

SUPREME COURT OF NIGERIA
29TH OCTOBER 1993. SC. 37/1988.
CORAM:- M. BELLO CJN, M.L. UWAI, A.G.
KARIBI-WHITE, S.M.A. BELGORE, O. OLATAWURA,
M.E. OGUNDARE, S.U. ONU, JJSC.

1. VICTOR J. ROSSEK)
2. MICHAEL ROSSEK) PLAINTIFFS/APPELLANTS
3. GEORGE ROSSEK)

AND

1. AFRICAN CONTINENTAL)
BANK LTD.
2. THE REGISTRAR OF TITLES) DEFENDANTS/
RESPONDENTS
3. ANTOINE ROSSEK)

JUDGMENT - Of a court of competent jurisdiction - subsists until set aside - whether judgment of a court of unlimited jurisdiction can be declared void

CONSTITUTIONAL - The Constitution-as the organic law that prescribes rights and powers - whether any part thereof can be described as adjectival or procedural

CONSTITUTIONAL - S. 259 (3) of the 1979 Constitution - that provides for reference of constitutional questions to the Supreme Court-proper application thereof - whether the said section is violated by the Court of Appeal

COURTS - The Supreme Court's previous decisions - powers to depart therefrom or overrule same under certain circumstances - whether any ground exists of Ojokolobo v. Alamu

FACTS

The Plaintiffs/Appellants sued the Defendants/Respondents in the Lagos High Court claiming certain declarations. After addresses by counsel, the learned trial Judge delivered judgment in favour of the Plaintiffs, six days after the 90 days period prescribed under s. 258(1) of the 1979 constitution. The 1st Defendant appealed to the Court of Appeal which gave judgment after the Decree that modified s. 258(1) had come into effect. But the trial court's out of time judgment was delivered four years before the said amendment came into force. The court of Appeal allowed the appeal on the constitutional ground that judgment was delivered out of time and ordered a retrial.

Plaintiffs being dissatisfied have now appealed to the Supreme Court. The apex Court had to determine inter alia, whether the amended s. 258(4) of the Constitution should have been applied by the Court of Appeal towards saving the trial court's said unconstitutional judgment.

Although the Court of Appeal followed the obiter in the case of *Kpema v. The State* in arriving at its decision, that decision was later discovered to be in line with the Supreme Court's earlier decision in *Ojokolobo v. Alamu*. Should the said case of *Ojokolobo* be overruled in order to do justice in the present case?

HELD (dismissing the appeal by a majority of 4 against 3 with **BELLO CJN**, Karibi-Whyte & Olatawura JJSC, dissenting)

1. In so far as *Kpema's* and *Taylor's* cases were decided on their peculiar facts, they were rightly decided and there is nothing to depart from or over-rule. The interpretation of s. 258 (4) of the Amended 1979 Constitution which did not form part of the *rationes decidendi* in either case remained an open question which was answered by the Supreme Court in *Ojokolobo's* case. (p.109 L1)
2. The judgment of a court of competent jurisdiction subsists until it is set aside either because it is void where the court has acted without competence, or irregular or voidable where it has acted in breach of rules of court. (p.112 L28)
3. In Nigeria, the proceedings or judgment of a court, whether of limited or unlimited jurisdiction will be declared void where there is a failure to observe any of the requirements of competence. (p. 113 L25)
4. No part of the constitution can be described as adjectival or procedural law in the sense that expression is often used seeing that it is the organic law of a country that prescribes rights, powers, duties and responsibilities. (p.115 L7)
5. The Supreme Court as the final court has the power and jurisdiction to depart and overrule its previous decision whether or not by a full court,

where it is shown that the previous decision is inconsistent with the provisions of the Constitution, or it is erroneously reached per incuriam or will perpetuate injustice. But such overruling should not be on the slightest pretence. (p. 124 L37)

6. No ground exists to warrant a departure from the Supreme Court's decision in *Ojokolobo v. Alamu* which case affirmed the earlier dicta in *Kpema's* and *Taylor's* cases. The Court of Appeal's decision in this case was therefore, correct. (p. 127 L20)
7. The Constitution did not provide for reference of every issue that raised a substantial question of law but one that related to the interpretation or application of the constitution. The issue whether the decision of a court of unlimited jurisdiction could be declared void, as important as it appears to be, does not relate to the interpretation or application of the constitution. (p. 132 L1)
8. Upon the Supreme Courts pronouncement on the question of the interpretation or application of any section of the constitution, that question ceases to be one in which a lower court is under compulsion to refer to the Supreme Court under s. 259 (3) of the 1979 Constitution, (p.132 L9)

PER BELLO CJN (DISSENTING)

"The adage 'justice delayed is justice denied' has now been universally recognised and, I will add that, 'inordinate delay in doing justice is a grave denial of justice'. It follows that this court has two options. The first option is to adhere to state decision and thereby continue causing inordinate delay in the administration of justice or causing denial of justice. The second option is to depart from the previous decision of this court in Ojokolobo and thereby avoid causing inordinate delay or denial of justice. The Court has the discretion to use one of the two options."(p.152 L31)

PER KARIBI-WHYTE JSC (DISSENTING)

"Certainty ought not to be maintained on the altar of erroneous construction clearly at variance with the express words and intention of the provision constructed. A docile adherence to the rule of binding precedent even where the decision is found to be erroneous, is more productive of injustice..."(p.183 L16)

REPRESENTATION.

Chief G.O.K. Ajayi, SAN with A.A. Oriola Esq., for the Appellants
 Chief D.K. Solesi, for the 1st Respondent.
 O.A. Ogunmodede Esq., for the 3rd Respondent,
 2nd Respondent absent and unrepresented.

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CASES REFERRED TO

1. Ifezue v. Mbadugha & Anor. (1984) 5 SC 79
2. Odi & Anor v. Osafire & Anor (1985) 1 NWLR 17
3. Richard Boyi v. Attorney General of Bendel State (1984) 9 SC 66
- 10 4. Kpema v. The State (1986) 1 NWLR (pt. 17) 397
5. Odi v. Osafire (1985) 1 NWLR (pt I) 17
6. Aladegbemi v. Oba Fasanmade (1988) 3 NWLR (pt.81) 129
7. Isaacs v. Robertson (1984) 3 WLR 705
8. Alao v. Akano (1988) 1 NWLR (pt 71) 431,433
- 15 9. Ojokolobo v. Alamu (1987) 3 NWLR (pt.61) 377
- 10 Hadkinson v. Hadkinson (1952) p. 285,288; (1982) 2 ALL ER 567,569
11. Macfoy v. UAC. Ltd (1961) 3 ALL ER 1169, 1172 (1962) AC 152
12. Church v. Cremer, Cooper temp Cott 338; 47 ER 884
13. Madukolu & Ors v. Nkemdilim (1962) 1 ALL NLR 581
- 20 14. Skenconsult v. Ukey (1981) 1 SC 6
15. The Registered Trustees & Anr. v. E.O. Adeosun & Anor (1986) 3 NWLR 561
16. Utih & Ors v. Onoyivwe (1991) 1 NWLR
17. Reed v. Bishop of Lincoln (1892) AC 644
- 25 18. Attorney-General for Ontario v. Canada Temperance Federation (1946) AC 193
19. African Newspapers of Nigeria Ltd. & Ors v. The Federal Republic of Nigeria (1985) 2 NWLR 137
20. Adesanya v. President of the Federal Republic of Nigeria & Anor (1986) 5 NWLR (pt. 39) 66
- 30 22. Adebayo v. Johnson (1969) 1 All NLR 176
23. Williams v. Sanusi (1961) 1 All NLR 334
24. Craig v. Kanseen (1943) KB 256
25. Ojiako v. Oguezo (1962) 1 All NLR 58
- 35 26. A.G. Lagos State v. Dosunmu (1989) 2 NWLR 552
27. Bucknor-Maclean v. Inlaks Ltd. (1980) 8-11 SC 1
28. Owumi v. P.Z. (1974) 1 All NLR (pt.2) 107
29. Huddersfield Police Authority v. Watson (1947) 2 All ER 193
30. Emerah & Sons Ltd. v. A.-G. Plateau State (1990) 4 NWLR (pt

- 147) 788
31. Kolawole v. Alberto (1989) 1 NWLR 382
 32. Gramioba v. Ezezi 11 of & Ors. (1961) All NLR 608
 33. Selangor United Rubber Estate Ltd. v. Cradock (No.2) (1968) 1 WLR 319
 34. Cardoso v. Daniel (1986) 2 NWLR (Pt 74) 105 5

STATUTES REFERRED TO

1. The Constitution of the Federal Republic of Nigeria 1979 ss. 258, 227, 233, 239, 244, 249, 259(3),
2. Constitution (Suspension & Modification) (Amendment) Decree No. 17 of 1985 s 258 (1) (4) (5) 10
3. Federal Court of Appeal (Amendment) Act 1982 s. 25
4. Halsbury's Laws of England vol. 10 para. 713

BOOKS REFERRED TO

1. Precedent in English Law 3rd. Ed. p.47 Rupert Cross
2. Chancery Practice 8th Ed. vol. 1 p. 708 Daniel 15

LEAD JUDGMENT BY OGUNDARE JSC

The main question that calls for determination in this appeal is: does sub-section (4) of section 258 of the Constitution of the Federal Republic of Nigeria, 1979 (hereinafter is referred to simply as the 1979 Constitution) have retrospective effect to save judgments delivered out of time prior to 27th August, 1985 when the Constitution (Suspension and Modification) (Amendment) Decree No. 17 of 1985 came into force" 20 25

Sub-section (1) of section 258 which provides:-

"Every court established under this Constitution shall deliver its decision in writing not later than 3 months after the conclusion of evidence and final addresses, and furnish all parties to the cause or matter determined with duly authenticated copies of the decision on the date of the delivery thereof." 30

has come for interpretation in Ifezue v. Mbadugha & Anor (1984) 5 S.C. 79 where this court (Bello, J.S.C. as he then was, dissenting) held that any judgment delivered outside the period of three months prescribed by the sub-section is incompetent, null and void. The decision in Ifezue v. Mbadugha & Anor was re-affirmed by this court in Odi & Anor Osafile & Anor (1985) 1 NWLR (Pt.1) 17 35

and has been followed ever since in a number of cases both by this court and the Court of Appeal- see, for example, Richard Boyi v. Attorney-General of Bendel State (1984) 9 S.C. 66. We are not being asked to review that decision again in this case.

Section 258 of the 1979 Constitution was modified by the Constitution (Suspension and Modification) (Amendment) Decree No. 17 of 1985 (now incorporated in the Constitution (Suspension and Modification) Act. Cap. 64 Laws of the Federation of Nigeria, 1990) by providing for a second proviso to sub-section (2) thereof and the addition of sub-sections (4) and (5). These new sub-sections read:

(4) *The decision of a court shall not be set aside or treated as a nullity solely on the ground of non-compliance with the provisions of this section unless the court exercising jurisdiction by way of appeal from or review of that decision is satisfied that the party complaining of such non-compliance has suffered a miscarriage of justice by reason thereof.*

(5) *As soon as possible after hearing and deciding any case in which it has been determined or observed that there was non-compliance with the provisions of sub-section (1) of this section, the person presiding at the sitting of the court shall send a report on that case to the Chairman of the Advisory Judicial Committee who shall keep the Committee informed for appropriate action."*

The Plaintiffs, who are now appellants before us, had sued the Defendants in the High Court of Lagos State claiming certain declarations. The trial took place before Oluwa, J. and addresses of counsel for the parties were concluded on 10th November, 1980. Oluwa, J. did not deliver judgment until 16th February, 1981, six days after the period prescribed in sub-section (1) of section 258 of the Constitution; he granted all the plaintiffs' claims. Being dissatisfied with the judgment, the 1st Defendant appealed to the Court of Appeal; the Plaintiffs also cross-appealed. The Court of Appeal heard the appeal and cross-appeal on 23rd November, 1986 after DecreeNo.17of 1985had come into effect on 27th August, 1985. The Court of Appeal took the Constitutional issue raised in one of the grounds of appeal of the 1st Defendant and held, per Kutigi, J.C.A. (as he then was):

"One other point to consider is whether or not the judgment was caught by the new subsection 4 of section 258 of the Constitution which came into force on 27th August, 1985. There is no doubt that the judgment was delivered on 16th February, 1981 as stated earlier; some four years before the constitutional

amendment came into force. The new section 258 subsection 4 reads:

'(4) The decision of a Court shall not be set aside or treated as a nullity solely on the ground of non-compliance with the provisions of this section unless the court exercising jurisdiction by way of appeal from or review of that decision is satisfied that the party complaining of such non-compliance has suffered a miscarriage of justice by reason, thereof.'

The Supreme Court in Kpema v. State (supra) and this court later in Gafari v. Johnson & Anal' (supra) made it clear that there is nothing in section 258 sub-section 4 to show that it was intended to have retrospective effect. The logical conclusion therefore is that all judgments, including the present judgment, which were delivered before 27th August, 1985 and which were delivered more than three months of the conclusion of final addresses were

automatically null and void by reason of section 258 subsection 1 of the 1979 Constitution.

I am in complete agreement with Chief Solesi for the appellant that the point in issue in this appeal having been previously decided by the Supreme Court there is nothing left to be referred to it. All we need to do is to apply the law as decided by the Supreme Court, the highest Court of the land. And that is exactly what I have done here."

The Court of Appeal allowed the appeal, set aside the decision of the trial court and ordered a retrial.

The Plaintiffs have now appealed against that decision to this Court and in their brief of argument, their learned leading counsel Chief G.O.K. Ajayi, SAN raised two question as calling for determination, to wit:

- "1. Was the Court of Appeal in November 1986 bound to apply the provisions of section 258(4) of the Constitution of the Federal Republic of Nigeria 1979 as amended by Decree No. 17 of 1985 to a decision given by the High Court in February 1981?*
- 2. Did the issue of whether section 258(4) of the Constitution of the Federal Republic of Nigeria 1979 as amended by Decree No. 17 of 1985 applied to the judgment herein raise a substantial question of law which ought to have been referred to the Supreme Court under the provisions of section 259 of the Constitution?"*

Chief Ajayi, SAN, learned leading counsel for the plaintiffs contends that this appeal raises a question which will necessitate this court to review its past decisions, particularly *Kpema v. The State* (1986) 1 NWLR (Pt.17) 397. He says that the question relates to the interpretation of section 258 of the 1979 Constitution as amended. Learned Senior Advocate observes that
 5 before the amendment, this court had decided that the first limb of section 258(1) was mandatory. He refers to *Ifezue v. Mbadugha* (1984) 5 S.C. 79 and *Odi v. Osafie* (1985) 1 NWLR (pt. 1) 17 where this court refused to review its decision in *Ifezue* and further held that failure to deliver judgment within 3 months rendered the judgment a nullity. He concedes it that he
 10 cannot persuade this court now to re-open its oft repeated position over the first limb of section 258(1). He, however, urges this court to re-examine its decision to the effect that non-compliance with the first limb of section 258(1) renders the judgment so delivered null and void and his reason for so urging the court is that it had not had the opportunity of being fully
 15 addressed on the effect of the failure to deliver judgment within the time prescribed by the Constitution. Learned Senior Advocate observes that this court has had occasion in the past to pronounce on whether the judgment of a court of unlimited jurisdiction could ever be said to be null and void. He refers in this connection to *Oba Aladegbemi vs. Oba Fasanmade* (1988) 3 NWLR (Pt.81) 129 where *Isaacs v. Robertson* (1984) 3 WLR 705 was
 20 followed. Learned counsel submits that the issue raised by him is fundamental to the jurisprudence of the common law with regard to the effect of court judgment. . He submits that unless and until a judgment of a court of unlimited jurisdiction which is otherwise null and void is set aside, it is binding. He refers to *Isaacs v. Robertson* (supra) at page 709C.

25 Chief Ajayi, SAN observes that at the time the Court of Appeal came to consider the judgment of Oluwa, J. the amendment to section 258(1) had come into effect and as on that date that judgment was still subsisting as it had not been set aside. The Court of Appeal was therefore, bound to apply section 258(4). He submits that sub-sections (1), (4) and
 30 (5) of section 258 are procedural as they do not affect the rights of citizens. It is learned Senior Counsel's submission that at the time the Court of Appeal was hearing the appeal before it, that it was section 258 as amended by Decree 17 of 1985 that was applicable. He urges the court to allow the appeal and remit the case to the Court of Appeal for that Court to hear
 35 and determine the other issues raised in the appeals before it.

Chief Solesi for 1st Defendant/Respondent while adopting his brief, submits in oral argument that section 258(4) was inapplicable and the judgment of the High Court on Appeal was given about 4 years before the sub-section came into effect. He further submits that sub-sections (4) and

(5) of section 258 should be read together. It is his submission that the effective date to decide the validity of a judgment is the date of the judgment and not the date it is being considered on appeal or review. He submits that the effective date of the commencement of the amendment to section 258 of the 1979 Constitution was 27th August 1985 and that the amendment has no retrospective effect. He submits further that the applicable law is the law at the time the judgment was given by the High Court and cites *Alao v. Akano* (1988) 1 NWLR (pt.71) 431, 433 in support. Finally learned counsel submits that the amendment is substantive law and not procedural law.

Mr. Ogunmodede learned counsel for the 3rd defendant/respondent associates himself with the submissions of Chief Ajayi, SAN. He submits that the applicable law is the law at the time the Court of Appeal was considering the appeal before it.

At the conclusion of oral arguments by learned counsel, we reserved our judgment. In the course of the consideration of our judgment however, we came across a decision of this, court touching squarely on the issue raised in this appeal. It is the case of *Ojokolobo v. Alamu* (1987) 3 NWLR (Pt.61) 377 where this court sitting as a Full Court had held, among other things (Bello, CJN & Karibi- Whyte, J.S.C. dissenting) that section 258 of the 1979 Constitution could not be interpreted as operating retrospectively so as to affect the proceedings decided prior to the 27th of August 1985 the date when section 258(4) became operative and that section 258 of the Constitution is not a procedural matter butane of substantive law. Following this discovery, we invited counsel for the parties to address us on the effect on their submissions of *Ojokolobo v. Alamu* (supra). Before the date fixed for the further hearing a member of the panel (Omo, J.S.C.) had retired and another Justice of the Court Uwais J.S.C. was substituted. The further hearing became a re-hearing of the appeal as there has been a change 'in the panel.

At the re-hearing Chief Ajayi SAN for the Plaintiffs/Appellants reiterates his earlier submissions in his written brief and oral argument. He refers to *Ojokolobo v. Alamu* (supra) and observes that this court did not, in its lead judgment in that case, decide that any judgment given after 3 months was void. He submits that *Ojokolobo v. Alamu* was wrongly decided and urges us not to follow it.

Chief Solesi on the other hand also reiterates his earlier submissions and submits further that *Ojokolobo v. Alamu* was rightly decided and that no grounds have been shown to warrant our departing from it. He submits that the amendments, particularly sub-sections (4) and (5) of section 258, brought in by Decree 17 of 1985 would only affect judgments

given after the Decree and come into force and not before.

Mr. Ogunmodede for the 3rd Defendant/Respondent associates himself with the submissions of Chief Ajayi and adopts same.

The grounds upon which this court will depart from and over-rule its previous decision are well discussed in *Odi v. Osafire* (supra). It must be shown that the previous decision is erroneous, and given per incuriam or shown to be occasioning miscarriage of justice or perpetuating injustice. I have read the judgments of this court in *Kpema's* case and *Taylor's* case and I am not satisfied that on the issues that actually called for determination in those cases, there are grounds to depart from them. In *Kpema v. The State* (supra), the appellant on 5th April, 1982, was convicted of culpable homicide punishable with death. The judgment was delivered after three months of the conclusion of final addresses contrary to section 258(1) of the 1979 constitution. On 19th March 1983, he filed a notice of appeal which was out of time. On 26th March 1983 he filed an application for extension of time to appeal to the Court of Appeal. Before then, however, the Federal Court of Appeal (Amendment) Act 1982 empowering the Court of Appeal to extend time to appeal in cases of sentence of death had come into effect on 15th July, 1982. The Court of Appeal struck out appellant's application for extension of time on the ground that it had no jurisdiction in that the right of appeal had expired before the Federal Court of Appeal (Amendment) Act 1982 came into force on 15/07/82. The appellant appealed against this decision of the Court of Appeal. This court held, inter alia, that although the amendment took effect on 15th July 1982, that is after the right of appeal had expired, nevertheless the amendment was meant to affect the jurisdiction and the procedure in all criminal cases in the Court of Appeal and there was nothing in the provisions of the amendment suggesting that no extension of time could be granted in respect of cases with death sentence whose time of appeal expired by the 14th July 1982. Consequently the Court of Appeal had jurisdiction to extend time to appeal. Uwais J.S.C. delivering the lead judgment of the Court observed at pages 402-403 of the Report thus:-

"Apart from this, it is obvious from the provisions of section 25 subsection (4) of the Federal Court of Appeal Act 1976 that the Court of Appeal was in error when it ruled that it had no power to grant the application for extension of time within which to appeal, in cases where death sentence was involved, unless the decisions in such cases were given on or after 15th July, 1982.

