary Law' is of special interest to lawyers in most of the newly-independent common law countries. The chapter is divided into two sections A. The Present Position, and B. The Future. In the second section he makes a number of predictions, observing, however, that "attempting to foresee the future is notoriously hazardous" (p. 143). One of these predictions relates to customary law in Nigeria. He says: "Customary law as such will cease to be a general source of law in its own right, though some of its rules will probably have been enacted in statutory form". (p. 143). This view seems to have been induced by the author's opinion that "customary law, despite its remarkable adaptability, is basically not suited to the type of developed and industrialised society which it is the earnest desire of Nigeria to become" (p. 139). The remarkable adaptability of customary law is probably being underrated here. Given remarkable adaptability, would it not be possible for customary law to make itself suitable to a developed and industrialised society? About Yoruba customary law adapting itself to the needs of a modern society, P. C. Lloyd has written: "Customary law is constantly being reinterpreted to satisfy the needs of a commercial economy;. .. . Many modern transactions, such as sale, were not illegal a century ago and legal today — a century ago they were inconceivable to most Yoruba.. . each generation sees its own problems, though the law may remain basically unchanged."[1] One may also cite Osborne C.J.'s observations in *Lewis* v. *Bankole*: "One of the most striking features of West African native custom. .. .is its flexibility; it appears to have been always subject to motives of expediency, and it shows unquestionable adaptability to altered circumstances without entirely losing its character."[2] The author himself refers to "many examples of changes that have taken place" in customary law, including the use of writing and the alienability of land held under customary titles (p. 67).

Speaking of the received English law, the author remarks: "The three branches of English law which are relevant for Nigeria are the common law, equity and statutory law. There is in fact a fourth source of English law, custom, but all customs are purely local exceptions to the general law of the land, and as such have no relevance to Nigeria. Any attempt to equate or compare English custom with Nigerian customary law is totally misleading and should be eschewed." (p. 5). In a footnote he adds: "In one old Gold Coast case the judge did treat the two as governed by the same rules: *Welbeck* v. *Brown* (1883) Sar. F.C.L. 185. That is an isolated instance, however, and the approach it exemplifies has clearly been abandoned." (p. 5, note 2.) One would wish that it were abandoned. What appears to have been impliedly abandoned is merely one of the rules, that is, the English test of immemorial antiquity applicable to a local custom. Apart from this minor departure, if this is to be regarded as a departure,[3] the same rules seem to apply to both of them at the present day. The requirement that customary law has to be proved in a court like any question of fact does not seem to have been abandoned in its essentials, though a rule of customary law may be judicially noticed if it has been applied in a number of previous cases. In 1916 in *Kobina Angu* v. *Cudjoe Attah*[4] the Judicial Committee laid down the rule:

1. P.C. Lloyd, *Yoruba Land Law*, pp. 11-12.

2. [1909] N.L.R. 100 at 100-101.

3. See Plucknett, *A Concise History of the Common Law,* pp. 307-308. He says: 'In modern times we hear a lot too much of the phrase "immemorial custom." In so far as this phrase implies that custom is or ought to be immemorially old it is historically inaccurate. In an age when custom was an active living factor in the development of society, there was much less insistence upon actual or fictitious antiquity" and he quotes Azo (d. 1230) who stated that "A custom can be called long if it was introduced within ten or twenty years, very long if it dates from thirty years, and ancient, if it dates from forty years". *(ibid)*

4. Gold Coast (Privy Council) Reports, 1874-1928, 43.

"As is the case with all customary law, it has to be proved in the first instance by calling witnesses acquainted with the native customs until the particular customs have by frequent proof in the courts become so notorious that the courts will take judicial notice of them." [5]

This was approved in 1936 in another Gold Coast case.[6] In 1957 the Judicial Committee observed in *Aryeh* v. *Ankrah,* a Tanganyika cass:

"There is not before their Lordships a series of decisions from which any relevant principles have crystallized out in the manner indicated in the case of *Kobina Angu* v. *Cudjoe Attah,* and the law which has to be applied has therefore to be ascertained from the evidence of witnesses who speak to what, as a fact known to them from its application in the past, the law is." [7].