Now prior to that date section 25 of the Federal Court of Appeal Act, 1976 read as follows:

25(1) When a person desires to appeal to the Court of Appeal

he shall give notice of appeal or notice of his application for leave to appeal in such manner as may be directed by rules of court within the period prescribed by the provision of subsection (2) of this section that is applicable to the case.

(2) *The periods for the giving of notice of appeal or notice of application for leave to appeal are-* 5

(a) *in an appeal in a civil cause or matter, fourteen days where the appeal is against an interlocutory decision and three months where the appeal is against a final decision;*

(b) *in an appeal in a criminal cause or matter, ninety days from the date of the decision appealed against.* 10

(3) *Where an application for leave to appeal is made in the first instance to the court below, a person making such application shall, in addition to the period prescribed by subsection (2) of this section, be allowed a further period of fifteen days, from the date of the determination of the application by the court below, to make another application to the Court of Appeal.* 15

(4) *The Court of Appeal may extend the periods prescribed in subsections (2) and (3) of this section except in case of a conviction involving the sentence of death.*

By the provisions of section 6 of the Federal Court of Appeal (Amendment) Act, 1982 the provisions of section 25 subsection (4) of the Federal Court of Appeal Act, 1976 were amended by the deletion of the words 'except in the case of a conviction involving the sentence of death'. The amendment took effect from 15th July, 1982 and it was meant to affect the jurisdiction and the procedure in criminal cases in the Court of Appeal. There is nothing in the provisions of the 1982 Act which suggests that no extension of time could be granted in respect of cases with death sentence whose time of appeal, viz 90 days, expired by 14th July, 1982, as is the case with the present appeal. I am unable therefore to understand the reason why the learned Justices of the Court of Appeal came to the conclusion that they could not grant the appellant's application for extension of time." 20 25 30

In the concluding part of his judgment, the learned Justice observed at page 405:

"Finally, I think it is pertinent to point out that the provisions of subsection (4) of section 258 of the Constitution which has been added to that section by section 6 of the Constitution (Suspension and Modification) (Amendment) Decree 1985, (No.17 of 1985), is not applicable to this case, since the addition came into force on 27th August, 1985. For ease of reference the subsection reads:

4. *The decision of a court shall not be set-aside or treated as a nullity solely on the ground or non-compliance with the provisions of this section unless the court exercising jurisdiction by way of appeal from or review of that decision is satisfied that the party complaining of such non-compliance has suffered a miscarriage of justice by reason thereof."*

5 In respect of the first dictum quoted above, there seems to be no problem. All the other Justices that sat on the case agreed with it. And, in my respectful view, that was the main issue before the court, that is, whether the Court of Appeal had jurisdiction to extend time to appeal where the right of appeal had expired before the amended law granting that court
10 power to extend time to appeal had come into force.

It is with the second dictum that I have some problems and that is the dictum Chief Ajayi has asked us to depart from on the ground that it was given erroneously and per incuriam. While there is nothing in the judgments of the learned Justices that sat on the case to suggest that the ques-
15 tion of section 258(4) of the 1979 Constitution was fully argued, there are indications in the judgments of Irikefe CJN and Karibi-Whyte, J.S.C, to suggest that some reference was made to section 258(4). Irikefe CJN said in his judgment at page 406 of the Report, as follows:

20 *"Other issues emerged in the course of argument in this appeal which are not directly relevant for its determination. They are fully dealt with in the lead judgment just read by my learned brother, Uwais, J.S.C., I am in full agreement with the reasoning and conclusions of my learned brother aforesaid."*

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Karibi-Whyte, J.S.C. in his own contribution observed at page 4 14 thus:

*"It is for this reason that the amendment to Section 258(1) of the 'Constitution 1979, by S. 6 of the Constitution (Suspension and Modification) (Amendment) Decree No. 17 of 1985 which renders judgments delivered in contravention of s. 258(1) a nullity only where such contravention results in a miscarriage of justice, which is not applicable to this case is most welcome. If the amend-
30 ment had applied to this case there would not have been a miscarriage of justice and the conviction would have been valid"*

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As the issue of section 258(4) was "not directly relevant" for the determination of the main question in that case, I will not consider the dicta of the learned Justices in it as forming part of the *rationes decidendi* in the case so as to make them binding on this Court under the doctrine of *stare decisis*.

The same consideration goes for Taylor v. Methodist Church (supra).

The conclusion I reach is that in so far as those cases were decided on their peculiar facts, they were rightly decided and there is nothing for us to depart from or over-rule. As the interpretation of section 258(4) did not form part of the ratio decidendi in either case, it remained an open question. That open question was answered by this court in 1987 in Ojokolobo v. Alamu (supra). I shall say more on this case presently. 5

I now turn to the main question calling for determination in this appeal, and that is, the effect of section 258(4) on judgments delivered before the sub-section came into effect. It is too late in the day to question the correctness of the decision of this court in Ifezue v. Mbadugha (supra) 10 and I must mention again that that is not being done in this case. On that authority, it cannot be disputed that the judgment of Oluwa, J. ought, but for sub-section (4) of section 258, be declared a nullity. Chief Ajayi SAN, contends that a judgment remains valid until otherwise so declared. Chief Solesi, for the 1st Defendant, however, contends that a judgment that is a nullity remains so ab initio and does not require an order of court to so declare it. 15

After examining the authorities cited by the learned Senior Advocate. I must say I agree with him only to the extent that a judgment remains binding until it is set aside by a competent court: Hodkinson v. Hodkinson (1952) P.285, 288; (1982) 2 All ER 567,569. To hold otherwise is to clothe a party against whom a judgment has been obtained with the discretion to decide, in his wisdom, that the judgment is invalid and not binding on him. This, to my mind, is an invitation to anarchy. I do not understand the law to be so. And the oft quoted dictum of Lord Denning MR in Macfoy v. UAC. Ltd. (1961) 3 All ER., 1169, 1172; (1962) A.C. 152 to the effect that: 20

"If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. 30

"is no more than an obiter given per incuriam - see Isaacs v. Robertson (1984) 3 All ER. 140, 143 per Lord Diplock. While I agree with the noble Master of the Rolls in his exposition of the distinction between acts that are void and those that are voidable, it is my humble view that his pronouncement (if it was meant to extend to a judgment or order of court) that there would be no need for an order of court to set aside a void judgment cannot be correct; it is against the weight of judicial opinion. With profound re- 35

spect, I do not subscribe to such view. The law has been laid down as long ago as 1846 by Lord Cottenham LC in *Chuck v. Cremer*, Cooper temp. Cott. 338 at 342; 47 ER 884 at 885 as follows:

5 *"A party, who knows of an order, whether null or valid, regular, irregular cannot be permitted to disobey it. It did not even signify whether the order was drawn up. That there were many cases in which a party had been held to have committed a contempt for disobeying an order, which had not only not been served, but have not even been drawn up. It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an*
 10 *order was null or valid - whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question. That the course of a party knowing of an order, which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be*
 15 *discharged. As long as it existed it must not be disobeyed."*

This view was re-echoed by Romer LJ in *Hadkinson v. Hadkinson* (supra) where he observed:

20 *"It is plain and unqualified obligation of every person against, or in respect of whom an order is made by a court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void"*

25 and affirmed by the Privy Council in *Isaacs v. Robertson* (supra). Eso J.S.C. stated the same view in *Oba Aladegbemi v. Oba Fasanmade* (supra) where he observed:

30 *".....for a court of competent jurisdiction, not necessarily of unlimited jurisdiction (and I will come to this anon) has jurisdiction to decide a matter rightly or wrongly. If that court never had jurisdiction in the matter, then its decision is, without jurisdiction, void, but then should a court of law not even decide the point? That is, the court without jurisdiction decided without jurisdiction? Should the decision just be ignored? Surely it would not make for peace and finality which a decision of a court seeks to attain. It would at least be against public policy for persons, without the*
 35 *backing of the court, to pronounce a court decision a nullity, act in breach of the decision whereas others may set out to obey it. In my respectful view it is not only desirable but necessary to have such decisions set aside first by another court before any act is built upon it despite the colourful dictum of the law Lord in U.A.C.*

v. Macfoy (supra)."

Isaacs v. Robertson has not decided anything new to Nigerian law on this point. There is always a presumption of correctness in favour of a court's judgment. And until that presumption is rebutted and the judgment is set aside, it subsists and must be obeyed.

Chief Ajayi has contended that the judgment of a court of unlimited jurisdiction could not be declared void ab initio and cited in support of this contention the cases of Oba Aladebemi v. Oba Fasanmade (*supra*) and Isaacs v. Robertson (1984) 3 WLR 705, 709; (1984) 3 All ER 140, 143. I have examined these two authorities. I can find nothing in them to support learned Senior Advocate's contention.

In Isaacs v. Robertson (*supra*) at page 143, Lord Diplock said:

"Their Lordships would, however, take this opportunity to point out that in relation to orders of a court of unlimited jurisdiction it is misleading to seek to draw distinctions between orders that are 'void' in the sense that they can be ignored with impunity by those persons to whom they are addressed, and orders that are 'voidable' and may be enforced unless and until they are set aside. Dicta that refer to the possibility of there being such a distinction between orders to which the descriptions 'void' and 'voidable' respectively have been applied and can be found in the opinions given by the Judicial Committee of the Privy Council in Marsh v. March (1945) A.C. 271 at 284 and MacFoy v. United African Co. Ltd. (1961) 3 All ER 1169, (1962) A.C. 152; but in neither of those appeals nor in any other case to which counsel has been able to refer their Lordships has any order of a court of unlimited jurisdiction been held to fall in a category of court orders that can simply be ignored because they are void ipso facto without there being any need for proceedings to have them set aside. The cases that are referred to in these dicta do not support the proposition that there is any category of orders of a court of unlimited jurisdiction of this kind: what they do support is the quite different proposition that there is a category of orders of such a court which a person affected by the order is entitled to apply to have set aside ex debito Justitiae in the exercise of the inherent jurisdiction of the court without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity and give to the judge a discretion as to the order he will make. The judges in the cases that have drawn the distinction between the two types of orders have cautiously refrained from seeking to lay down a comprehensive definition of defects that bring an order into the cat

egory that attracts ex debito Justitiae the right to have it set aside, save that specifically it includes orders that have been obtained in breach of rules of natural justice.

5 *The contrasting legal concepts of voidness and voidability form part of the English law of contract. They are inapplicable to orders made by a court of unlimited jurisdiction in the course of contentious litigation. Such an order is either irregular or regular. If it is irregular it can be set aside by the court that made it on application to that court; if it is regular it can only be set aside by an appellate court on appeal if there is one to which an appeal lies."*

10 Be it noted that the above dictum was per incuriam and the latter part of it is clearly not in line with the dicta of Lord Cottenham, LC in *Chuck v. Cremer* (supra) and *Romer LJ* in *Hadkinson v. Hadkinson* (supra), both of whom recognise the voidity of a judgment.

15 In *Oba Aladebemi v. Oba Fasanmade* (supra) relied on by Chief Ajayi, *Eso J.S.C.* observed that the observation of Lord Diplock applied not only to courts of unlimited jurisdiction but to all courts of competent jurisdiction. *Oputa. J.S.C.*, in the same case, observed:

20 *"The point that it needs an order of Court to set aside, even a judgment that is a nullity was brought out in Craig v. Kanseen (1943) 1 All ER, 108 AT P.111 Per Greene, M.R.:*

'An order which can be properly be described as a nullity is something which the person affected by it is entitled ex debito justitiae to have set aside. As far as the procedure for having it set aside is concerned the court in its inherent jurisdiction can set aside its own order and an
25 *appeal from the order is not necessary. '*

Whether the court sets aside its own order or an appellate court does it, the point being made is that there must be an application to a court to have the order set aside otherwise the order subsists:-
30 *Grafton Isaacs v. Emery Robertsoo (1984) 3 WLR 705."*

The sum total of all the dicta is that the judgment of a court of competent jurisdiction (not necessarily of unlimited jurisdiction) subsists until it is set aside either because it is void where the court has acted without competence or irregular or voidable where it has acted in breach of rules of court. A court is competent when

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- (1) It is properly constituted as regards numbers and qualifications of the members of the bench, and no member is disqualified for one reason or another; and
 - (2) the subject matter of the case is within its jurisdiction, and there is no feature in the case which, prevents the court from exercising its

jurisdiction; and

- (3) the case comes before the court initiated by due process of law, and upon fulfilment of any condition precedent to the exercise of jurisdiction.

per Bairamiah, FJ. in *Madukolu & Ors v. Nkemdilim* (1962) 2 SCNLR 341; (1962) 1 All NLR 581 at RP589-590 (Reprint). Drawing the distinction between proceedings that are void and those that are voidable or irregular. Bairamian F.J. observed:

"Any defect in competence is fatal, for the proceedings are a nullity however well conducted and decided: the defect is extrinsic to the adjudication.

If the court is competent, the proceedings are not a nullity; but they may be attacked on the ground of irregularity in the conduct of the trial; the argument will be that the irregularity was so grave as to affect the fairness of the trial and the soundness of the adjudication. It may turn out that the party complaining was to blame, or had acquiesced in the irregularity; or that it was trivial; in which case the - appeal court may not think fit to set aside the judgment. A defect in procedure is not always fatal."

In *Skenconsult v. Ukey* (1981) 1 SC 6, this court declared a nullity the proceedings of the High Court of Mid- Western State (a court of unlimited jurisdiction) where there had been a breach of requirement (3) above for competence, i.e. non-service of the writ of summons on the defendant before adjudication. On the authorities, the law seems to be that where a court acts without jurisdiction or competence the decision or order made by it is void and will be so declared by either the court itself or an appeal court. But where there is competence or jurisdiction, an erroneous decision or order made by a court is a matter for appeal and may be set aside or varied as the appeal court may deem fit.

In conclusion it is, in my respectful view, not the law in Nigeria that the proceedings or judgment of a court of unlimited jurisdiction cannot be declared void. Such a declaration will be made in respect of any court whether of limited or unlimited jurisdiction where there is a failure to observe any of the requirements of competence listed above. I am satisfied that this court had the benefit of full arguments on the effect of a breach of the first limb of section 258(1) before it declared in *Ifezue v. Mbadugha* and *Odi v. Osafile* that such failure renders the decision given a nullity. I have no reason to depart from that conclusion.

It follows from the above that though Oluwa, J's judgment of 16th February 1981 was void on the authority of *Ifezue v. Mbadugha*. it nevertheless was subsisting when on 23rd November, 1986 the Court of Appeal

set it aside. But as on that day sub-section (4) of section 258 had come into force. The question that now arises is: was the Court of Appeal right in selling aside that judgment on 23rd November 1986 for non-compliance with section 258(1)? This question was answered in the affirmative by this court in Ojokolobo v. Alamu and unless there are compelling reasons to
5 depart from that decision it has to be followed.

For ease of reference I shall set hereunder once again sub-section (4), it reads:

10 *"(4) The decision of a court shall not be set aside or treated as a nullity solely on the ground of non-compliance with the provisions of this section unless the court exercising jurisdiction by way of appeal from or review of that decision is satisfied that the party complaining of such non-compliance has suffered a miscarriage of justice by reason thereof."*

15 It is perhaps pertinent to consider the history of this sub-section for it is by so doing that one can have an idea of the "mischief" aimed at by it.

In Ifezue v. Mbadugha (supra) and Odi v. Osafire (supra) this court held that non-compliance with section 258(1) of the 1979 Constitution
20 rendered a judgment null and void. No doubt this decision has caused inconvenience to parties who, for no fault of theirs, have had to be put to additional expense in relitigating the whole matter. Sometimes, apart from the fact of non-compliance no miscarriage of justice is otherwise occasioned by the lapse on the part of the Judge or Justices. It is to obviate this
25 inconvenience that the amendment was inserted but at the same time preserving the right to set aside a judgment where it is established that as a result of non-compliance with section 258(1) a miscarriage of justice occurs. If this historical fact is accepted and reading sub-sections (4) and (5) of section 258 together, the inescapable conclusion is that the sub-sections are directed at the two appellate courts, that is, the Court of Appeal and
30 the Supreme Court. Can they be read to have a retrospective effect? I rather think not. Sub-section (5) provides for the taking of disciplinary action against an erring Judge by providing that the lapse of such a Judge be brought to the attention of the Judicial Advisory Committee which, at the time, was the body advising the Supreme Military Council and, later, the
35 Armed Forces Ruling Council on the appointment and discipline of Judges of the superior courts in the country. Can the intention be read into Decree No. 17 of 1985 that Judges of such courts be disciplined for lapse committed by them in the non-observance of the provisions of section 258(1) prior to 27th August 1985 when the Decree took effect? I cannot read such an

intention into the Decree. It follows, therefore, that sub-section (5) could not be said to take effect retrospectively. And if this cannot be said of sub-section (5) it is my respectful view that it cannot also be said of sub-section (4) which must be read together with sub-section (5). Furthermore, sub-section (1) confers a right on a litigant to have his cause or matter disposed of within 3 months of completion of final addresses. It is a constitutional right which cannot be taken away retrospectively unless by clear words expressly for by necessary implication indicating such an intention. The use of the word "shall" in sub-section (4) negatives such an intention.

It is submitted by Chief Ajayi that sub-sections (1) and (4) of section 258 constitute procedural law. With profound respect to learned Senior Advocate, I do not share this view. A Constitution, in my respectful view, is the organic law of a country and it prescribes rights, powers, duties and responsibilities. It indeed, is the fons et origo from which all other laws derive their validity, that is. in an ideal constitutional democracy. I cannot describe any part of it as adjectival or procedural law in the sense that that expression is often used. The Constitution itself makes provisions for procedural law applicable in the various courts established by it in sections 216, 227, 233, 239, 244 and 249 thereof. Section 258(4) is, in my respectful view, a modification of the effect of the right conferred on a party to a cause or matter by section 258(1) as interpreted by this Court in *Ifezue v. Mbadugha* (supra) to have his cause or matter decided within 3 months of conclusion of evidence and final addresses. The passing reference by Irikefe J.S.C (as he then was) in his judgment in *Ifezue v. Mbadugha* (supra) at page 82 to section 258(1), as being "merely procedural" is at best, an obiter dictum: he advanced no reasoning for this view. Obaseki J.S.C. who expressed a similar view in that case, though rather obliquely, in a reasoned judgment in *Ojokolobo v. Alamu* (supra) at page 404 held a contrary view. I am more persuaded by the reasoning and conclusion on the point of Obaseki J.S.C. in the latter case.

This takes me to the decision of this court in *Ojokolobo v. Alamu* (supra) where all the issues relating to the main question for determination in this appeal were exhaustively argued by learned counsel for the parties and Chief Williams, SAN as amicus curiae, and pronounced upon by the court. The Court by majority of five to two affirmed *Kpema v. The State* (supra) and *Taylor v. Trustees of the Trinity Methodist Church* (supra) on the effect of section 258(4). One of the two dissenting Justices, Bello CJN (who presided) joined the majority in the final conclusion reached that the appeal in that case be allowed on the reasoning:

"In Odi & Anor. v. Osafire (1985) 1 NWLR (Pt.1) 17 this

court exhaustively considered the significance of adhering to the rule of stare decisis in constitutional cases and set out the circumstances on which the court may depart from its previous decision. I do not intend to reiterate the circumstances herein. It is sufficient to state that the court may depart from the previous decision if it is satisfied the previous decision is erroneous and was reached per incuriam and that adhering to the previous decision will perpetuate hardship or injustice. I am satisfied the decisions Kpema and Taylor cases were reached per incuriam but as I pointed out in Odi v. Osafire (supra) such decisions will not perpetuate hardship or injustice. Accordingly, one of the circumstances, i.e. perpetuating hardship or injustice that will warrant the court to depart from the decisions in Kpema and Taylor cases has not been satisfied."

With the affirmation by this court of Kpema and Taylor in Ojokolobo request that we depart from them must therefore, fail; we can no longer depart from them, unless of course, we depart from Ojokolobo itself.

I may here mention that before Ojokolobo v. Alamu was decided by this court, the Court of Appeal (Ibadan Division) had had cause to pronounce on section 258(4). It is in the case of The Registered Trustees & Anor v. E.O. Adeosun & Anor. (1986) 3 NWLR (Pt.30) 561 where the judgment of the trial High Court was given outside the period of 3 months prescribed in section 258(1). This lapse was made the only ground of appeal in the appeal to the Court of Appeal. It was submitted by learned counsel for the appellants (Mr. Olaleye) that the judgment ceased to exist (presumably being a nullity) and that as Decree No. 17 of 1985 (which introduced the amendments to section 258 by inserting subsections (4) & (5) came into force on 27/08/85 and not having retrospective effect, it would not affect the appeal filed on 8/12/83 against a judgment delivered on that day.

Learned counsel for the respondents (Mr. Omotoso) submitted that the Decree affected the appeal as it was being heard after the Decree had come into force.

Omololu-Thomas, JCA delivering the lead judgment of the Court of Appeal (with which Sulu- Gambari JCA and Onu JCA (as he then was agreed) held:

"The submission of the respondents' counsel must be upheld in view of the effect of the constitution (Suspension and Modification) (Amendment) Decree in its application in relation to the present appeal. By its provision the decision of the lower court is not to be set aside or treated as a nullity in terms of subsection (1) of 258 of the 1979 Constitution as is hitherto the case (vide Ifezue v. Mbadugha & Anor.

(1984) 5 S.C. 79 and a host of other cases following that decision)- Solely on the ground of non-compliance with the provisions of the section'.

The rider to the foregoing substantive provision is that the decision can still be set aside or treated as a nullity if the Court of Appeal is satisfied that the party complaining has suffered a miscarriage of justice by reason of the non-compliance." j u s - 5

This case was not cited before this court in Ojokolobo. In view of the later decision of this court in the latter case. The Registered Trustees v. Adeosun must be held to have been overruled.

It is equally noteworthy to observe also that after Ojokolobo v. Alamu was decided, this court recently had another opportunity to revisit section 258(4). It is in Utih & Ors v. Onoyivwe (1991) 1 NWLR (Pt.166) at page 166, where the judgment of the trial High Court was given outside the period prescribed by section 258(1). It was commended before the Court of Appeal that in view of section 258(4) which had come into force when the appeal was being heard, the Court of Appeal could no longer pronounce the judgment of the High Court a nullity. The Court of Appeal rejected the contention. On appeal to the Supreme Court, Bello CJN who delivered the lead judgment of the Court (Full Court) declined to pronounce on the issue as the appeal was determined on the lack of jurisdiction of the High Court to entertain a chieftaincy matter arising prior to 1/10/79 when the 1979 Constitution came into force. Two members of the Court (Karibi-Whyte and Akpata J.J.S.C.) on it. Karibi-Whyte J.S.C., in his judgment observed at page 229 thus: 10
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"Effect of S.258(4) on the facts of this case

Learned counsel to the appellant has submitted that section 258(4) of the 1979 Constitution which came into force on the 27th August, 1985 applies to this case. It was contended that the amendment applies to pending proceedings which included appeals. It was argued that the issue was not one of retrospectively, sic but one primarily and essentially a construction of the relevant constitutional provision. It is a fundamental principle of interpretation of statutes that unless there is express provision therein, or a clear intention that the provision shall operate retrospectively, there is a presumption against retrospectivity. - See University of Ibadan v. Adamolekun (1967) 1 All NLR 213; Ige v. Obiwalé (1967) 1 All NLR 276. It was further submitted that the provision not affecting substantive rights, and being merely procedural, is applicable. Counsel cited and relied on Kpema v. The State (1986) 1 NWLR (pt.17) 396. 25
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I think learned counsel like the appellant is under a clear misconception of the law and misapprehension of the facts of the case before

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this court. The judgment being nullified as a contravention of
section 258(1) is the judgment of the High Court delivered on 19/
7/84 before the amendment to S.258(1); Section 258(4) came
into force on the 27th August, 1985 and not being stated to be
retrospective does not apply to the judgment of the High Court delivered on
19/7/84 - See *Ige v. Obiwalé* (1967) 1 All NLR 276; *Okafor v. Ibeziako*
5 (1965) 1 All NLR 407; *Swiss Air v. A.C.B* (1971) 1 All NLR 37. The judg-
ment of the Court of Appeal was merely declaring the validity vel non of
the judgment of the High Court. The judgment has not been alleged to and
had not contravened S. 258(1). Accordingly the provisions of neither that
sub-section nor sub-section (4) are applicable to it."

10 (Italics and mine)

And on page 230 of the Report he summarized thus:

"2. The judgment of the learned Judge was delivered on the 19th July,
1984, after the conclusion of evidence and final addresses on the
16th February, 1984. This was more than 3 months from the
15 conclusion of evidence and the final addresses. It is therefore a
nullity. Having been decided before the coming into effect of
S.258(4) the amendment to S.258(1) is not applicable."

Akpata JSC. in his own judgment observed at pages 245-246 of the Report:
".....I therefore have to consider the issue relating to grounds 2
20 and 3 of the appeal that is, whether the Court of Appeal was right
in holding that the judgment of the trial court was a nullity for
infringing the provisions of section 258(1) of the Constitution en
joining superior courts to deliver their judgment within three months
of final addresses.

25 I make haste to state that sub-section(4)of section258of the
Constitution introduced by the Constitution(Suspension and
Modification)(Amendment)Decree,1985 No17is not applicable to
this case. The trial court was therefore bound by the provision of
section 258(1)The judgment of the trial court was delivered on 19/
30 7/84 long before the amending Decree of 1985 Sub-section(4)reads:

The decision of a court shall not be set aside or treated as
a nullity solely on the ground of non-compliance with the
provisions of this section unless the court exercising juris
diction by way of appeal from or review of that decision
35 is satisfied that the party complaining of such non-com
pliance has suffered a miscarriage of justice by reason
thereof.'

The sub-section is not retrospective. There is nothing
inherent in it to show that it was meant to be retrospective. The

effective date was 27th August, 1985. In the case of Kpemo v. The State (1986) 1 NWLR (Pt.17) 396 delivered here on 2/2/86, the question whether the amendment to section 258(1) was retrospective or prospective came in for consideration. It was unanimously held that the decision of the trial court dated 5th April, 1982 which was delivered more than three months from the delivery of final addresses was a contravention of section 258(1) and therefore void.

In the case of Ojokolobo v. Alamu (1987) 3 NWLR (Pt.61) 377 at page 403, Obaseki J.S.C., held that sub-sections (4) and (5) of section 258 are meant to operate in respect of decisions delivered on or after the 27th day of August, 1985, which were taken on appeal to appellate court for review, and that the rights of the parties in that case were therefore to be decided as the law existed on 12th October, 1982, when judgment was delivered and when appeal against the decision was filed.'

Akpata J.S.C. cited, with approval, Kpema and Ojokolobo and followed them.

This then was the state of the law at the time this appeal came before us. This court in Ojokolobo expressly approved the obiter dicta in *kpemo* and Taylor on the interpretation of section 258(4).

To allow the present appeal would amount to our departing from our previous decision in *Ojokolobo v. Alamu*. The question then is: do grounds exist which warrant a departure from our decision in that case? The onus, of course, is on the party seeking to have the earlier decision overruled to satisfy the court that there is need to do so. The only reason advanced by Chief Ajayi SAN for requesting us not to follow *Ojokolobo v. Alamu* is that that case was wrongly decided.

The grounds on which this court will depart from its earlier decision were exhaustively pronounced on in *Odi v. Osofile* (supra). On the question whether this court sitting as a full Court has jurisdiction to depart from the decision given previously on the same constitutional question by another full Court of this Court, Obaseki J.S.C. delivering the lead judgment of the court in that case observed at pages 34-35 of the Report:

"Turning to the first question there is unanimity and I hold very strong views on it that the Supreme Court, as a court at the apex of the judicial hierarchy in this country has the jurisdiction and power, sitting as full court of seven justices to depart from and overrule previous erroneous decisions on points of law given by a full court Rossek v. A.C.B. Ltd. (Ogundare, J.S.C) 443 on constitutional questions or otherwise.

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The court by law has the exclusive jurisdiction to hear appeals from the court of appeal (See section 213(1) of the 1979 Constitution). It is the highest and final Court of Appeal in Nigeria and no appeal lies to any other body, authority or person in Nigeria (sec. 215 of the 1979 Constitution). Its decision binds every authority or person in Nigeria and is by law to be enforced by all authorities, persons and courts in a subordinate capacity throughout Nigeria [section 251 of the 1979 Constitution]. The Supreme Court is therefore by the expressed provisions of the Constitution in a very pre-eminent position.

As a Court of law with strong historical association with the British Crown and Parliament and having succeeded the Judicial Committee as the highest and final Court of Appeal in Nigeria, it cherishes its heritage of common law doctrines and in particular the doctrine of stare decisis as a sine qua non to certainty in the practice and application of law in Nigeria.

Laws are made for men and not men for laws. The administration of justice involves the administration of the purest principles of law among men for the good of men in its fairest conception. Man is fallible, so are the thoughts of man. This fallible nature of man demands that whenever the errors of thoughts and thought processes surface and are exposed and brought to the attention of its authors, there should be power of jurisdiction to depart from the errors and tread the correct path.

The sovereign powers of the state which are shared among the three arms of Government - the Executive, the Legislature and the Judiciary - by the Nigerian Constitution 1979 as amended enable such corrective processes in the interest of justice and the good of all persons in and all citizens of Nigeria. Thus, the Judicial Committee of the Privy Council has, in its advisory capacity to the Sovereign of the British Empire since the 19th Century given repeated expression to the fact that it will not be bound by the erroneous previous decisions of the court and that for good and compelling reasons it will depart from such decisions and overrule them in the interest of justice and the law. These previous decisions must be clearly shown to be (1) vehicles of injustice or (2) given per incuriam or (3) clearly erroneous in law.

These previous decisions are not set aside as by then the litigation in matters to which they pertain had been brought to an end and closed. When the need to depart from them is established clearly before the court, they are however no longer followed. They

are departed from and overruled. This is because it is fallacious to talk of certainty of the law in erroneous decisions. The interest of justice is served not by certainty of the law in fallacious decisions but by certainty of the law in decisions which properly apply the law and give a correct exposition of the law."

After citing dicta of Lord Halsbury, LC and Viscount Simon in *Read v. Bishop of Lincoln* (1892) AC 644, 654 and *Attorney-General for Ontario v. Canada Temperance Federation* (1946) AC 193, 206 respectively, the learned Justice of the Supreme Court went on at pages 36-37:

"However, a decision given on a given state of facts is not re opened without the greatest hesitation. This was pointed out clearly by the Privy Council in Gideon Nkamhule v. The King (1950) AC 379 at 397 when Lord Porter delivering their Lordships' reasons for dismissing the appeal, said:

'It is true that the Board does not act, as the House of Lords acts, on the strict rule that they are bound by a previous decision based on the same consideration. Nevertheless, as was said in Read v. Bishop of Lincoln (1892) AC 644 a decision on a given state of facts ought not to be reopened without the greatest hesitation, though the right to re-open is not confined to cases where some fresh fact was adduced which had not been under consideration on the previous occasion. Still the right to re-open remains and from these observation it is apparent that the existence of some fresh material not communicated or at any rate not fully presented to the tribunal which heard and decided the earlier case is an element to be borne in mind when deciding whether that case should be followed or not.

From a perusal of judgment in Tumahole's case (1949) AC. 253 it is apparent that the history of the adoption and promulgation of the various statutes and proclamations dealing with the effect of the evidence of accomplices in South Africa was only partially put before the Board and most material which has now been ascertained was not presented to their Lordships on that occasion.

The present case, therefore is one in which fresh facts have been adduced which were not under consideration when Tumahole's case. (1949) AC. 253 was decided, and accordingly, it is one, in which, in their Lordships' view, they are justified in reconsidering the conditions on which that case was determined. '

It is therefore clear that new facts must emerge which were not available for consideration by the tribunal that heard the previous case before a review is undertaken with a view to overruling a previous decision of the Board."

After referring to more decisions of Courts of the common law jurisdiction, the learned Justice concluded at pages 38- 39:

5 *"The answer to the first question for determination therefore, in my view, is that there is nothing in the 1979 Constitution as amended by Decree No. 1 depriving the Supreme Court of any jurisdiction to depart from and overrule its previous decisions on constitutional questions. Therefore, the Supreme Court as the Court of ultimate jurisdiction or final court of Appeal and citadel of justice in Nigeria is at liberty to depart from and overrule its previous decisions on constitutional questions for compelling reasons which proved them erroneous. It will not do so readily or without much hesitation or in the absence of proof that the previous decisions were dearly erroneous and against the public good and welfare."* (Italics mine)

Irikefe J.S.C. (as he then was), in his contribution observed at pages 46 - 47 thus:

20 *The legal rule of stare decisis - based as it is on the binding nature of judicial precedent is one of those rules enshrined in the decisions of the courts in this country. As recently as 1966 - this was what the Lords of Appeal in Ordinary said in their Practice Statement (Judicial Precedent) - (1966) 1 WLR 1234:-*

25 *Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individual can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules'*

30 *Their Lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose, therefore, to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so.' In this connection they will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into and also the special need for certainty as to the criminal law.*

Having set out the above guide-lines, Lord Reid-in Jones v. Secre-

tary of State for Social Services (1972) 2 (W.L.R. 210 at 215) stated thus:-

'But that certainty will be impaired unless this practice is used sparingly. I would not seek to categorise cases in which it should or cases in which it should not be used. As time passes experience will supply some guide. But I would venture the opinion that the typical case for reconsidering an old decision is where some broad issue is involved and that it should only be in rare cases that we should reconsider questions of construction of statutes or other documentsholding these views, I am firmly of opinion that Dowling's case ought not to be reconsidered. No broad issue of justice or public policy is involved nor is any question of legal principle.'
(Emphasis supplied)

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Again where there is a real, likelihood of injustice being perpetuated this court has, in the recent past had occasion to over-rule itself. See - Bucknor-Maclean v. Inlaks Ltd. (1980) 8-1 S.C. 1 wherein this court overruled its previous decision in Shell B.P. v. Jammal Engineering (1974) 1 All NLR 543 and Owumi v. P.Z. (1974) 1 All NLR (Pt.2) on the above ground.

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The cases listed above show that the rigour of the rule on stare decisis may sometimes be softened, but this can only be done on clearly settled principles of law.

In my view, the onus is clearly on the respondents to show that there have been new developments since Ifezue which render our decision therein no longer good law or which would render the application of our ratio therein oppressive. All the cases cited in argument by counsel, over and above those cited in Ifezue, do not deal directly with the point in issue in this case. We are here concerned with a fundamental constitutional provision which cries out loud and clear for compliance. It is a provision aimed at preventing a situation where a judgment which is reserved is eternally preserved and never delivered. Finally the respondents have failed also to show that Ifezue was delivered per incuriam".

25

BelloJSC.(as he too then was),in his own judgment observed at pages 47-48:

30

" The first question for determination in the appeal is whether this court has power to depart from its previous decision on the same constitutional question. In other words, whether precedent or the rule of stare decisis is flexible in constitutional cases.

35

The practice of this court in non-constitutional cases has well been settled. Recognising that precedent is an essential foundation upon which certainty of the law may be assured, the court ordinarily adheres to the rule of stare decisis and does not readily depart from its previous decision. However, where the court is satisfied that its previous decision

124 Rossek v. A. C. B. Ltd. (1993) 12 KLR Ogundare JSC
is erroneous and was reached *per incuriam* and to perpetuate the error, by
following such decision, will result in considerable injustice then the Court
will depart from such decision or overrule it. Thus in *Johnson v. Lawanson*
(1971) 1 All NLR 56 the court held that it would not perpetuate an erroneous
decision which was reached *per incuriam* and which, if followed, would
5 inflict hardship and injustice upon generations in the future or cause temporary
disturbance of rights acquired under such a decision. Accordingly,
the court overruled *Odeweye v. Savage* (1964) NMLR 115 and *Williams v.*
Akinwunmi (1966) 1 All NLR 115 which were considered to be erroneous.

In *Bucknor-Maclean v. Inlaks Ltd. (1980) 8-11 S.C. 1* the court over-
ruled *Shell BP v. Jammal Engineering* (1974) 1 All NLR 543 and *Owumi v.*
10 *PZ* (1974) 1 All NLR (Pt.2) 107 because following the two previous deci-
sions will perpetuate considerable injustice. Again in *Surakatu v. Nigerian*
Housing Development Society (1981) 4 S.C. 26. *Moses v. Ogunlabi* (1975)
4 S.C. 81 and *Adis Ababa v. Adeyemi* (1976) 12 S.C. 51 were over-ruled
15 because both were decided *per incuriam* and, to follow either, will continue
to fetter the discretion which the Court of Appeal undoubtedly has to remedy
any non-compliance with its Rules if it is in the interest of justice to do
so. Furthermore, the decision in *Odunade v. Rossek* (1962) 1 SCNLR
170; (1962) 1 All NLR 98 followed in *Mobil Oil v. Coker* (1975) 3 S.C. 175
20 was over-ruled by *Odunola & Ors. v. Nabham & Ors* (1981) 5 S.C. 197
because the previous decision curtails the right of appeal under Section
220(1) (a) of the Constitution of the Federal Republic of Nigeria. 1979 and
it will perpetuate a denial of justice and of constitutional right to follow it.

It appears from the perusal of the fore-going cases that the attitude of
25 this court on the question at issue may be stated thus: that the court will
not adhere to the rule of *stare decisis* but will depart from its previous
decision if such decision is inconsistent with the provisions of the constitution
or if it is erroneously reached *per incuriam* and will, if followed, perpetuate
hardship and considerable injustice or it will cause temporary disturbance
30 of rights acquired under it or will continue to fetter the exercise of
judicial discretion of a court. It may be emphasized that the Court has not
laid down a hard and fast rule exhausting the area within which to warrant
a departure from a previous decision. Each case must be decided on its
special facts and circumstances with a view to avoid perpetuating injustice
35 which, in my view, is the paramount determinant factor in this respect. "

Having regard to the opinions expressed and the state of the authorities
as they stand, I am of the firm view that this court as the final
court in this country has the power and jurisdiction to depart and overrule
its previous decision whether or not by a Full Court where it is shown that
the previous decision is inconsistent with the provisions of the constitution

or it is erroneously reached per incuriam or will perpetuate injustice. But, as Eso J.S.C. warned in Odi v. Osafire, this court should not overrule itself on the slightest pretence. It must be remembered that the doctrine of stare decisis or precedent is an indispensable foundation on which to decide what the law is and unless there is certainty in the law there will be no equilibrium in society.

Applying the above guidelines to the appeal on hand, it is not plaintiffs' case that the decision of this court in Ojokolobo v. Alamu is inconsistent with the provisions of the 1979 Constitution. It is not being contended either that it was reached per incuriam: but it is contended that it was erroneously reached. What then must we look for in order to determine that the earlier decision was reached erroneously. Eso J.S.C. provided the answer in Odi v. Osafire (supra) when he observed at pages 50 - 51 of the Report:

"To decide whether the previous decision had been erroneous, what is it that compels the Supreme Court to reconsider its view? I have found the authorities to which Chief Gani Fawehinmi referred us very useful in connection with this. Is the Supreme Court to listen to a re-argument of the case, though with more authorities on the points? If the points canvassed in the second proceeding are merely points that had earlier been canvassed and all that is being done is to put in more emphasis, by way of more authorities on those points, it is my considered view that that would not amount to a case whereby the Supreme Court should reconsider its view. In re-application of Woods (1970) I.R. Walsh J. (p.167 ibid) said'

In my view sub-section (6) of S.4 of Art 34 refers to the decision of the Supreme Court in a particular case and means that there shall be no appeal available in any court from the particular decision. It does not, for example, mean that the Supreme Court cannot reconsider in a later case the ratio decidendi of a previous decision, and indeed this court has already decided in The State (Quinn) v. Ryan and the Attorney-General v. Ryan's Car Hire Ltd. that it may do so.'

These are potent words except that when one reads the words in the context of the facts of the Woods case, which was a case of Habeas Corpus, the position is not as strong as the proposition made to us by Gani Fawehinmi in his submissions. However, in Attorney-General & Anor v. Ryan's Car Hire Ltd. (1965) I.R. 642 the Supreme Court of Ireland held that compelling reasons would influence the Supreme Court to reconsider its previous decisions.

The decision of the Privy Council in Nkambulu v. The King (1950) A.C. 379 is important. The Board held that the existence of some fresh material not communicated or, at any rate, fully presented to the tribunal which heard and decided the earlier case is an element to be borne in mind
 5 *when deciding whether that case should be followed or not.*

It seems to me that the authority could justify the stance taken by Chief Williams in the presentation of his arguments when he seemed, with respect, to have presented the same arguments as he did in the Ifezue
 10 *case, but now with more authorities and emphasis. However I am of the clear view that for this court to depart from its decision in a previous case, the arguments must bring some fresh elements no just more authorities which had not been adverted to in the earlier proceedings, or that there have been new developments, even in the socio-economic or political stance*
 15 *of the country, especially when the matter under consideration is a matter that is provided for by the constitution, to warrant the Court to change its earlier stand."*

I have gone through the submissions of learned counsel in this
 20 case, particularly those of Chief Ajayi. What learned Senior Advocate, with respect, appears to have done here is to re-argue Kpema and Taylor and, by extension, Ojokolobo all over again with more authorities, such as Isaacs v. Robertson, but not even on points relevant to the issue under discussion. He has not laid before us fresh material not communicated or fully pre-
 25 sented to this court in Ojokolobo, in fairness to Chief Ajayi, however, he was not mindful of Ojokolobo until this court drew his attention to it and invited further arguments. Learned Senior Advocate directed his attention, in his written brief and in his first oral argument, to Kpema and Taylor in which, as appearing from the judgments in them, it would not appear this
 30 court had the benefit of full and comprehensive arguments before it pronounced on the effect of sub-section (4) of section 258 on judgments delivered prior to 27th August, 1985 when the sub-section came into force. But Kpema and Taylor have been affirmed by this court in Ojokolobo. We are not sitting on appeal over the Ojokolobo case and as Chief Ajayi has not
 35 shown how and where this court went wrong in that case, I find myself not persuaded to depart from it. I need to reiterate the caution proffered by Lord Reid in Jones v. Secretary of State for Social Services (supra) that it is only in rare cases that we should reconsider questions of construction of statutes or other documents. The fact that a later tribunal would have

come to a different conclusion from that of an earlier tribunal is no ground for departing from the decision given by that earlier tribunal. Such an attitude will only destroy the need for certainty in the law that is the bedrock of the doctrine of state decisis. In my respectful view no broad issue of justice or public policy is involved in this case nor any issue of legal principle. The cases that may be affected by the decision of Ojokolobo must be few and far between unless it is accepted that the courts below prior to 27th August, 1985 indulged in large scale non-compliance with section 258(1) of the 1979 Constitution which, from my experience, cannot be the case. Even if this were the case it is no reason to depart from Ojokolobo; this court cannot be seen to condone breaches of the Constitution. As shown earlier in this judgment, however, this court reached a correct conclusion in Ojokolobo. Can it be said that by not departing from Ojokolobo injustice will be perpetuated? I rather think not. As Bello J.S.C. (as he then was) rightly, in my view, observed in Odi v. Osafire, the decision in Ifezue may occasion inconvenience and unnecessary expenses to the parties, it does not perpetuate injustice that will warrant this court to depart from its decision in Ojokolobo v. Alamu (supra). See the dictum of Bello CJN in Ojokolobo v. Alamu at page 398, earlier quoted in this judgment. Each party to the present appeal still has the opportunity at the trial of the case in the trial court to put forward his case. In any event, it is not plaintiffs/appellant's case that a retrial will perpetuate injustice to them.