Again, the requirement that the custom sought to be enforced should not be contrary to public policy and should be in accordance with natural justice, equity and good conscience[8] also seems to indicate that the assumed similarity with local custom in England is not totally abandoned. In England the enforceable local custom must have been enjoyed as of right, must be certain and reasonable and must not conflict with a fundamental principle of common law.[9]

The insistence that an enforceable custom should not be incompatible either directly or by implication with any law for the time being in force is also reminiscent of one of the necessary conditions for the enforcement of a local custom in England. In this connexion one may note that in certain systems of law usage is permitted to prevail over the text of law. It was observed by the Judicial Committee in an Indian case: "Under the Hindu system of law, dear proof of usage will outweigh the written text of law." [10] And all British Indian legislation which provided for the administration of Hindu law dictated a similar adherence to usage, unless it was contrary to justice, equity or good conscience, or had been actually declared to be void.[11]

Dr. Allott says: "The doctrine of judicial notice as expounded in the second branch of the rule in *Angu* v. *Attah* serves progressively to incorporate the rules of customary law in the fabric of the law of the land." [12] He also says that the operation of the second branch of the rule "may take a particular rule of customary law out of the realm of fact, and into the realm of law, of which judicial notice will be taken".[13] There seems to be very little to be happy about this development. Judicial notice ought to be taken of a rule of customary law because it is law, not because it is a fact which has been judicially noticed on a few previous occasions. If what is to be judicially noticed is a notorious fact established by judicial decisions, it is not unlikely that by the time judicial notice is taken of a particular rule of customary law on the basis of its being a notorious fact, the custom itself may have undergone some modification, as one of the characteristics of customary law is that it is "a mirror of accepted usage".[14] The custom may have even disappeared. According to

5. *Ibid.,* at p. 44.

6. *Amissah* v. *Krabah* (1936) 2 W.A.C.A. 30 at p. 31 (P.C.) cited in Allott, *Essays in African Law,* p. 77, who gives a number of instances where the rule has been followed in other territories in Africa. *(Ibid).*

7. [1958] J.A.L. 26 at 31.

8. See the Nigerian Evidence Act, cap. 62, s. 14 (3): ".... in case of any custom relied upon in any judicial proceeding it shall not be enforced as law if it is contrary to public policy and is not in accordance with natural justice, equity and good conscience."

9. See Dias and Hughes, *Jurisprudence,* pp. 35 et seq., Salmond, *Jurisprudence,* 10th Edition, pp. 209-10, 211.

10. *Collector of Madura* v. *Mootoo Ramalinga* (1868) 12 M.I.A. 397 at 436.

11. Mayne, *Hindu Law and Usage,* 11th Edition, p. 62. See also the observations of Savigny and Windscheid quoted in Salmond, *op. cit.* p. 111. "The power of customary law," writes Windscheid, "is equal to that of statutory law."

12. A.N. Allott, *Essays in African Law*, p. 89.

13. Id., p. 75.

14. per Bairamian, F.J. in *Owonyin* v. *Onotosho* (1961) 1 All N.L.R. 304 at 309.

the Ghana Native Courts (Colony) Ordinance "native customary law" is "a rule or a body of rules... .which obtains and is fortified by established native usage"[15] Because of the efflux and whirligig of time, what obtains may not be what has been judicially noticed. After all, as the Judicial Committee expressed it, "It is the assent of the native community that gives a custom its validity."[16] It would therefore seem necessary to take judicial notice of a rule of customary law, because it is law, because it is a rule recognised as obligatory by the community at the relevant time. It may sound strange that the general or 'common law' of a country (or it may of a tribe) has to be proved as a matter of fact, while the laws of another country are judicially noticed as they are considered to have been 'received' into the local legal system; but this happens to be true and seems to be in accordance with our sense of justice, equity, and good conscience and our concept of public policy.[17] The British administrators probably had some excuse in laying down the rule that a rule of customary law had to be proved as any question of fact, for most of the British judges did not know the customary laws of the dependant country in which they administered justice. But there does not seem to be any justification for the judiciary in independent countries to cling to this rule, merely because they were familiar with its application in days gone by.

The book contains four appendices setting out the relevant sections of the enactments dealing with the reception of English law, the establishing of customary law, conflicts between English and customary law and those between different customary laws.

Though one may not feel inclined to endorse some of the views expressed by the author, especially when they are of a prophetic nature, there can be no doubt that the book is a valuable addition to the literature on Nigerian law.

JOSEPH MINATTUR.