In conclusion, I am not satisfied that any ground exists that would warrant us to depart from the decision reached by this court in Ojokolobo v. Alamu which case affirmed the earlier dicta in Kpema and Taylor. That being so, I must hold that the court below rightly decided the present case when it was before that court.

I now proceed to deal with the second question which relates to the refusal of the Court of Appeal to refer to this court, the issue as to the interpretation of section 258(4).

In the plaintiffs written Brief before the Court of Appeal it was submitted thus:

"5.06 *In the alternative, the plaintiffs submit that the issue of whether section 258(3) (sic) as amended applies to save the judgment of the High Court of Lagos State delivered in the instant case raises a substantial question of law with regard to the interpretation or application of the Constitution. They therefore request that if the Court of Appeal finds that the delay in delivering judgment has*

not occasioned any miscarriage of justice. The issue ought to be referred to the Supreme Court of Nigeria under the provisions of section 259(3) of the Constitution. It is submitted that from the majority of the decisions in the recent case of Florence Taylor v. The Trustees of Trinity Methodist Church, an unreported decision of the Supreme Court delivered in Suit No. SC.29/1985 on the 1st of April 1986, that court was not addressed on the effect of the amendment contained in section 258(3) (sic) of the Constitution, and that the position of the law is therefore still unclear, such as to warrant a reference to the Supreme Court."

10 At the oral hearing of the Constitutional issue raised in the additional ground of appeal, it would appear that learned leading counsel for the plaintiffs did not formally bring up his request for a reference of the issue to this Court. Rather, Chief Ajayi, SAN proffered arguments in support of his contention that the decision given by a court of unlimited jurisdiction could not at any
15 time be treated as void. Learned Senior Advocate, however, added:

"I submit that the decision of this court on the voidability of the judgment is as it is today. In other words the Supreme Court should have an opportunity to consider Isaac v. Robertson in treating the judgment delivered outside the 3 months limitation counsel referred to the decision of the S.C. in Florence Taylor v. The Trustees of Trinity Methodist Church (unreported) suit No. 29. 1985 delivered on 1/4/86. The judgment is not regarded void otherwise it would not be called upon to set it aside. I argue the court to consider the submissions I have given."

25 If the above was meant as a request for a reference to the Supreme Court, it would be on the issue of void ability of a judgment with reference to Isaacs v. Robertson. Section 259(3) of the 1979 Constitution provided thus:

"(3) Where any question as to the interpretation or application of this Constitution arises in any proceedings in the Court of Appeal and the court is of opinion that the question involves a substantial question of law, the court may, and shall if any party to the proceedings so requests, refer the question to the Supreme Court which shall give its decision upon the question and give such directions to the Court of Appeal as it deems appropriate."

35 This section came up for consideration before this Court in African Newspaper of Nigeria Ltd. & Ors v. The Federal Republic of Nigeria (1985) 2 NWLR (Pt.30) 137, 148- 150 where Aniagolu J.S.C. delivering the lead judgment of this court observed:

"Appellants had applied to the Court of Appeal under S.259(3) of the 1979 Constitution for the Court to refer the issue of the contested jurisdiction of the Federal High Court to entertain the case, to the Supreme Court for determination. The Court refused to refer the issue to the Supreme Court on the ground that it had already held in the said Federal Republic of Nigeria v. Jonah Onyebuchi Eze (supra) that the Federal High Court has jurisdiction, and having so held, the Court could not refer the question to the Supreme Court by reason of the fact that in Adesanya v. The President of the Federal Republic of Nigeria & Anor. (1981) 1 All NLR (Pt.1) 1 the Supreme Court had held that where the Court of Appeal was minded to refer a question of law to the Supreme Court it should not proceed to decide the matter and then refer it, since once the matter has been decided, the procedure for bringing the matter before the Supreme Court would be by appeal. It should refer it without deciding on it. Counsel submitted that this line of argument, taken by the Court of Appeal, was a misinterpretation of the decision of the Supreme Court in ADESANYA. 15

Further in their briefs, counsel submitted that the Federal High Court had no jurisdiction to entertain criminal matters other than those arising out of matters set out in S.7 of the Revenue Court Act by which the original jurisdiction of the Court was founded and that the decisions of this court had made it abundantly clear that the Federal High Court had no general criminal jurisdiction to try offences contained in the Criminal Code Act, whether or not their prosecution was initiated by the Federal Attorney-General. 20

I shall deal first with the issue of references. The whole of S.259 of the 1979 Constitution of the Federal Republic of Nigeria deals with 'References of questions of Law' from subordinate Courts to the High Court; from the High Court to the Court of Appeal, and from the Court of Appeal to the Supreme Court - under the condition and circumstances laid down in that section. Sub-section 3 of S.259 deals specifically with references from the Court of Appeal to the Supreme Court and reads: 25

'(3) Where any question as to the interpretation or application of this constitution arises in any proceedings in the Court of Appeal and the court is of the opinion that the question involves a substantial question of law, the court may; and shall if any party to the proceedings so requests, refer the question to the Supreme Court which shall give its decision upon the question and given such directions to the Court of Appeal as it deems appropriate.' 30

The two immediately previous Constitutions of Nigeria carried provisions which were in pari materia with those of S.259 of the 1979

130 Rossek v. A. C. B. Ltd. (1993) 12 KLR Ogundare JSC
Constitution. The Nigeria (Constitution) Order in council, 1960, L.N. 159
of 1960, provided for 'The Constitution of the Federation of Nigeria'. Section
108 thereof provided for reference to the 'federal Supreme Court' of
questions as to interpretation of that Constitution, from Courts subordinate
to the High Court and from the High Court to the Federal Supreme Court.
5 *In identical terms, the Constitution of the Federation 1963, No. 20 of 1963,*
in its S.115 provided for references from subordinate courts to the High
Court and from the High Court to the Supreme Court. In all the provisions
of the three Constitutions it was required that the matter for reference:

- (i) *must involve 'a substantial question of law'*
- 10 (ii) *in which case:*
 - (a) *the court may refer the matter to the Supreme Court (or*
Federal Supreme Court under the 1960 constitution), and
 - (b) *the court shall, if any party to the proceedings so request,*
refer the matter to the Supreme Court.

15 *There is no question that the matter of the jurisdiction of the Federal High*
Court challenged in these proceedings was a matter involving a substantial
question of law; for, if the court had no jurisdiction then it was incompetent
to embark upon the trial. The issue of what is a substantial question of law
is, of course, for the court to decide and in doing so a guide may be gath-
20 *ered firstly from the formulation made by the Federal Supreme Court in*
OTUGBOR GAMIOBA And Ors v. Ezezi II the Onodje of Okpe And Ors.
(1961) 1 SCNLR 115; (1961) 1 All NLR. 584 at 588 where the court stated
that.

25 *'We shall not attempt a complete definition of what amounts to a*
substantial question of law, but it must clearly be one on which
arguments in favour of more than one interpretation might
reasonably be adduced.'

30 *Secondly, the question must be one which must necessarily be*
decided in the cause or matter and not one which may prove unnecessary
to decide (Weed v. Ward (1989) 40 Ch. D 555 and thirdly, the plaintiff,
where it is a civil case, must have locus standi in the cause BARRS And
Ors. v. BETHEL and Ors. (1981) 3 WLR 874)".

35 The Court of Appeal in the case on hand declined to accede to
Chief Ajayi's request for a reference. Kutigi, JCA (as he then was) in his
lead judgment at pages 217 -218 of the record of appeal summarised in
part the submissions of learned counsel in these words:

"Mr. Ajayi learned Senior Counsel for the 1st, 2nd and 3rd
respondents while agreeing that this court is bound by the
Supreme Court decision in Kpema v. State (supra) and that we

are also bound by our own decision in Gafari v. Ajayi (supra) was of the view that the constitutional point should be referred to the Supreme Court. He was also of the view that the Supreme Court may decide to have a second look at its decision in Kpema v. State (supra) in the light of the Privy Council decision in Isaacs v. Robertson (1984) 3 WLR 705, which according to him was not referred to in Kpema v. State (supra). I must state that most of the submissions of the learned Senior Advocate, Mr. Ajayi, are stuff for consumption by the Supreme Court and not for an intermediate Court of Appeal like we are. We cannot overrule the Supreme Court. We are bound by its decisions, Isaacs v. Robertson notwithstanding.

Mr. Olowu for the 5th respondent associated himself with the submissions of appellant's counsel that the judgment was a nullity and that a new trial ought to be ordered.

In his final reply learned counsel for the appellant Mr. Solesi submitted that there is nothing in the appeal to be referred to the Supreme Court now because the point for reference has already been decided by the Supreme Court itself and that section 258(4) deals with judgments delivered before 27th August, 1985 only,"

The learned Judge, after deciding the issue of section 258(4), declined to make a reference to the Supreme Court. He said:

"I am in complete agreement with Chief Solesi for the appellant that the point in issue in this appeal having been previously decided by the Supreme Court there is nothing left to be referred to it. All we need to do is to apply the law as decided by the Supreme Court, the highest Court of the land. And that is exactly what I have done here."

Kolawole JCA in his own judgment gave fuller reasons for refusing Chief Ajayi's request. It is clear from Kolawole JCA's judgment that what Chief Ajayi wanted the Court of Appeal to refer to this Court was the issue decided by the Privy Council in Isaacs v. Robertson to the effect that the judgment or order of a court of unlimited jurisdiction could not be declared void. Kolawole JCA observed:

"The application of Mr. Ajayi for a reference of the matter in question is not apposite. The decision in Hakido v. Kpema v. The State was that of a full court, secondly the three exceptions which I have listed above do not apply to the case of Gafari v. Ajayi Thompson thirdly there can be no reference of a constitutional matter under section 259(3) of the Consti-

tution where there has been a definitive decision of the Supreme Court on the matter."

In the Appellant's Brief it is contended that as the Justices of the Court of Appeal recognised that there was a substantial question of law raised, they were in error not to have referred the case to this court. With profound respect, I do not share this view. Section 259(3) did not provide for reference of every issue that raised a substantial question of law but one that related to the interpretation or application of the constitution. Whether the decision of a court of unlimited jurisdiction could be declared void, as important as it appears to be, is not one that relates to the interpretation or application of the Constitution.

Secondly, this court having pronounced on the question of the interpretation or application of any section of the Constitution, that question ceases to be one in which a lower court is under compulsion to refer under section 259(3) to this court. The situation here is not the same as in *African Newspaper of Nigeria Ltd. v. Federal Republic of Nigeria* (supra) where the court that pronounced on the question in another matter was the Court of Appeal itself. The Court of Appeal misconstrued the dictum of Fatayi-Williams, CJN in *Adesanya v. President of the Federal Republic of Nigeria & Anor.* (1981) 5 S.C. 112; (1979-81) NSCC, 146, 154 to the effect that

"Before proceeding further, I would like to express my own views of the scope and extent of the provisions of section 259(3) of the Constitution and of the procedure laid down in Order 6 rules 1 and 3 of the Supreme Court Rules when any substantial point of law is being referred to the Supreme Court by a lower court by virtue of section 259(3).

It cannot be disputed that what can be referred to the Supreme Court for a decision under section 259(3) of the Constitution is:-any question as to the interpretation or application of the constitution which involves a substantial question of law.'

A decision already made by the Federal Court of Appeal cannot be referred to the Supreme Court for another decision under that section. Once a decision 'on the substantial question of law' is given by the Federal Court of Appeal, the only way to obtain a review of that decision is by way of appeal to the Supreme Court".

Explaining that dictum in *African Newspapers Anigbolu J.S.C.* at page 152 observed;

"The Court of Appeal (with the greatest respect to the distinguished panel of Judges who made the ruling) was in error when it held that

because it had once before expressed its legal opinion on the interpretation of S. 7 aforementioned, it was following the opinion of the Supreme Court in ADESANYA (supra) in refusing a reference of the question of law involved, in this matter, to the Supreme Court. ADESANYA (supra) was clearly misinterpreted and misapplied by the Court of appeal. The fact that the Court of Appeal had ruled in EZE's case (supra) that the Federal High Court had jurisdiction to hear that case (that is Eze's case), could not constrict the court referring, under S259(3) of the 1979 Constitution. The substantial question of law involved in the present case - an entirely different case - to the Supreme Court for a determination. When the Supreme Court in the already quoted passage stated that:

'A decision already made by the Federal Court of Appeal cannot be referred to the Supreme Court for another decision under that section'

the court was referring to a decision in the particular proceedings in which the reference was made, and not to a decision taken in a different case between different parties,"

It follows therefore that if the court below had refused a reference to this court of any question as to the interpretation or application of the Constitution which question involved a substantial point of law (e.g. section 258(4) for the reason that it (the court below) had pronounced on the question in another matter between different parties (e.g. Alhaji Abudu Gaffari v. Ajayi Johnson & Anor.) (1986) 5 NWLR (Pt.39) 66. I would have unhesitatingly held that it acted wrongly. In this case, however, that court followed an earlier decision of this court in Kpema v. The State (supra). I, therefore, cannot fault the court below for not acceding to learned Senior Advocate's request for reference.

For the reasons I have given above, I dismiss this appeal and affirm the judgment of the court below. I award N1,000.00 (One Thousand Naira) costs against the plaintiffs/appellants and in favour of the 1st defendant/respondent.

BELLO CJN (Dissented):

The decision of this court in Ifezue v. Mbadugha & another (1984) 5 S.C. 79 was supposed to be buried by section 258(4) which was added to section 258 of the 1979 Constitution by the Constitution (Suspension and Modification) (Amendment) Decree 1985. The addition came into force on

27th August, 1985. In spite of the apparent interment of the decision, its ghost still haunts us from the grave. Section 258(1) of the Constitution provides that every court shall deliver its judgment in writing not later than three months after the conclusion of evidence and final addresses. In Ifezue's case, this court decided that the judgment of a court delivered outside the
 5 period of three months was null and void. In order to remedy the hardship and inconveniences caused to litigants by the failure of Judges to comply with the provision of the subsection, the Constitution was amended by the addition of section 258(4), which states:

10 *"(4) The decision of a court shall not be set aside or treated as a nullity solely on the ground of non-compliance with the provisions of this section unless the court exercising jurisdiction by way of appeal from or review of that decision is satisfied that the party complaining of such non-compliance has suffered a miscarriage of justice by reason thereof."*

15 The two issues for determination in this appeal relate to the failure of the trial Judge in the High Court of Lagos State to deliver his judgment within three months as prescribed by section 258(1) of the Constitution.

In the action the plaintiffs as joint owners had sought Declarations
 20 that 1st defendant was not entitled to lodge or register a caution against registered dealings in the plaintiffs' interests in the property at No.2 Pedro street, Lagos and No. 41 Agarawu street, Lagos and they had also sought orders directing that the caution lodged against the said two properties be removed by the 2nd defendant. The trial of the action took place before
 25 Justice Ishola Oluwa; addresses of counsel were concluded on 10th November, 1980 and the case was adjourned to 19th January, 1981. However, the judgment was not delivered until on 16th February, 1981 when the Trial Judge granted all the plaintiffs claims.

Dissatisfied with the judgment, the 1st defendant appealed to the
 30 Court of Appeal and the plaintiffs also cross-appealed. While the appeal and cross-appeal were pending in the Court of Appeal, the amendment to section 258 of the Constitution came into force on 27th August, 1985. The Court of Appeal heard the appeal on 23rd November, 1986. Although the 1st defendant/appellant had filed four grounds of appeal and one addi-
 35 tional ground of appeal and the plaintiffs had also filed one ground of appeal, the Court of Appeal informed counsel at the hearing that the court would consider only the constitutional issue at that stage and invited counsel to address it on the issue, which was:-

"The judgment delivered by the lower court on the 16th day of

February, 1981 is null and void because it was given later than three months after the conclusion of evidence and final addresses in contravention of section 258(1) of the Constitution of the Federal Republic of Nigeria, 1979.'

After having heard the submissions of learned counsel on the issue including the request of Chief Ajayi, S.A.N. that the issue should be referred to this court, the Court of Appeal followed Ifezue v. Mbadugha (supra); Richard Boyi v. Attorney-General of Bendel State (1984) 9 S.C.66 and Odi v. Osafire (1985) 1 NWLR (Pt.1) 17 and held that, since the judgment of the trial court was delivered more than three months after the addresses, the judgment was null and void under section 258(1) of the Constitution. With respect to the application of section 258(4) to the case and to refer that issue to the Supreme court, Kutigi, J.C.A., as he was then, in his lead judgment agreed by Mohammed, J.C.A. as he was then, and Kolawole, J.C.A. stated as follows:-

"One other point to consider is whether or not the judgment was caught by the new subsection 4 of section 258 of the Constitution which came into force on 27th August 1985. There is no doubt that the judgment was delivered on 16th February, 1981 as stated earlier, some four years before the constitutional amendment came into force. The new section 258 subsection 4 reads:-

"4. The decision of a court shall not be set aside or treated as a nullity solely on the ground of non-compliance with the provisions of this section unless the court exercising jurisdiction by way of appeal from or review of that decision is satisfied that the party complaining of such non-compliance has suffered a miscarriage of justice by reason thereof."

The Supreme Court in Kpema v. State (supra) and this court later in Gafari v. Johnson & Anor. (supra) made it clear that there is nothing in section 258 subsection 4 to show that it was intended to have retrospective effect. The logical conclusion therefore is that all judgments, including the present judgment, which were delivered before 27th August, 1985 and which were delivered more than three months of the conclusion of final addresses were automatically null and void by reason of section 258 subsection 1 of the 1979 Constitution. I am in complete agreement with Chief Solesi for the appellant that the point in issue in this appeal having been previously decided by the Supreme Court there is nothing left to be referred to it. All we need to do is to apply the law as decided

by the Supreme Court, the highest court of the land. And that is exactly what I have done here."

The appeal was allowed, the decision of the trial court set aside and retrial ordered.

The plaintiffs/appellants here at have now appealed to this court against the decision of the Court of Appeal. Learned counsel for the appellants formulated two issues for determination in the appeal. They are:-

1. *Was the Court of Appeal in November, 1986 bound to apply the provisions of section 258(4) of the Constitution of the Federal Republic of Nigeria, 1979 as amended by Decree No. 17 of 1985 to a decision given by the High Court in February, 1981?*

2. *Did the issue of whether section 258(4) of the Constitution of the Federal Republic of Nigeria, 1979 as amended by Decree No. 17 of 1985 applied to the judgment herein raise a substantial question of law which ought to have been referred to the Supreme Court under the provisions of section 259 of the Constitution?"*

In his brief and oral submission, Chief Ajayi, S.A.N., prefaced his contention on the main issue by urging the court to review its decisions in the cases from which, in his judgment above quoted, Kutigi, J.C.A. concluded as follows:

" *The logical conclusion therefore is that all judgments, including the present judgment, which were delivered before 27th August, 1985 and which were delivered more than three months of the conclusion of final addresses were automatically null and void by reason of section 258(1) of the 1979 Constitution.*" (Italics added).

The expression "*automatically null and void*" was the fulcrum of the, contention of the senior counsel.

According to the senior counsel the decisions of this court in Ifezue v. Mbadugha (supra) and Odi v. Osafire (1985) 1 NWLR (Pt.1) 17, which followed the former, seem to imply that a judgment given over three months after the conclusion of addresses was in fact no judgment at all and, being null and void, a party is at liberty to disregard and disobey any order made thereat without resort to an appeal court. To buttress his contention the senior counsel referred to the lead judgment of Aniagolu, J.S.C. in Ifezue v. Mbadugha (supra) where he stated at page 176:

"...the 1979 Constitution required that the judgment of the Court of Appeal in this matter be delivered within three months of its being "reserved" by that court, after the hearing of the appeal and that failure to do so invalidated the so-called judgment delivered

after that period. The appeal must be allowed and is hereby allowed. The so-called judgment is declared null and void and for the avoidance of any doubt, is hereby set aside". (Italics added)

The senior counsel stated that Idigbe JSC spoke in the same vein in Skenconsult (Nigeria) Limited v. Godwin Ukey (1981) 1 SC 6 thus at page 7:

"The position then is, as my Lord Nnamani, J.S.C. has said, that the said orders are in each case null and void. As was stated in Macfoy v. U.A.C. (1962) A.C. 152 at 160 the orders being void, there is even no need "for an order of the court to set (them) aside though it is sometimes convenient to have the court declare (them) to be so. And every proceeding which is founded on (them) is bad and incurably bad." per Lord Denning "

The senior counsel further argued that the foregoing pronouncements were based on the misconception of the proper perspective of the often repeated Obiter dicta by Judges of Lord Denning in MacFoy v. U.A.C. (supra) at page 160 where he stated:-

"If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so."

Referring to Halsbury's Laws of England (4th Edition) volume 10 paragraph 713; Hadkinson v. Hadkinson (1952) 2 AER 567 p.285 and Grafton Isaacs v. Emery Robertson (1984) 3 All E.R. 140, the senior counsel submitted that it has been long established principle of law that an order of court is valid and must be obeyed unless and until set aside by a court of competent jurisdiction. Because the senior counsel considered the judgment of Lord Diplock in Isaacs v. Robertson (supra) is of such importance for the resolution of the issues in this appeal, he referred extensively to page 142 where Lord Diplock quoted with approval the following passage in the judgment of Romer L.J in Hadkinson v. Hadkinson (1952) 2 All E.R 567 at 569, (1952) p.285 at 288:-

"It is the plain and unqualified obligation of every person against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void. Lord Cottenham. L.C., said in Chuck v. Cremer (1846) Coop temp Cott 338 at 342, 47 E.R. 884 at 885 "A party, who knows of an order, whether null or void,

regular, cannot be permitted to disobey it... It would be most dangerous to hold that the suitors, or their solicitors could themselves judge whether an order was null or valid - whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question. That the course of a party knowing of an order which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed."

At page 143, Lord Diplock continues as follows:-

"Their Lordships would, however, take this opportunity to point out that in relation to orders of a court of unlimited jurisdiction it is misleading to seek to draw distinctions between orders that are 'void' in the sense that they can be ignored with impunity by those persons to whom they are addressed, and orders that are 'voidable' and may be enforced unless and until they are set aside. Dicta that refer to the possibility of there being such a distinction between orders to which the descriptions 'void' and 'voidable' respectively have been applied can be found in the opinion given by the Judicial Committee of the Privy Council in Marsh v. Marsh (1945) A.C.271 at 284 and MacFoy v. United African Co. Ltd. (1961) 3 All E.R.1169 (1962) A.C.152: but in neither of those appeals nor in any other case to which counsel has been able to refer their Lordships has any order of a court of unlimited jurisdiction been held to fall in a category of court orders that can simply be ignored because they are void ipso facto without there being any need for proceedings to have them set aside. The cases that are referred to in these dicta do not support the proposition that there is any category of orders of a court of unlimited jurisdiction of this kind: what they do support is the quite different proposition that there is a category of orders of such a court which a person affected by the order is entitled to apply to have set aside ex debito justitiae in the exercise of the inherent jurisdiction of the court without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity and give to the Judge a discretion as to the order he will make. The Judges in the cases that have drawn the distinction between the two types of orders have cautiously refrained from seeking to lay down a comprehensive definition of defects that bring an order into the category that attracts ex debito justitiae the right to have

it set aside, save that specifically it includes orders that have been obtained in breach of rules of natural justice.

The contrasting legal concepts of voidness and voidability form part of the English law of contract. They are inapplicable to orders made by a court of unlimited jurisdiction in the course of contentious litigation. Such an order is either irregular or regular. 5 If it is irregular it can be set aside by the court that made it on application to that court; if it is regular it can only be set aside by an appellate court on appeal if there is one to which an appeal lies."

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Continuing his submission against the line of authorities such as Ifezue v. Mbadugha (supra) which tend to suggest that an order of a superior court of record may be void ipso facto. Learned counsel drew our attention to several decisions of this court wherein the court upheld the principle that a judgment of a court of law, however perverse, is valid until 15 it is set aside by a court of competent jurisdiction. He relied on Adebayo v. Johnson (1969) 1 All NLR 176 at 194; Mobil Oil v. Coker (1975) 3 S.C.175; Williams v. Sanusi (1961) 1 All NLR 334 and Ajao v. Alao (1986) 5 NWLR (Pt.45) 802 wherein C.F.A.O. v. Chapman 9 WACA. 181 was discussed.

Mr. Solesi, learned counsel for the 1st respondent, both in his brief 20 and oral argument has not responded to the above submission while Mr. Ogunmodede for the 3rd respondent supports Chief Ajayi that the judgment of a court is valid and subsisting until it is set aside on appeal by a court and that the judgment of the trial court in this instance could not be said to be a nullity until after it had been declared so by the Court of 25 Appeal. He referred to Craig v. Kanssen (1943) K.B. 256; Ojiako v. Oguezo (1962) 1 All NLR 58 and Ekerele v. Eke 6 NLR 118.

I consider it appropriate to deal with the aforestated submissions before proceeding to the main issue. I entirely agree with Chief Ajayi, S.A.N. 30 that a judgment of a court of law is presumed valid and the parties concerned are not only bound to obey it but the authorities charged with responsibility for the enforcement of judgments are also obliged to enforce it unless it is declared a nullity or set aside by a court of competent jurisdiction. It has never been the laws of Nigeria as some of our judges, like 35 judicial robots, have been parroting the dicta of Lord Denning in MacFoy v. UAC. (supra) that there is no need for an order of a court which is void to be set aside by a court and thereby implies that all and sundry have the right to disobey the order. It is not also the law of England: Isaacs v.

Robertson (supra).

It has never been the law that a party may review a judgment, regard it a nullity and disobey it. A prisoner who thinks that his conviction was a nullity cannot with impunity walk out of prison. Similarly, a judgment debtor cannot lawfully resist execution because he considers the judgment against him was null and void. Thus, a judgment of a court of law remains valid and effective unless it is set aside by an appeal court or by the lower court itself if it acted without jurisdiction or in the absence of an aggrieved party: *Williams v. Sanusi* (1961) All NLR 334 at 337; *Ojiako v. Ogueze* (1962) 1 All NLR 58 at 61; *Adebayo v. Sonowo* (1969) 1 All NLR 176 at 194; *Ajao v. Alao* (1986) 5 NWLR (Pt.45) 802 at 823 and *Yonwuren Modern Signs* (1985) 1 NWLR (pt.2) 244; (1985) 2 S.C.86; *Odiase v. Agbo* (1972) 1 All NLR 170 at 176 and *Melifonwu v. Egbiyi* (1982) 9 S.C.145.

I have taken the pain to deal extensively with the preliminary submission of Chief Ajayi. S.A.N because he had put a lot of research and learning on it. It also formed the bulk of his brief and oral argument as he considered it to be of crucial importance for the determination of the two issues.

However, with all due respect, I have been unable to appreciate the direct relevance of the submission to the determination of the main issue, which is departure from our previous decision. None of the parties to this appeal extra-judicially treated the judgment of the trial court or of the Court of Appeal as a nullity and for that reason had claimed that he was at liberty to disobey it. The Court of Appeal did not decide in its judgment in this case that a party might do so.

Now, I shall consider the submission of learned counsel on the main issues. The rule of law that procedural law existing at the hearing of a case governs the case, whether the case was instituted or filed before or after the enactment of the procedural law, formed the bedrock of Chief Ajayi's submission. He submitted that since section 258(4) of the Constitution was in force when the Court of Appeal heard the appeal, that court ought to have applied the subsection but it did not do so because it was bound by the decision of this court in *Kpema v. The State* (1986) 1 NWLR (Pt.17) 396 and *Taylor v. Methodist Church* (1986) 4 NWLR (Pt.34) 136.

He further submitted that the application of section 258(4) as the law in force at the time of the review is not retrospective application of the law, as Uwais, J.S.C, seemed to imply in *Kpema* case and *Taylor* case: that the decision in both cases were clearly given per incuriam and urged us to review the decisions and depart from them. He pointed out that the application of section 258(4) was not an issue in the Court of Appeal during its

hearing of Kpema case, The issue thereat was whether the appellant who had been convicted of murder in contravention of section 258(1) and who had failed to appeal within the lime prescribed by the law existing at the time of his conviction could take advantage of the amendment of the law made while his appeal was pending in that court. The Court of Appeal decided the issue in the negative and this court set aside the decision on the ground that the Court of Appeal erred in law in denying the appellant the benefit of the amendment law. 5

The learned S.A.N. further urged us to hold that Uwais, J.S.C. was undoubtedly in error when he stated at page 405 of the report as follows:-

"Finally, I think it is pertinent to point out that the provisions of subsection (4) of section 258 of the Constitution which has been added to that section by section 6 of the Constitution (Suspension and Modification) (Amendment) Decree 1985 (No.17 of 1985), is not applicable to this case, since the addition came into force on 27th August, 1985." 10 15

He contended that since section 258(4) was an existing law during the hearing of the appeal in this court, the Court ought to have applied the subsection even though the court was not addressed at all or not addressed fully on the application of the subsection and the observation of Uwais, J.S.C. that the section did not apply because it would amount to applying it retrospectively ought to be reversed as it had been given per incuriam. 20

Finally, the learned S.A.N. submitted that the report of Taylor's case also shows that this court was never fully addressed nor invited to consider the application of section 258(4). He pointed out that although seven Justices of the Supreme Court participated in the appeal, only Uwais, J.S.C. mentioned section 258(4) at all, and in doing so, relied on the decision in Kpema's case, which the appellants have submitted was wrongly decided. It is clear that none of the other Justices considered the provisions of subsection 258(4) at all. In the circumstances, the learned S.A.N. submitted that the decision was also given per incuriam, and ought not to be followed in the determination of this appeal. 25 30

The submission of Chief Ajayi S.A.N on the issue on reference of question of law under section 259(3) of the Constitution is short. Having pointed out the observations of the Justice of the Court of Appeal on his application for reference which clearly show that a substantial question of law had been raised, he contended that the Court of Appeal was bound to make reference since the appellant had asked for it. He urged us to allow the appeal. Inter alia, because the Court of Appeal had failed to make 35

reference. He referred to *African Newspapers Limited v. Federal Republic of Nigeria* (1985) 2 NWLR (Pt.6) at 152 showing that the procedure under section 259(3) was designed to save time and costs.

The response of Chief Solesi, learned counsel for the 1st respondent, was short. Referring to the dicta of Uwais in *Kpema* case, which was the decision of a full Court, he submitted that the Court of Appeal was bound to follow the decision as it in fact had done; that as in *Kpema* case, section 258(4) is inapplicable to the present case because the High Court judgment was delivered four years before the enactment of the subsection; that the subsection was not intended to be retrospective and hence the law applicable was the law in force when the judgment of the trial court was delivered. He relied on *Alao v. Akano* (1988) 1 NWLR (Pt.71) 431 at 433. He concluded that *Kpema* case was not decided per incuriam and the Court of Appeal was right in refusing to refer the question to this Court because the issue sought for reference was not a new one and had been decided by this Court sitting as a full court. He urged us to dismiss the appeal.

Ogunmodede, Esq. for the 3rd respondent associated himself with Chief Ajayi, S.A.N. that the applicable law is the existing law at the hearing of the appeal.

The reference issue may be shortly disposed of. Chief Ajayi S.A.N. for the respondents thereat requested the Court of Appeal to refer to the Supreme Court under section 259(3) the question, which the judgment of Kutigi, J.C.A as he was then, stated to be as follows:-

"Mr Ajayi, learned senior counsel for the 1st, 2nd and 3rd respondents while agreeing that this Court is bound by the Supreme Court decision in Kpema v. State (Supra) and that we are also bound by our own decision in Cafari v. Ajayi (Supra), was of the view that the constitutional point should be referred to the Supreme Court. He was also of the view that the Supreme Court may decide to have a second look at its decision in Kpema v. State (supra) in the light of the Privy Council decision in Isaacs v. Robertson (1984) 3 WLR 705, which according to him was not referred to in Kpema v. State (supra). I must state that most of the submissions of the learned senior advocate, Mr. Ajayi are stuff for consumption by the Supreme Court and not for an intermediate. Court of Appeal like we are. We cannot overrule the Supreme Court. We are bound by its decision, Isaacs v. Robertson notwithstanding."

The subsection reads:-

"259(3) Where any question as to the interpretation or application of this Constitution arises in any proceedings in the Court of Appeal and the court is of opinion that the question involves a substantial question of law, the court may, and shall if any party to the proceedings so requests, refer the question to the Supreme Court which shall give its decision upon the question and give such directions to the Court of appeal as it deems appropriate."

In *Adesanya v. President of the Federal Republic of Nigeria* (1981) 5 S.C. 112; (1981) 1 NSCC 146 and *African Newspaper Limited v. Federal Republic of Nigeria* (1985) 2 NWLR (Pt.6) 137; (1985) 1 NSCC 405 it was established that where a substantial question of law is involved and a party request the Court of Appeal to refer the question to the Supreme Court, the Court of Appeal has a mandatory duty under the subsection to refer the question and failure to do so is an error of law.

It is clear from the subsection as was pointed out by Fatai-Williams, C.J.N. in *Adesanya v. President of the Federal Republic of Nigeria* the only question that can be referred to the Supreme Court under the subsection is any question as to the interpretation or application of the Constitution which involves a substantial question of law. In *Adesanya* case, question of locus standi was involved which required the interpretation of sections 6(6)(b), 141(1), 236 and 277(1) of the Constitution and the question in the *African Newspaper* case related to the jurisdiction of the Federal High Court which raised the issue of the interpretation of sections 230, 231 and 236 of the Constitution. It cannot be doubted that the question as to the interpretation and application of the provisions of the Constitution arose in the proceedings of both cases.

On the contrary, in the present case the substance of the question which Chief Ajayi asked the Court of Appeal to make reference, did not raise any question as to the interpretation or application of the Constitution. The question was concerned with the rule of practice of the Court relating to stare decisis and departure from the rule. In *Odi & Anor. v. Osafire & Anor* (1985) 1 NWLR (Pt.1) 17, 1 NSCC 14 at 41. I pointed out that the Constitution has not conferred on the Supreme Court jurisdiction or the discretion to depart from its previous decision. The rule of law relating to departure was developed through the juris-prudential evolution of stare decisis.

For the foregoing reasons, the question for reference was not a constitutional question within the provisions of section 259(3) and the Court of Appeal was right in refusing to refer it to the Supreme Court, though not

because of the reasons it had stated but for the reasons stated herein.

The main issue in the appeal may now be examined, which is whether a proper case has been made out to enable, the Court to depart from its previous decisions in Kpema and Taylor.

Firstly, I consider it pertinent to indicate the significance of the difference between the application of substantive law to a cause of action and procedural law in the prosecution of the case, whether at first instance or on appeal. It is trite law that the substantive law existing at the time a cause of action arises governs the determination of the action and the rights and obligations of parties must be determined in accordance with the substantive law when the cause of action arises. A change of law after the cause of action has arisen will not affect accrued rights and obligation unless the change is made retrospective: Attorney-General of Lagos State v. Dosunmu (1989) 2NWLR (Pt. 111) 522; Alao v. Akano (1988) 1NWLR (Pt. 71) 431 and Uwaifo v. Attorney-General of Bendel State (1982) 75 C. 124.

On the other hand, procedural law existing at the time of the hearing of a case, whether at the trial or on appeal, applies to the prosecution and defence of the case. It does not matter whether the procedural law comes into force before or after the cause of action arises or has arisen and whether before or after an appeal is filed or has been filed: Attorney-General v. Vernazza (1960) A.C. 965 at 975 and Maxwell on Interpretation of Statutes, Eleventh Edition p. 216.

Now, section 258(1) of the Constitution is "merely procedural and does not belong to the area of substantive law" per Irikefe, J.S.C. in Ifezue v. Mbadugha (supra) at page 82 of the report and at page 118 of the same report, Obaseki, J.S.C. in dealing with the subsection observed thus:-

"In the procedural law or adjectival law including the rules of court, the law or rule normally fixes times for the doing of an act or the taking of a step in the proceedings."

It follows that since section 258(4) is subordinate to and merely qualifies section 258(1), section 258(4) is also procedural. Consequently, the subsection applies to all appeals pending in the Court of Appeal and in this court on 27th August, 1985 when it came into force and on all the appeals that have been filed thereafter.

Upon the premise, the decisions in Kpema and Taylor may now be considered. The facts in Kpema may be summarised: he was convicted of culpable homicide and was sentenced to death on 5th April, 1982 by the High Court of Gongola State. The judgment was given after three months of the conclusion of final addresses contrary to section 258(1). At the time of his conviction, under section 25 of the Federal Court of Appeal Act

1976, he had ninety days within which to appeal and the period could not be extended in conviction involving death sentence. On 19th March, 1983, he filed a notice of appeal which was out of time and on 26th March 1985, he filed an application for extension of time within which to appeal to the Court of Appeal. Before then, section 25 had been amended by the Federal Court of Appeal (Amendment) Act 1982 which enable the Court of Appeal 5 to extend time in capital cases. In its ruling on 27th March, 1985 on the application for extension of time the Court of Appeal was unable to extend the time because the amendment to the law came into force on 15th July, 1982 after the right of appeal had expired and it struck out the appeal. On further appeal, this Court held that the Court of Appeal erred in law in its failure to apply the amendment, which is procedural, and thereby upheld a void conviction. The conclusion of Uwais, J.S.C, on the issue of the appli- 10 cation of the amendment, to which the other six members of the Panel agreed, in his lead judgment is:-

"By the provisions of section 6 of the Federal Court of Appeal (15 Amendment) Act 1982 the provisions of section 25 subsection (4) of the Federal Court of Appeal Act 1976 were amended by the deletion of the words "except in the case of a conviction involving the sentence of death," The amendment took effect from 15th July, 1982 and it was meant to affect the jurisdiction and the 20 procedure in criminal cases in the Court of Appeal. There is nothing in the provisions of the 1982 Act which suggests that no extension of time could be granted in respect of cases with death sentence whose time of appeal, viz 90 days, expired by 14th July, 1982, as is the case with the present appeal. I am unable therefore 25 to understand the reason why the learned Justices of the Court of Appeal came to the conclusion that they could not grant the appellant's application for extension of time."

Uwais J.S.C. then proceeded to answer the other question which had arisen and canvassed. It was: is there a competent appeal before us 30 (the Panel of the Supreme Court that decided that appeal)? He answered the question in the affirmative and before allowing the appeal, as the conviction was a nullity, set it aside and ordered a retrial, he made the following observation:-

"Finally, I think it is pertinent to point out that the provisions of 35 subsection (4) of section 258 of the Constitution which has been added to that section by section 6 of the Constitution (Suspension and Modification) (Amendment) Decree 1985 (No.17 of 1985) is not applicable to this case, since the addition came into force on 27th August, 1985:'

Expressing his view on the application of the amendment to the appeal, Karibi-Whyte, J.S.C. stated at page 414 as follows:-

'Otherwise it will offend our sense of justice to allow the appellant to go scot free merely because of the contravention of the Constitution relating to the period prescribed for the delivery of judgment. It is for this reason
 5 *that the amendment to section 258(1) of the Constitution 1979 by s. 6 of the Constitution (Suspension and Modification) (Amendment) Decree No. 17 of 1985 which renders judgment delivered in contravention of s. 258(1) a nullity only where such contravention results in a miscarriage of justice, which is not applicable to this case is most welcome. If the amendment*
 10 *had applied to this case there would not have been a miscarriage of justice.*

It is transparent from the report of the case that the only issue decided by the Court of Appeal was the application of the amendment of the Act and that Court ruled the amendment inapplicable because it was made after the time to appeal had expired. This Court held that the amendment
 15 of the Act being procedural law existing at the time of the hearing of the application in the Court of Appeal that court should have extended the time as the conviction was a nullity. The constitutional questions on sections 258(1), 258(4) were not canvassed at all in the Court of Appeal.

One may summarise that except the issue on whether there was a
 20 competent appeal before the Supreme Court, which is not relevant to this appeal, the only ratio decidendi in Kpema case is that procedural law existing during the hearing of an appeal by the Court of Appeal applies to the case even if the time for filing the appeal in that Court had expired when the procedural law was made. This ratio, in my view, is in accord with the
 25 principle of operation of procedural law and it cannot be faulted.

The report also showed that no issue was raised nor canvassed in the Supreme Court on section 258(4) at the hearing of the appeal. It does not appear in the report that the observation of Uwais, J.S.C on the inapplicability of the subsection 258(4), with which all the other Justices agreed
 30 and that of Karibi Whyte, J.S.C., were made after having heard counsel on the matter. It is therefore an obiter dictum. In my view, to say that the subsection would not apply because it came into force on 27th August, 1985 that is, after the time within which Kpema could appeal had expired, contradicts the very ratio of the case, which is, that the amendment of the
 35 Act was applicable to the appeal in that case though the amendment was made after the time to appeal had expired. Certainly, having regard to the said ratio, the subsection ought to have applied to the case. The obiter dictum was therefore made per incuriam.

Taylor case was decided by this Court sitting as a full court. Irikefe

C.J.N delivered the lead judgment which declared the judgment of the trial court. Given on 28th March, 1980, a nullity because it contravened section 258(1) and the case was remitted for a retrial. Each of the six other Justices of the Panel delivered independent judgments arriving at the same conclusion as Irikefe C.J.N. that the judgment was null and void for non-compliance with section 258(1). 5

The judgment of Irikefe C.N.J. and of the four other justices made no reference to section 258(4). However, Obaseki, J.S.C, did at page 140 of the report where he observed as follows:-

"The judgment delivered by Ademola Johnson J. on the 28th day of March, 1980 was therefore a nullity. Being a nullity, the appeal from the judgment to the Court of Appeal together with the judgment of the Court of Appeal dated 24/4/84 are also all nullities. They are not saved by Decree No.17 of 1985 Constitution (Suspension & Modification) (Amendment) Decree 1985." (Emphasis mine). 15

The learned Justice did not state the reason why the judgments were not saved by the Amendment Decree. In my view, the reason is very crucial to the determination of the present appeal.

In his observation on the subsection, Uwais, J.S.C. stated the reason for its inapplicability at page 141 thus:- 20

"The provisions of section 258(4) of the Constitution which came into force on 27th August, 1985 has no application to this case since it has no retrospective effect - see Kpema v. State (1986) 1 NWLR 396"

The report does not show that the issue on the subsection was taken 25 and canvassed during the hearing of the appeal. It follows that the observations of Obaseki J.S.C. and Uwais J.S.C, were also obiter dicta, one made without stating any reason and the other based on Kpema dictum which I have held to be made per incuriam. Accordingly, the observations on the subsection were not the decision of the Court but were mere obiter dicta 30 stated by two Justices of the full Court consisting of seven Justices. The decision of the majority, Irikefe C.J.N. and the four Justices was based on Ifezue v. Mbadugha wherein this Court firmly laid down that any judgment which had offended section 258(1) was a nullity. This can only be the ratio decidendi of Taylor case since the majority did not make any pronouncement on subsection 258(4). 35

Accordingly, in my view, neither Kpema nor Taylor can be regarded as an authority for the proposition that section 258(4) of the Constitution did not apply to an appeal against the judgment delivered by a trial court

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before the enactment of the subsection but the subsection was in force during the hearing of the appeal. As I have shown, the observations on the subsection in Kpema and Taylor were obiter dicta and as such they have no binding force of law: *Flower v. Iron & Coal* (1934) 2 K.B.132 at 154.

If follows from the foregoing that the Court of Appeal erred in law in holding that it was bound by the obiter dicta on the subsection stated in Kpema and Taylor cases and for that reason refused to determine the issue on the subsection 258(4). It is pertinent to point out that I committed the same error as the Court of Appeal in my judgment in *Ojokolobo & Ors. v. Alamu* (1987) 2 N.S.CC 991 at 1007 wherein I stated "I am satisfied the decisions in Kpema and Taylor cases were reached per incuriam ". I have now perused the several judgments in the two cases, and I have discovered that the so called "decisions" were not the decisions of the ourt but were only obiter dicta of the minority Justices of the Court. I shall in due course deal with *Ojokolobo* case. It is clear that the Court did not make any decision on the application of subsection 258(4) in Kpema and Taylor to warrant departure from either case.

Now, the matter does not stop there. The appeal was first heard on the 14th of June, 1993 and it was reserved for judgment on the 10th of September, 1993. During the interval, a member of the Panel discovered the decision of this Court in *Ojokolobo & Ors. v. Alamu & Anor* (1987) 3 NWLR (Pt. 61) 377: (1987) 2 N.S.C.C 991 wherein the Court had held that subsection 258(4) did not apply to judgments of the High Court delivered before 27th August, 1985 which was the date the subsection came into force. As the case was not canvassed by counsel at the hearing, the appeal was re-heard for the purpose.

In his submission at the re-hearing, Chief Ajayi referred to *Ojokolobo v. Alamu* (supra) and contended that the case was wrongly decided and the Court should depart from it. He submitted that section 258(4) was addressed to an appeal court exercising appellate jurisdiction and not to a Trial court. Furthermore, it was not a case of retrospective legislation in the strict sense but it was a directive to the court exercising appellate jurisdiction. Mr. Ogunmodede for the 3rd respondent associated himself with Chief Ajayi, S.A.N.

On the other hand, Chief Solesi for the 1st respondent contended that *Ojokolobo v. Alamu* was rightly decided and that the Court should not depart from it but ought to endorse and follow it.

In *Ojokolobo*, Karibi-Whyte, J.S.C. and myself disagreed with the decision of the majority that section 258(4) did not apply to cases decided by the trial courts before the subsection came into force. Both Karibi-Whyte, J.S.C and I concluded, though for different reasons though for different

reasons, that the subsection applied to all appeals irrespective of the dates the trial courts, had delivered judgments that became the subject matters of the appeal, that were to be heard by the Court when the provisions of the subsection was in force.

Indeed, the contention of Chief Ajayi. S.A.N. that the provision of section 258(4) was a directive to the appellate courts reinforces my conviction that the decision of the majority in Ojokolobo case was erroneous. It may be case was erroneous. It may be observed that in his interpretation of the subsection. Nnamani, J.S.C. picked the phrases "shall not be set aside" and "or treated as a nullity" and concluded that the phrases implied futurity. The learned Justice stated at p.1000 of the report:-

"It is cardinal rule of the construction of statutes that words should be given their natural meaning. To do this one has to look at the words of the statute carefully. Having done that, the use in subsection 4 of Section 258 of the Words shall set aside referred to earlier contemplates something in future, that is judgments delivered after the commencement date of the amendment which is 27th August, 1995. It had to refer to judgments delivered after that date for the section continues with the words "or treated as a nullity" which cannot apply to judgments delivered before 27/8/85 which, as I shall show hereunder, were already a nullity if they violated the provisions of Section 258(1). Furthermore, the condition in Section 258(4) which requires miscarriage of justice is a new ground going beyond the nullity stipulated by Section 258(1)."

With all due respect to my learned brother, he did not construe the subsection as a whole. In my view, proper construction of the subsection would show the meaning of the word shall therein is peremptory. For clarity, the provision of the subsection may be reiterated, it reads:-

"(4) The decision of a court shall not be set aside or treated as a nullity solely on the ground of non-compliance with the provisions of this section unless the court exercising jurisdiction by way of appeal from or review of that decision is satisfied that the party complaining of such non-compliance has suffered a miscarriage of justice by reason thereof." (Italics mine)

Peremptorily, the subsection may be rewritten thus:-

"(4) The Court exercising jurisdiction by way of appeal from or review of the decision of court. shall not set aside or treat as a nullity the decision solely on the ground of non-compliance with the provisions of this section unless the court is satisfied that the party complaining of such non-compliance has suffered a miscarriage of justice by reason thereof."

Reading and interpreting the subsection as a whole, one will see that the words "*shall not be set aside*" or (*shall not be*) "*treated as a nullity*" are words of injunction prohibiting the appeal court from following the decisions of this court in Ifezue case subject to the exception stated therein. The words signify prohibition and not futurity. By implication, the prohibition is
 5 at the time of "*exercising jurisdiction by way of appeal or review of the decision*" by the appeal court. Certainly, the prohibition cannot be invoked on the date of the decision appealed against as the decision of the majority in Ojokolobo seems to suggest.

Therefore, the question for consideration is whether this court should
 10 depart from the decision in Ojokolobo. I may reiterate my observations on the question in Odi v. Osafire (1985) 1 NWLR (Pt.1) 17 at page 47 - 48 where I stated:-

*"The first question for determination in the appeal is whether this court has power to depart from its previous decision
 15 on the same constitutional question. In other words, whether precedent or the rule of stare decisis is flexible in constitutional cases.*

*The practice of this court in non-constitutional cases has well been settled. Recognizing that precedent is an essential
 20 foundation upon which certainty of the law may be assured the court ordinarily adheres to the rule of stare decisis and does not readily depart from its previous decision. However, where the court is satisfied that its previous decision is erroneous and was reached per incuriam and to perpetuate the error, by following such
 25 decision, will result in considerable injustice then the court will depart from such decision or overrule it. Thus in Johnson v. Lawanson (1971) 1 All NLR 56 the court held that it would not perpetuate an erroneous decision which was reached per incuriam and which, if followed, would inflict hardship and injustice upon
 30 generations in the future or cause temporary disturbance of rights acquired under such a decision. Accordingly, the court overruled Odeneye v. Savage (1964) NMLR 115 and Williams v. Akinwunmi (1966) 1 All NLR 115 which were considered to be erroneous.*

*In Bucknor-Maclean v. Inlaks Ltd. (1980) 8 - 11 S.C. 1
 35 the court over ruled Shell B.P. v. Jammal Engineering (1974) 1 All NLR 543 and Owumi v. P.Z. (1974) 1 All NLR (Pt.2) 107 because following the two previous decisions will perpetuate considerable injustice. Again in Surakatu v. Nigerian Housing Development Society (1981) 4 S.C. 26; Moses v. Ogunlabi (1975) 4 S.C. 81*

and Adis Ababa v. Adeyemi (1976) 12 S.C. 51 were overruled because both were decided per incuriam and, to follow either, will continue to fetter the discretion which the Court of Appeal undoubtedly has to remedy any non-compliance with its Rules if it is in the interest of justice to do so. Furthermore, the decision in Odufunade v. Rossek (1962) 1 All NLR 98 followed in Mobil Oil v. Coker (1975) 3 S.C. 175 was overruled by Oduola & Ors v. Nabham & Ors. (1981) 5 S.C.197 because the previous decision curtails the right of appeal under section 220(1)(a) of the constitution of the Federal Republic of Nigeria, 1979 and it will perpetuate a denial of justice and of constitutional right to follow it. 5 10

It appears from the perusal of the foregoing cases that the attitude of this court on the question at issue may be stated thus: that the court will not adhere to the rule of stare decisis but will depart from its previous decision if such decision is inconsistent with the provisions of the constitution or if it is erroneously reached per incuriam and will, if followed, perpetuate hardship and considerable injustice or it will cause temporary disturbance of rights acquired under it or will continue to fetter the exercise of judicial discretion of a court. It may be emphasised that the court has not laid down a hard and fast rule exhausting the area within which to warrant a departure from previous decision. Each case must be decided on its special facts and circumstances with a view to avoiding perpetuating injustice which, in my view, is the paramount determinant factor in this respect. 15 20

In my judgment in Ojokolobo, I did not depart from what I then thought was the decision of the court in Kpema and Taylor for the following reason:- 25

"In Odi & Anor v. Osafire (1985) 1 NWLR 17 this court exhaustively considered the significance of adhering to the rule of stare decisis in constitutional cases and set out the circumstances on which the court may depart from its previous decision. I do not intend to reiterate the circumstances herein. It is sufficient to state that the court may depart from the previous decision if it is satisfied that the previous decision is erroneous and was reached per incuriam and that adhering to the previous decision will perpetuate hardship or injustice. I am satisfied the decisions in Kpema and Taylor cases were reached per incuriam but as I pointed out in Odi v. Osafire (supra) such decisions will not perpetuate hardship or injustice. Accordingly, one of the circumstances, i.e. perpetuating hardship or injustice that will warrant the court to depart from the decisions in Kpema and Taylor cases has not been 30 35

satisfied."

On reflection, particularly as the obiter dicta in Kpema and Taylor were not decisions of the court and my emphasis in the preceding paragraph that:

5 *"...the court has not laid down a hard and fast rule exhausting the area within which to warrant a departure from a previous decision. Each case must be decided on its special facts and circumstances with a view to avoiding perpetuating injustice which in my view, is the paramount determinant factor in this respect."*

I think in the circumstances of the present case on appeal, my view on perpetuating hardship or injustice needs re-examination.

10 The suit in this appeal was filed in the High Court in September, 1975. It has been sub judice without final determination for the last 18 years. If this court follows the erroneous decision in Ojokolobo, the suit will have to be remitted to the High Court for trial de novo. If all the essential witnesses are available at the retrial the suit may take another 18 years for its final
15 determination. In that event, although justice may in the end be done, there will be inordinate delay in reaching justice. However, if some of the essential witnesses will not be available for the retrial by reason of death or other cause, one of the parties may not be able to prove his case and consequently, will suffer injustice.

20 On the other hand, if the court departs from its previous decision in Ojokolobo, the case will be remitted to the Court of Appeal for determination of the issues raised thereat including whether non-compliance with section subsection 4 occasioned miscarriage of justice. Such a course will minimise delay in the administration of justice and will not cause any in-
25 justice to any of the parties.

The adage *"justice delayed is justice denied"* has not been universally recognised and, I will add that, *"inordinate delay in doing justice is a grave denial of justice."*

It follows that this court has two options. The first option is to ad-
30 here to stare decisis and thereby continue causing inordinate delay in the administration of justice or causing denial of justice. The second option is to depart from the previous decision of this court in Ojokolobo and thereby avoid causing inordinate delay or denial of justice. The court has the discretion to use one of the two options. In my view, it will be wrong exercise of
35 discretion to follow the erroneous previous decision of this court in Ojokolobo. I will depart from it. I hold that the provisions of section 258(4) was applicable to any appeal that came for hearing in an appeal court after the provision of the subsection had come into force irrespective of whether or not the judgment on appeal was delivered before the enactment of the

subsection. For these reasons, my answer to the issue number one is in the affirmative. My learned brother, Karibi-Whyte, J.S.C. was right to have applied the subsection in his determination of Ojokolobo case.

Accordingly, the Court of Appeal erred in law in holding that it was bound by the dicta in Kpema and Taylor cases and for that reason refused to determine the issue on section 258(4). The appeal succeeds and the decision of the Court of Appeal is set aside. The case is remitted to the Court of Appeal for hearing on all the other issues raised thereat. One thousand naira only (N 1000.00) costs to the appellants against the 1st respondent.

10

UWAIS JSC

I have had the opportunity of reading in draft the judgment read by my learned brother Ogundare, J.S.C. Subject to what I have to say hereunder. I entirely agree with the judgment. Two issues were formulated in the appellants' brief of argument. They read as follows-

"1. Was the Court of Appeal in November 1986 bound to apply the provisions of section 258(4) of the Constitution of the Federal Republic of Nigeria, 1979 as amended by Decree No. 17 of 1985 to a decision given by the High Court in February, 1981?"

20

2. Did the issue of whether section 258(4) of the Constitution of the Federal Republic of Nigeria 1979 as amended by Decree No. 17 of 1985 applied to the judgment herein raise a substantial question of law which ought to have been referred to the Supreme Court under the provisions of section 259 of the Constitution?"

25

I wish to start first with the latter issue, that is issue No.2, in respect of which I adopt, in its entirety, the consideration given to it by my learned brother the Chief Justice of Nigeria in his judgment; the draft of which I have had the privilege of reading in advance. Suffice it to say that the question which the appellant requested the Court of Appeal to refer to this Court under the provisions of Section 259 subsection (3) of the 1979 Constitution was not a constitutional question on substantial law. It, therefore, did not qualify for a reference by the Court of Appeal to this Court - see *Adesanya v. President of the Federal Republic of Nigeria & Anor.* (1981) 5 S.C. 112 at pp. 122-123 and *African Newspapers v. Nigeria*, (1985) 2 NWLR (Pt.6) 137 at p. 149.

I will not turn to the first issue for determination. It is significant to observe from the onset that the issue is as to whether in November, 1986 (and not today or in 1993) the Court of Appeal was bound to apply the

provisions of section 258 subsection (4) of the 1979 Constitution. It is necessary to emphasize this point in view of the opinion expressed or to be expressed by my learned brother on whether the decision in the case of *Ojokolobo & Ors. v. Alamu & Anor.* (1987) 3 NWLR (Pt.61) 377; (1987) 2 N.S.C.C. 991 should be departed from by this Court.

5 In arguing the issue Chief Ajayi, learned Senior Advocate, for the appellants, touched on the point whether a judgment that is void can be treated as such by a party to the case in the absence of a declaration to that effect by an appeal court. In my view, the point is not relevant to the issue raised in this appeal. It does not, in my judgment, call for the attention being paid to it. Since any opinion expressed on it can only pass as an obiter dictum.

The main thrust of the argument of Chief Ajayi which is relevant to the issue on hand is against the opinion which I expressed in the cases of *Kpema v. The State*, (1986) 1 NWLR. (Pt.17) 396 at p. 405 and *Taylor v. Methodist Church* (1986) 4 NWLR (Pt.34) 136 at p.141. The remark I made in the former case on which the submissions of learned Senior Advocate are focused reads -

20 *"Finally, I think it is pertinent to point out that the provisions subsection (4) of the Constitution which has been added to that section by section 6 of the Constitution (Suspension and Modification) Decree, 1985 (No.17 of 1985), is not applicable to this case, since the addition came into force on 27th August, 1985."*

The criticism of Chief Ajayi is that only my judgment in the case dealt with the effect of subsection (4) of section 258. Although each of the 25 remaining six Justices on the panel that heard the case added their comments to the lead judgment, the panel was either not addressed at all, or not addressed fully on the issue. He, therefore, submitted that the statement to the effect that the judgment of the High Court was null and void ought to be re-considered and disapproved, and that the finding that section 258 subsection (4) did not apply because it would amount to applying 30 it "retrospectively" ought to be reversed as having been given per incuriam.

On Taylor's case (supra) Chief Ayayi contended that the Supreme Court was not fully addressed or invited to consider whether the Court itself, being the court exercising jurisdiction by way of appeal, was bound to 35 apply the provisions of section 258 subsection (4) as an existing law during the hearing of appeals. In the cases of *Kpema* and *Taylor*, this Court he submitted, should have applied the subsection even though it (the Court) was not addressed at all or not addressed fully on the application of the subsection.

Mr. Ogunmodede, learned counsel for the 3rd respondent associated himself with the argument and submissions made by Chief Ajayi on the basis that section 258 subsection (4) being an existing law, at the time of hearing the appeals on Kpema and Taylor, was the applicable law.

In his reply, Chief Solesi learned counsel for the 1st respondent submitted that the Court of Appeal was bound to follow the decision of the Supreme Court in Kpema's case as it had in fact done. He contended that section 258 subsection (4) is inapplicable to the present case since the judgment of the trial court was delivered 4 year prior to the enactment of subsection (4) of section 258, He argued that the subsection was not intended to have retrospective effect and as such, the law which applied was the law that was in force at the time the judgment of the High Court was delivered,

It is pertinent to point out some flaws in the submissions made by Chief Ajayi before considering the argument that the decisions in Kpema and Taylor were per incuriam. Learned Senior Advocate contended that it was only my judgment in Kpema's case that touched on or made reference to the provisions of section 258 subsection (4). This is incorrect because my learned brother Karibi-whyte, J.S.C. remarked as follows on page 414 B-C thereof -

"Otherwise it will offend our sense of justice to allow the appellant to go scot free merely because of the contravention of the Constitution relating to the period prescribed for the delivery of judgment. It is for this reason that the amendment to section 258(1) of the Constitution 1979, by Section 6 of the Constitution (Suspension and Modification) (Amendment) Decree No. 17 of 1985 which renders judgment delivered in contravention of section 258 (1) a nullity only where such contravention results in miscarriage of justice, which is not applicable to this case is most welcome. If the amendment had applied to this case there would not have been a miscarriage of justice..... " (emphasis mine).

It was further argued by learned Senior Advocate that "the panel was either not addressed at all, or not addressed fully on the issue." *This contention was stated not in a definite but speculative term. Granted that the question whether section 258(4) was applicable was not part of the ground of appeal in the case. It was, whoever, validly raised in the course of the argument in the case. This is confirmed by the remark by Irikefe, CJN in his concurring judgment on p. 406 B-C where he stated thus -*

Other issues emerged in the course of argument in this appeal which are not directly relevant for its determination. They are fully dealt with in the lead Judgment just read by my learned brother Uwais, J.S.C. I am in

full agreement with the reasoning and conclusions of my learned brother aforesaid." (Emphasis mine).

In respect of Taylor's case, Chief Ajayi's contention was that the Supreme Court was never fully addressed or invited to consider the effect of section 258 subsection (4). Again, he stated, *"only Uwais, J.S.C. of the 7 Justices that heard the case made reference to section 258 subsection (4)"*. This submission is inaccurate for Obaseki, J.S.C., who was a member of the full court remarked as follows on p. 140C thereof -

"The judgment delivered by Ademola Johnson, J, on the 28th day of March, 1980 was therefore a nullity. Being a nullity, the appeal from the 10 judgment to the Court of Appeal together with the judgment of the Court of Appeal dated 24/4/84 are all nullities.

They are not saved by Decree No. 17 of /985 Constitution" (Suspension & Modification) (Amendment) Decree, 1985, (Emphasis mine).

It is to be further observed that the judgment in Taylor's case was 15 given extempore. It was written on the bench immediately after addresses by counsel were concluded. There was no lead judgment in the case. Each Justice on the panel simply expressed his opinion with Aniagolu, Kawu and Oputa, J. J.S.C. agreeing merely with the order as to costs contained in the judgment of Irikefe. CJN. Admittedly, on the face of the Law Report, there 20 is nothing to show whether the issue of the applicability of section 258 (1) retrospectively was raised. However, the minutes in my record book show that it was Mr. L. V. Davis who appeared in that case for the respondent that raised the issue. This is what he said -

"The provisions of section 258 subsection (1) will not apply retro- 25 spectively. The Court cannot assume that this case was caught by the provisions of the Constitution since the record does not show that the case was further adjourned for judgment after the Constitution came into being."

I now return to the main issue which is whether my dicta in the cases 30 of Kpema and Taylor, that the provisions of Section 258 subsection (4) did not have retrospective effect, were made per incuriam as submitted by Chief Ajayi and Mr. Ogunmodede. The words "per incuriam" have been defined in *Morelle Ltd v. Wakeling*. (1955) 1 All E.R. 708 C.A. per Evershed, M.R. at p.718B to mean thus-

35 *"As a general rule the only cases in which decisions should be held to have been per incuriam are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned: so that in such cases some part of the decision or some step in the reasoning on which it is based is found, on that ac-*

count, to be demonstrably wrong. This definition is not necessarily exhaustive, but cases not strictly within it which can properly be held to have been decided per incuriam must, in our judgment, consistently with stare decisis rule which is an essential feature of our law, be, in the language of Lord Greene, M.R., of the rarest occurrence." (Emphasis mine)

A similar definition of a decision per incuriam was earlier given in 5 the case of Huddersfield Police Authority v. Watson, (1947) 2 All E.R. 193 at p. 196A per Lord Goddard, C.J, who stated as follows-

"What is meant by giving a decision per incuriam is giving a decision when a case or a statute has not been brought to the attention of the court and they have given the decision in ignorance or forgetfulness of the exist- 10 ence of that case or that statute."

In the present case neither Chief Ajayi nor Mr. Ogunmodede has pointed out any decision binding on the Supreme Court or statute which had been ignored or been forgotten at the time of the decisions in the cases 15 of Kperna and Taylor. Their reason for submitting that the decisions were reached per incuriam is no more than that it was either I alone, on the respective panels which heard the cases, that referred to the retroactive effect of section 258 subsection (4) or that there was no full argument before us on the applicability of the subsection. I have already explained that I was not alone in the panel to have made the reference to the section. 20 As seen from the English authorities cited above; though not binding on this Court, but which I find to be very persuasive and to have been followed in some Nigerian cases, such as Elufioye v. Halilu (1990) 2 NWLR. 1 at pp. 18-19 and Bucknor-Maclean & Anor v. Inlaks Ltd., (1980) 8-9 S.C. 1; the reasons given by counsel to overrule the cases of Kperma and Taylor do not 25 amount to the decisions being reached per incuriam. A decision is not regarded as given per incuriam simply because the court had not the benefit of the best argument - See Bryers v. Canadian Pacific Steamships Ltd., (1956) 3 All E.R. 559 at p. 569. I, therefore, hold that on the basis of the submissions made by Chief Ajayi and Mr. Ogunmodede, there is nothing 30 whatsoever to make me come to the conclusion that the decisions were given per incuriam.

My learned brother the Chief Justice of Nigeria has gone further in his judgment, as he did in Ojokolobo's case (supra), to hold that the decisions in Kperma and Taylor were obiter dicta and that they have, as such, 35 no binding effect. I entirely agree that an obiter dictum of this Court is not binding on the Court or indeed on the lower courts - see American International Insurance Co. v. Ceekay Traders Ltd., (1981) 5 SC. 81 at p. 110.

Be that as it may, the question is: were the decisions in Kperma and

Taylor obiter dicta? It was held in *Flower v. EBBW Vale, Steel, Iron & Coal Co.*, (1934) 2 K.B. 132 C.A. at p. 154 per Talbot J.-

"There is no question that the three learned judges who decided that case stated in emphatic and unambiguous language that contributory negligence is a good defence to an action of this class: but it is said that that expression of opinion can be disregarded in this Court because it was not necessary for the purpose of deciding that case that that opinion should be expressed. I do not agree, any more than the other members of this court that that expression of opinion was in fact unnecessary, and it appears to me that it is not legitimate to say that it should be disregarded. It is of course perfectly familiar doctrine that obiter dicta, though they may have great weight as such, are non conclusive authority. Obiter dicta in this context means what the words literally signify - statements by the way." (Emphasis mine)

However, the issue whether the provisions of section 258 subsection (4) had retrospective effect was, as shown above, raised in both the cases of *Kpema* and *Taylor* and some argument advanced by counsel. It may well be that both cases could have been decided without the allusion to section 258 subsection (4), which I very much doubt since at the lime of hearing the cases and delivering the judgments, the provisions of section 258 subsection (4) had already come into force, and hence could not have been rightly ignored. (For if the provisions of the subsection had been ignored the decisions in those cases would have been rendered *per incuriam*), should the cases then be overruled on that account? With respect, I do not think so, because that will be a fruitless exercise as the obiter dicta in the cases had since the decision in *Ojokolobo v. Alamu*, (1987) 3 NWLR (Pt.61) 377; (1987) 2 N.S.C.C. 991, acquired the force of *ratio decidendi*. The arguments which have been raised in the present appeal (and indeed more) were raised in *Ojokolobo's* case (*supra*) where this Court, in a full panel, by majority of 5 to 2 (*Obaseki. Aniagolu, Nnamani, Kazeem and Belgore, J.* J.S.C. with *Bello CJN* and *Karibi-Whyte, J.S.C* dissenting) affirmed the obiter dicta in *Kpema* and *Taylor*. I am supported in this respect by the statement of *Rupert Cross* in his work - *Precedent in English Law*. 3rd Edition, where he said, on p.47 thereof, on the subject of *Ratio Decidendi* and *Obiter Dictum* -

"It seems to follow that, whatever a judge may say, expressly or by implication, concerning the proposition of law on which he bases his decision, that proposition must be construed in the light at the existing case-law at the time when the proposition falls to be considered by a later judge or by anyone else who may be concerned with the question. Further support

to this view may be obtained from the words of Lord Tenterden in Wells v. Hopwood, (1982) 3 B & Ad. 20 at p. 34)... " (Emphasis mine).

The attention of all the counsel in the present case was drawn, in the course of further addresses by them, to the decision in Ojokolobo's case and they were asked whether this Court should now depart from that decision. With utmost respect, I do not think that we were right in asking counsel to address us on whether we should depart from the decision in the case because that is not the appellant's contention in their issue no. 1, I am not to be understood as saying that we had no power to raise the point. Far from it. It is indeed within our inherent powers and the provisions of Order 8 rule 2 (6) of the Supreme Court Rules, 1985 to do so. However, it is my view that the question so raised should have bearing on the issues before the Court and should not lead to an academic exercise. I think, after due consideration, that the question which we should have asked was simply: What did counsel think about their earlier submissions vis-a-vis the later decision of this Court in Ojokolobo's case? The appellants' complaint is as formulated in their brief of argument as issue No.1, which I feel obliged to reiterate here. It is -

"Was the court of Appeal in November, 1986 bound to apply the provisions of section 258(4) of the Constitution of the Federal Republic of Nigeria as amended by Decree No.17 of 1985 to a decision given by the High Court in February, 1981?"

The judgment in Kpema's case was given on the 7th day of February, 1986 while the one in Taylor's case was delivered on the 1st day of April, 1986. Ojokolobo's case was decided on the 9th day of July, 1987. Subsection (4) of section 258 of the 1979 Constitution was added to the original provisions of the section by the Constitution (Suspension and Modification) Decree No.17 of 1985 (now the repealed Cap. 64 of the Laws of the Federation of Nigeria, 1990) which came into force on 27th August, 1985. The subsection reads -

"(4) The decision of a court shall not be set aside or treated as a nullity solely on the ground of non-compliance with the provisions of this section unless the court exercising jurisdiction by way of appeal from or review of that decision is satisfied that the party complaining of such non-compliance has suffered a miscarriage of justice by reason thereof."

The decision of the Court of Appeal (Mohammed, Kutigi, J.C.A., as they were then, and Kolawole, J.C.A.) in the present case was given on the 18th day of November, 1986, so in effect the issue formulated by the appellants is: Whether the Court of Appeal as at that date (i.e. 18/11/86) was bound to apply the provisions of section 258 subsection (4) to the decision

of Oluwa J. in the High Court which was delivered out of time on the 16th day of February, 1981.

The question whether the decisions in the cases of Kpema and Taylor were binding on the Court of Appeal depends on how one interprets those decisions. If the decisions were considered to be obiter dicta which is not the appellants' case, then they were not binding on the Court of Appeal. If, on the other hand, they were considered to be per incuriam, which is the case of the appellants, then, they were binding in accordance with the rules of stare decisis. In *Emerah & Sons Ltd., v. A.G of Plateau State.* (1990) 4 NWLR (Pt.147) 788 at p. 802 Adio, J.C.A. (as he then was) made the following observation -

"There is a clear distinction between a judgment given per incuriam and a decision which is obiter dictum. In one there is an error in the judgment whereas in the other the decision given was not necessary for the determination of the issues involved in the case before the court. What the learned trial judge did in the American International Insurance Company's case (supra) which related to a decision which was obiter does not affect the principle earlier stated in this judgment that a lower court cannot refuse to be bound by decisions of higher courts even if those decisions were reached per incuriam." (Emphasis mine)

Again in *Jalo Tsamiya v. Bauchi N.A* (1956) SCNLR 220; 1957 N.R.N.L.R. 73 at pp 82-83 the Federal Supreme Court, per Jibowu Ag. F.C.J., stated as follows-

"In the judgments in Fagoji's case we observe that the learned Chief Justice and the members of the Court decided that they had acted per incuriam in their previous decisions in homicide cases from Native Courts, particularly in this case of Jalo Tsamiya. That was not all, they refused to follow the decision of the West African Court of Appeal in Gishiwa Gana v. Bornu N.A.; 14 W.A.C.A. 587 because they considered that the decision was reached per incuriam.

We do not quarrel with the High Court's decision not to follow their own previous decisions, if they felt that the decisions had been reached per incuriam; but there is no precedent for their refusing to follow a previous decision of the West African Court of Appeal on the subject matter of the inquiry because they considered that that decision had been reached per incuriam.

With respect to the learned Chief Justice and other members of the Court, it must be pointed out that it is not for an inferior Court to say that a decision of the higher Court was reached per incuriam; that is a privilege of the higher Court if, after reconsidering its former decision it is satisfied

that the previous decision had been reached per incuriam.

When the High Court found itself in such a position that it could not follow a previous decision of a higher Court by which, according to the comity of Courts, they are bound, the proper course, it appears was for the High Court to have reserved questions of law under section 20 of the Federal Supreme Court (Appeals) Ordinance for the consideration of the Federal Supreme Court in order to give that Court... the opportunity of reconsidering previous decisions in the light of the questions reserved with a view to giving a considered ruling on the question of law raised on the issues involved."

I need to point out that Section 259 of the 1979 Constitution is similar, though with modification, to section 20 of the Federal Supreme Court (Appeals) Act which had since been repealed). See also Cassell & Co. Ltd, v. Broome (1972) A.C. 1027 at p. 1054 and Cardoso v. Daniel, (1986) 2 NWLR (Pt. 20) 1 at p. 23 per Aniagolu, J.S.C.

I have already held that the decisions in Kpema and Taylor were neither per incuriam not obiter dicta for the reasons already stated above. Therefore, they were binding on the Court of Appeal as was rightly held by Kutigi, J.C.A. (as he then was). Furthermore, there were decisions of the Court of Appeal, which were given earlier than the present case, where the Court itself had held that the provisions of section 258 subsection (4) had no retrospective effect on judgment given before the provisions came into force. Such judgments include Gafari v. Johnson (1986) 5 NWLR (Pt.39) 66 which was delivered on the 14th of July, 1986. It is settled law that a previous decision of any Division of the Court of Appeal is binding on all the Justices of that Court - Young v. Bristol Aeroplane Co. (1944) K.B 718.

The conclusion which I arrive at from the foregoing, is that the Court of Appeal was as at November, 1986 bound by the decisions in the cases of Kpema, Taylor and Gafari (supra) not to apply the provisions of section 258 subsection (4) of the 1979 Constitution with retrospective effect, that is to cases decided in the High Court before the 27th day of August, 1985. I will, therefore, answer issue number I, formulated by the appellants as a question, in the negative.

Ordinarily, the foregoing disposes of this appeal. However, as I earlier observed in this judgment, counsel were asked at the further hearing of the case, when I joined the panel, to address the Court on whether we should depart from our decision in Ojokolobo's case (supra). As I have already indicated that is, with utmost respect, a misdirection. There is no cause for us to be so addressed, however attractive that may be, since the appellants' case is as represented by their issues for determination of this

case. The position of the law as far as the interpretation of section 258 subsection (4) of the 1979 Constitution is concerned is as laid down in Ojokolobo's case. Anything said here which is contrary to or departs from that decision is merely obiter dictum and, therefore, can have no binding effect on this or any court for that matter. See *Tindall v. Wright*, (1922) 127 L.T. 149; 27 Cox c.c. 212 at p. 217.

In the light of the aforesaid, I have no desire to go into the argument whether we should depart from the decision in Ojokolobo's case.

In the result this appeal fails and I will dismiss it. The decision of the Court of Appeal is hereby affirmed with N1,000.00 costs to the 1st respondent against the appellants.

KARIBI-WHYTE JSC (Dissented):

The modification and amelioration of the provision of section 258(1) of the Constitution, 1979 by section 6 of the Constitution (Suspension and Modification) (Amendment) Decree No. 17 of 1985 by the addition of subsections (4) and (5) notwithstanding, it seems that the construction of the section is still not free from difficulties. This appeal suggests an interpretative approach not hitherto adopted in the construction of the provisions of the section.

The issue which appellant has raised before us, simply stated is whether a judgment delivered in contravention of section 258(1) of the 1979 Constitution is valid and remains so until set aside by the judgment of a competent Court. If this proposition is accepted, whether the Court of Appeal was not therefore bound to apply the law in force at the time the judgment came before it for review, namely sec. 258(4) of the Constitution.

So concisely stated the issue wears an aura of deceptive simplicity. A careful examination of the cases decided on the interpretation of the relevant provisions and construction of the words of the sections, and considering the nature of a legal act and the exercise of jurisdiction, render it evident that it is a task of no mean difficulty.

Although a considerable part of the facts are not *stricto sensu* material to the construction urged by the parties, it is useful to state them in the interest of completeness and clarity.

The Facts

Plaintiffs and the 3rd defendant who are brothers, were the registered owners of No.2 Pedro Street, and No. 41 Agarawu Street both in Lagos. They claim to be beneficial owners of the property in a loan transaction for 85,000 pounds with the 1st defendant in 1958. The 3rd defen-

dant executed a Deed of Legal Mortgage in respect of the above properties and others of his own as security for the loan. On the 26th April, 1960, the 1st defendant filed a caution against registered dealings in respect of each of the properties because of the loan transaction and the legal mortgage in respect thereof.

Plaintiffs claim to own the properties with the 3rd defendant in undivided shares, 3rd defendant is only owner of one-quarter. They have not parted with or pledged their interest in the said property. They contend 2nd defendant has wrongfully entered caution against first registration of the property in favour of the 1st defendant. 1st defendant has refused to withdraw the said caution inspite of repeated demands by the plaintiffs. 2nd defendant has failed to proceed with the registration of plaintiffs' interests in the said property No.2 Pedro Street, Lagos. The 1st and 2nd defendants have refused to remove the cautions. Plaintiffs thereupon brought this action claiming as follows:

"A DECLARATION that the 1st defendant is not entitled to lodge or register a caution against registered dealings in the plaintiffs' interest in the property at No.2 Pedro Street, Lagos.

A DECLARATION that the 1st defendant is not entitled to lodge or register a caution against registered dealings in the plaintiffs' interest in the property at No. 41 Agarawu Street Lagos.

AN ORDER directing that the caution lodged against registered dealings in the property No.2 Pedro Street, Lagos by the 1st defendant be removed by the 2nd defendant.

AN ORDER directing that the caution lodged against registered dealings in the property No. 41 Agarawu Street, Lagos by the 1st defendant be removed by the 2nd defendant"

The action was tried on pleadings filed, exchanged and amended by the parties. Learned trial Judge after the addresses of counsel gave judgment in favour of plaintiffs in accordance with their claim. The defendants appealed against the judgment.

The Appeal

But arising from the findings of the learned trial Judge which I shall state anon plaintiff also sought for extension of time to appeal against the judgment in respect of the finding. The finding was where he stated as follows - at p. 107 lines 15-24.

"I must say that what I believe is that all the three brothers who are plaintiffs here and the 3rd defendant were privy to all the happenings about the two properties. But in spite of my belief

section 48 of the registration of the two titles cannot be upset u n -

less there is before me a proof of fraud or some other matters incompatible with such registration and there is an application for ratification in accordance with section 61."

There were thus an appeal by the defendants and a cross-appeal by the plaintiffs.

5 It is the action subsequent that has resulted in the construction of the provisions of section 258(1) and later of section 258(4). The dates are significant.

I said above that the learned trial Judge delivered judgment after the addresses of counsel, but there was an adjournment between the date when
10 the case was first adjourned for judgment, and the delivery thereof. Addresses of counsel were concluded on the 10th November, 1980. Judgment was reserved on the 19th January, 1981. Judgment was not delivered on that day, but was delivered on 16th February, 1981. This is the non-compliance complained of.

15 Before the appeal was heard, the defendants/appellants in an application dated 20/12/85 and filed on the same day were granted leave on 19/3/86 to file and argue an additional ground of appeal. It is this additional ground of appeal which raised the issue of the validity of the judgment subject matter of the appeal.

20 The additional ground of appeal reads: *"The judgment delivered by the lower court on the 16th day of February, 1981 is null and void because it was given later than three months after the conclusion of evidence and final addresses in contravention of section 258(1) of the Constitution of the Federal Republic of Nigeria. 1979"*

25 The ground for the complaint is very precise and clear. The judgment, having been decided more than three months from hearing and final addresses is in contravention of the constitutional provision, and therefore a nullity. This is consistent with section 258(1) of the Constitution 1979 which came into force on the 1st October, 1979. The section reads as follows:

30 *"(1) Every court established under this Constitution shall deliver its decision in writing not later than 3 months after the conclusion of evidence and final addresses, and furnish all parties to the cause or matter determined with duly authenticated copies of the decision on the date of the delivery thereof."*

35 There have been several decisions of this Court holding that the provision is mandatory, and non-compliance therewith results in a nullity - See Ifezue v. Mbadugha (1984) ISCNLR 427; (1984) 5 S.C. 79; Uttah v. Golden Guinea Breweries (1988) 2 NWLR (Pt. 76) 373.

The Court of Appeal decided to hear arguments on this issue on

23rd September 1986, since if successful, the appeal will be terminated in limine. It rejected the application by the respondent/cross-appellant to refer the construction of the provision of section 258(4) to this Court for interpretation under section 259(3) of the Constitution 1979, as a substantial question of law, since the interpretation of section 258(4) of the Constitution 1979 was involved.

It is of critical importance and pertinent to refer to the amendment to section 258(1), in section 6 of the Constitution (Suspension and Modification) Decree No.17 of 1985 by the addition of sub-sections (4) and (5) which came into force on the 27th August, 1985. The sub-sections read:

"(4) The decision of a Court shall not be set aside or treated as a nullity solely on the ground of non-compliance with the provisions of this section unless the Court exercising jurisdiction by way of appeal from or review of that decision is satisfied that the party complaining of such non-compliance has suffered a miscarriage of justice by reason thereof.

(5) As soon as possible after hearing and deciding any case in which it has been determined or observed that there was non-compliance with the provisions of sub-section (1) of this section, the person presiding at the sitting of the Court shall send a report on the case to the Chairman of the Advisory Judicial Committee who shall keep the Committee informed for appropriate action."

Sub-section (5) of section 258 is not relevant in this appeal. In its judgment delivered on the 18th November, 1986, which is the subject-matter of this appeal, the Court of Appeal, per Kutigi, J.C.A., held after referring to arguments of counsel as follows:

"I should probably begin by satisfying myself that the judgment in question was delivered later than three months after the conclusion of evidence and final addresses. I think counsel on both sides agree that this was so. Final address was on 10th November, 1980 and judgment was delivered on 16th February 1981 - this is clearly a period of more than three months from 10/11/80. That being so, we would have no alternative other than to follow the chain of cases decided under section 258(1) of the Constitution cited by appellants' counsel and hold that the judgment is a nullity (see for example Ifezue v. Mbadugha (1984) 1 SCNLR 427: (1984) 5 S.C. 79: Richard Boyi v. Attorney-General of Bendel State (1984) 9 S.C. 66: Odi v. Osafie (1985) 1 NWLR (Pt.1) 17. And I so hold."

Again, with respect to the reference of the construction of sub-section 4 of section 258, to this Court the learned Justice of the Court of Appeal referred to the fact that the judgment on appeal was decided some four years before the amendment came into force. He referred to Kpema State (1986)

1 NWLR (Pt.17) 396 and *Gafari v. Johnson & Anor* (1985) 5 NWLR (Pt. 39) 66 for the view that the sub-section was not intended to be retrospective. The learned Justice of the Court of Appeal (as he then was, but now Kutigi, J.S.C.) held, at P. 219.

"The logical conclusion therefore is that all judgment including the
5 present judgment which were delivered more than three months of the conclusion of final addresses were automatically null and void by reason of section 258 sub section 1 of the 1979 Constitution."

He then concluded that,

"...the point in issue in this appeal having been previously decided
10 by the Supreme Court there is nothing left to be referred to it. All we need to do is to apply the law as decided by the Supreme Court, the highest Court of the land. And that is exactly what I have done in this case."

Although, learned counsel to the parties in their briefs of argument, varied in the formulation of the issues for determination in this appeal. There
15 appears to be consensus that the issues are with respect to the application of section 258(4) of the Constitution 1979 to the facts of this case, and whether the Court of Appeal ought to have referred the construction of the provision to this Court.

I accept the formulation of the issues by learned counsel to the appellants in this appeal. They are as follows:-

"(i) Was the Court of Appeal in November, 1986 bound to apply the provisions of section 258(4) of the Constitution of the Federal Republic of Nigeria 1979 as amended by Decree No. 17 of 1985, to a decision given by the High Court in February, 1981.

25 (ii) Did the issue of whether section 258(4) of the Constitution of the Federal Republic of Nigeria 1979 as amended by Decree No. 17 of 1985 applied to the judgment herein raise a substantial question of law which ought to have been referred to the Supreme Court under the provisions of section 259 of the Constitution?"

30 The two issues differently formulated in the 3rd defendant's brief of argument agree with the above. Similarly of the three issue formulated in the brief of argument of the 1st respondent, the first two came within the first of the appellants' issue. The third issue is identical with the second issue of the appellant.

35 Chief G.O.K. Ajayi, S.A.N. counsel to the appellants, both in his brief of argument and in his oral argument attacked the prevailing view in the decisions of this Court, that a decision made in contravention of section 258(1) of the Constitution 1979 was automatically null and void. He referred to the leading case of *Ifezue v. Mbadugha* (supra) and the dictum

to that effect, and submitted that the view was erroneous.

Learned counsel relied on Halsbury's Laws of England Vol. 10. paragraph 13 for the submission that it superior Court of record is a Court of unlimited jurisdiction, and that prima facie, no matter is deemed to be beyond its jurisdiction, unless it is expressly shown to be so. As against the view that a judgment can be nullity, and void ipso facto. Chief Ajayi referred to Adebayo v. Johnson (1969) 1 All NLR 176. Mobil Oil v. Coker (1975) 3 S.C. 175; C.F.A.O. v. Chapman & Anor 9 WACA 181, and Ajao v. Alao (1986) 5 NWLR (Pt.45) 802, for the contention that a judgment however perverse, is valid until it is set aside. Chief Ajayi blamed the often cited and blamed the dictum of Denning L.J. in Macfoy v. U.A.C. (1961) 3 All E.R. 1168 for what he regards as the continued confusion in countries exercising common law jurisdiction by making the dictum applicable to judgments and orders of courts.

Learned counsel relied on the Privy Council decision in Isaacs v. Robertson (1984) 3 WLR 705 for the submission that the *"concept of voidness and voidability form part of the English law of contract. They are inapplicable to orders made by a Court of unlimited jurisdiction in the course of contentious litigation."*

Relying on Williams v. Sanusi (1961) 2 SCNLR 129; (1961) 1 All NLR 334. Chief Ajayi submitted that judgment of our courts are not ipso facto invalid. They do not become invalid unless and until they are set aside. Otherwise, they remain valid and binding. Learned counsel pointed out the chaos that will attend the judicial process, if individuals were to be allowed to ignore judgments and orders of the Court based on their own interpretation as to their validity.

It was finally submitted that the decision of the High Court given on the 19th February, 1981, was a valid and subsisting judgment at the time when it came up before the Court of Appeal for review. I must add that this is notwithstanding the contravention of the provisions of section 258(1).

Chief Ajayi submitted that sub-section (4) of section 258 was applicable to the case before the Court of Appeal. He contended that the provision was in force when the Court below gave its judgment; and was the applicable law, which cannot be ignored. The amendment, it was submitted, assumed the continued validity of the judgment or order impugned until the review.

Learned counsel submitted that the decisions in Kpema v. State and Taylor v. Methodist Church were decided per incuriam. It was also argued that in the circumstances, the Court of Appeal having merely struck out the appeal, but not set aside the judgment of the High Court, it remained valid

and binding when the appeal came before the Supreme Court in February, 1986. The Supreme Court, it is submitted, was bound to apply the existing law, which is sub-section (4) of section 258.

The main thrust of Chief G.O.K. Ajayi's argument is against the proposition that a decision in contravention of section 258(1) of the Constitution 1979 is a nullity. In his view being a decision of a Court of superior record, vested with the exercise of unlimited jurisdiction, the decision however reached, remains valid until set aside by the decision of a Court.

Mr. Ogunmodede for the 3rd respondent agreed with the submissions of Chief Ajayi, Mr. Solesi for the 1st respondent did not react to the 10 submissions.

The principle so eloquently enunciated by learned counsel is very well settled. The authorities relied upon in the Halsbury's Laws of England, and the decisions of this Court are not ambiguous. But the establishment of the principle is predicated on the existence of other legal considerations. 15 As was stated in Halsbury's Laws of England, (4th Edition) Volume 10, paragraph 713;

"Limits of Jurisdiction: The chief distinctions between superior and inferior courts are found in connection with jurisdiction. Prima facie, no matter is deemed to be beyond the jurisdiction of a superior court of record 20 unless it is expressly shown to be so, while nothing is within the jurisdiction of an inferior court unless it is that expressly shown on the face of the proceedings that the particular matter is within the cognisance of the particular court."

It requires no extra effort to recognise that this proposition relates 25 entirely to English superior courts of records or similar courts of common law jurisdiction without a written constitution as we have. In our circumstance, although section 236(1) of the Constitution, such jurisdiction is at once made "subject to the provisions of this Constitution..." Thus its jurisdiction may be subject to the limitations imposed by the provisions of the 30 Constitution, as in the instant appeal.

In *Sule v. Nigerian Cotton Board* (1985) 2 NWLR (Pt. 5) 17, this Court held that the unlimited jurisdiction of the High Court in section 236(1) of the 1979 Constitution, did not vest it with the exercise of original jurisdiction over matters covered by the Rent Control and Recovery of Residential 35 Premises, Edict No.9 of 1976. A similar view was expressed in *Nwabueze v. Okoye* (1988) 4 NWLR (Pt.91) 664, where it was held that the unlimited jurisdiction in section 236(1) subject to the provisions of section 6(2) of the Constitution 1979. Examples can be multiplied. Hence, though a superior court of record, its jurisdiction is not at large. It is subject to other provisions

of the Constitution. Section 258(1) is one of such provisions. Also is the High Court Law of the State, and the practice and procedure from time to time prescribed by the House of Assembly of the State.

The comparison therefore of the jurisdiction between superior courts of record and inferior courts in England as stated in Halsbury's Laws of England quoted above and our own Constitutional Courts inappropriate. 5 The conceptual different between the common law position and that of a written constitution is clearly significant. Our Constitution is the basic law of the land. All institutions derive their authority and validity from it. Hence, the scope of authority, jurisdiction and competence of the High Court which is a creation of the Constitution is determined by the Constitution. 10

Chief G.O.K. Ajayi has severely criticized the concept that the decision of a superior court of record could be declared to be void or voidable. His view relying on Isaacs v. Robertson (1984) 3 All E.R. 705 is that the more apposite description of the validity of acts of superior courts is "regular" or "irregular". This view raises a jurisprudential conceptualization of 15 legal acts.

It is important to point out at once that the validity of a judicial act is founded on the competence of the Court to exercise jurisdiction. As has been clearly laid down in Madukolu & Ors. Nkemdilim & Ors. (1962) 2 SCNLR 118; (1962) 1 All NLR 287 and defect in competence is fatal, and 20 the proceedings however well conducted and decided will be a nullity. Among the other conditions of competence, this Court approved of Madukolu v. Nkemdilim (supra) in Adeigbe v. Kusimo (1965) NMLR 284, and held that a Court is competent: when the case comes before the Court initiated by due process of law, and upon fulfillment of any condition precedent to the 25 exercise of jurisdiction.

In Daniel's Chancery Practice 8th Ed. Vol.1 at p. 708 the learned author stated the rule thus;

"A judgment obtained by some steps not warranted by the rules or capable of being sanctioned is wholly void and can be set aside.... Where 30 the proceedings are wholly void they may be set aside at any time"

This principle is founded on the idea that the decision impugned was reached without jurisdiction and for lack of competence to do so. Hence the Court has been able to say in Sken Consult (Nig) Ltd v. Godwin Sekondi Ukey (1981) 1 S.C. 6 in respect of service outside the jurisdiction without leave: 35

"The position then is, as my Lord Nnamani. J.S.C. has said that the said orders are, in each case null and void. As was stated in Macfoy v. U.A.C. (1962) A.C. 152 at 160 the orders being void, there is even no need "for an order of the Court to set (them)aside though it is sometimes conve-

nient to have the Court declare (them) to be so. And every proceeding which is founded on (them) is bad and incurably bad" per Lord Denning.

This case and many others following it merely establish the principle that where the court relied upon lacks jurisdiction and therefore competence it does not and cannot produce a legal consequence. A judgment of a Court
 5 is the legal consequence of a proceeding in litigation between two parties. Hence, unless the judgment is predicated upon the legal conditions enabling its validity: it remains invalid. There can be a judgment in fact because it has been written and delivered. But without competence the judgment lacks legal validity and is not a judgment in law capable of enforce-
 10 ment. It is in strict legal parlance a nullity. It is an act without legal consequence.

This is why it is described as void and capable of being ignored.

As against these line of cases there are the cases in which it has been held consistently that a judgment however perverse is valid until set aside.
 15 In *Adebayo v. Johnson* (1969) 1 All NLR. 176, at p. 194, it was held that until judgment howsoever perverse is set aside, it subsists as a judgment and must be deemed as a cover under which the amount was paid to Chief Shonowo. There was in this case, no question of lack of jurisdiction of the Court which made the order for refund.

20 In *Ajao v. Alao* (1986) 5 NWLR (Pt.45) 802, the issue before the Court was not the lack of jurisdiction. It was pleaded as a defence of *res judicata* in challenging the validity of the judgment to the action. The Court looked at the substance of the action. The judgment so impugned was not the subject matter of the appeal and the Court will not inquire into its
 25 validity. Hence the presumption in that case that the judgment subsists until set aside.

The case of *Isaacs v. Robertson* (1984) 3 All E.R 140 relied upon was clearly founded on the principle of competence of the court to make the order or give the decision. In that case an appeal to the judicial Com-
 30 mittee of the Privy Council from the High Court of St. Vincent, the relevant rules provide that where no proceedings had been taken for over a year, the case would be deemed altogether abandoned. After a year, plaintiff sought for and obtained an order of interlocutory injunction. The order was served on the defendant who ignored it and refused to comply. Plaintiff then ap-
 35 plied to commit the defendant to prison for contempt for disobeying the order. In his defence, it was contended that the order of injunction obtained a year after the action was abandoned was a nullity and that defendant was not bound to obey it, and that he could not be committed for contempt.

The learned Judge dismissed the application to commit defendant for contempt. Plaintiff appealed to the Court of Appeal which allowed the appeal and held that the learned trial Judge was wrong to have dismissed the application and that defendant was in contempt for disobeying the interlocutory injunction. No penalty was inflicted because the Court held that defendant would have been entitled to and could have succeeded in setting aside the injunction if he had brought the application. Defendant's appeal to the Judicial Committee of the Privy Council was dismissed.

The Privy Council approved of the ratio of the Court of Appeal allowing the appeal which is the well established ground that an order made by a court of unlimited jurisdiction such as the High Court of St. Vincent must be obeyed unless and until it has been set aside by the court.

The overriding consideration of the competence and jurisdiction of the Court to make the order or give the decision is clearly emphasised in *Hadkinson v. Hadkinson* (1952) 2 All E.R. 567 where Romer L.J. said:

"It is the plain and unqualified obligation of every person against or in respect of whom an order is made by a Court of competent Jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void. Lord Conenham L.C. said in Chuck v. Cremer (1846) 1 Coop. temp. Cotto 338 at 342. 4 E.R. 884 at 885; "A party who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it..... It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid whether it was irregular or irregular. That they should come to the Court and not take upon themselves to determine such a question. That the course of a party known of an order, which was null or regular, and who might be affected by it was plain. He should apply to the Court that it might be discharged. As long as it existed it must not be disobeyed." Such being the nature of this obligation, two consequences will, in general, follow from its breach. The first is that anyone who disobeys an order of the Court....is in contempt and may be punished by committal or attachment or otherwise."

These principles have been applied in our courts. They have not been mechanically applied as Chief Ajayi appears to suggest. Lord Denning M.R. in *Macfoy v. U.A.C. Ltd* (supra) did not so suggest. But it seems to me difficult to deny that the insistence on obedience of the orders of a Court made without jurisdiction is to uphold the public policy of avoiding confusion with respect to obedience to orders of Court. This is why in *Macfoy v. U.A.C. Ltd* (1961) 3 All ER 1169 at p. 1172, it was said: *"It is sometimes*

convenient to have the Court declare it to be so."

I venture to postulate that since the non-compliance results in a purported judicial act and, is the consequence of a judicial proceeding, it is only proper to declare its invalidity through a judicial act. I do not think the procedure for declaring the act a nullity has the effect of conferring any
5 validity on the act. The statement that the act is valid until it is set aside, though well settled, is and clearly represents the accepted legal position. It is however, correct to say also that it is a purported validity, deemed to be so, until the invalidity is established by judicial declaration. The presumption of validity is rebutted by the declaration of its invalidity in my attempt
10 to enforce it. It must be understood that judicial acts, orders and judgment are not negotiable instruments which are exchanged by mere delivery. They enjoy no validity outside the courts. Hence a judgment without competence is necessarily void against the party affected. It creates no legal consequence.

I shall now turn to the legal concept of voidness and voidability which Chief Ajayi following the view expressed in *Isaacs v. Robertson* (supra) as inapplicable to courts of unlimited jurisdiction in contentious litigation, as also inapplicable in our own High Courts. I have already drawn attention to the distinction between our superior courts of record, and those
20 contemplated in *Isaacs v. Robertson* (supra). There is hardly any dispute that non-compliance with and contravention of the provision of the constitution result in an illegal act, and consequently a nullity. Thus, where the contravention is an act prohibited by the Constitution, no valid legal act results, and there is a nullity - See *Ifezue v. Mbadugha* (1984) 1 SCNLR
25 427. See *Kolawole v. Alberto* (1989) 1 NWLR (Pt. 98) 382. However, where the act complained of was done contrary to the method prescribed by the procedure and practice allowed by the law in some material respect, there is an irregularity which may be curable - See *Noibi v. Fikolati* (1987) 1
NWLR (Pt. 52) 619; *Ekpanya v. Akpan* (1989) 2 NWLR (Pt. 101) 86.

Whereas a contravention of a provision of the Constitution renders the doing of the act prohibited a nullity and accordingly void, the imperfect performance of procedure and practice i.e. procedural defect with results in a curable irregularity does not ipso facto vitiate the act and is merely void-
35 able. It is true, the concept of voidness and voidability is more appropriate in the law of contract but they are concepts arising from the legal consequences of acts.

Construction of section 258(1) and (4) of the Constitution 1979.

I shall now consider the construction of the provisions of section 258(1) and (4) of the Constitution 1979.

Chief G.O.K. Ajayi. S.A.N. predicated his submission on the construction of these sub-sections with the presumption that what came before the Court of Appeal was a valid and subsisting judgment rather than a dead, null and void "so called judgment requiring only the coup de grace of formal pronouncement to seal the lid on its coffin

As I will show later in this judgment, both from the history of the constitutional provisions construed and the express words of the sub-sections, the approach tantamount to attacking the problem from the wrong end of the issue. The words of section 258(4) which are unambiguous provide that *"The decision of a Court shall not be set aside or treated as nullity solely on the ground of non-compliance with the provisions of this section...."* It is therefore strange to start with opposite of what the provisions wants you to assume. It assumes that the noncompliance results in a nullity and could be set aside, but should not be treated.

I think a proper and rewarding construction of these sections is better approached from its history. In this case, I think the history tells sufficiently the object of the provision and will enable a construction to give effect to that object. - *Bronik Motors v. Wema Bank* (1983) 1 SCNLR 296.

In the interest of clarity and ease of reference I shall reproduce the section which is as follows:

"258-(1) Every Court established under this Constitution shall deliver its decision in writing not later than 3 months after the conclusion of evidence and final addresses and furnish all parties to the cause or matter determined with duly authenticated 'copies of the decision on the date of the delivery thereof

(4) The decision of a Court shall not be set aside or treated as a nullity solely on the ground of non-compliance with the provisions of this section unless the Court exercising jurisdiction by way of appeal from or review of that decision is satisfied that the party complaining: of such non-compliance has suffered a miscarriage of justice by reason thereof."

This section was introduced into our legal system for the first time by the 1979 Constitution. It was a device introduced to curb the excesses of inordinately long adjournments of reserved judgment described as "preserving" rather than reserving judgments. Judgments were reserved after addresses of counsel to upwards of two years, when the recollections of the facts of the case would have been dim, the demeanour of witnesses would have disappeared by the effluxion of time. See *Ariori & Ors v. Elemo & Ors.* (1983) 1 SCNLR 1: (1983) 1 S.C. 13. It was considered that a period of 3 months after hearing of the case and addresses of Counsel was reason-

able time within which the judgment ought to be delivered. See *Taylor v. Methodist Church* (1986) 4 NWLR (Pt.34) 136. Hence when on the 1st October, 1979 the provision came into force, it was held to be mandatory. See *Ifezue v. Mbadugha* (1984) 1 SCNLR 427; *Odi v. Osafire* (1985) 1 NWLR (Pt. 1) 17. Accordingly every non-compliance rendered judgment
5 delivered thereafter invalid and a nullity.

That the expression "shall" read together with the phrase "'not later than 3 months after the conclusion of evidence and final addresses'" made it clear that judgments after the prescribed period of 3 months are outside the mandatory period and are accordingly delivered without jurisdiction.
10 Such judgments were regarded as nullities. *Ifezue v. Mbadugba* (supra); *Ojokokolobo v. Alamu* (1987) 3 NWLR (Pt. 61) 377. That construction was inevitable from the express words of section 258(1) and effect must be given to them. Chief G.O.K. Ajayi's submission that the judgment remained valid till set aside cannot be the correct view. I shall hereafter explain the
15 effect of the amendment to the provision.

This construction which aims at the mischief of the provision soon resulted in an "overkill" throwing away the baby with the bath water. The mandatory construction overlooked the justice of the case where the avoidance of a miscarriage of justice will obviate the inconvenience resulting
20 from the delay - See *Taylor v. Methodist Church* (1986) 4 NWLR (Pt.34) 136; *Sodipo v. Lemminkainen OY* (No.1) (1985) 1 NWLR (Pt. 8) 547.

Accordingly, on the 27th August, 1985 by section 6 of Decree No. 17 of 1985, the Constitution' (Suspension and Modification), sub-sections (4) and (5) were provided to subjugate non-compliance to overriding con-
25 siderations of avoiding miscarriage of justice and ameliorate the rigidity of the mandatory provision of subsection (1) of section 258. Hence in construing section 258 the two related sub-sections (1) & (4) ought to read together. - See *Adesanya v. President of the Federal Republic of Nigeria & Anor* (1981) 5 S.C. 112 at p.134.

30 It is only by such a construction of the section, will the object of the amendment intended by the provisions be clear and forcibly brought out.

As I have already pointed out a contravention of the prohibition of subsection (1) of section 258 invariably results in a decision reached without jurisdiction. This has been consistently held to be a nullity. The express
35 words of sub-section (4) which are clear and unambiguous is that the decision of a Court shall not be set aside or treated as a nullity solely on the ground of non-compliance with the provisions of this section. Now the operative expression in sub-section (4) is "*shall not be set aside or be treated as a nullity solely on the ground of non-compliance with the provisions of*

this section."

It is obvious from these words that the non-compliance referred to is with 3 months mandatory period after hearing evidence and addresses of counsel, within which a judgment must be delivered as prescribed in sub-section (1).

Again, the requirement "unless the court exercising jurisdiction by way of appeal from or review of that decision." Point unequivocally to the exercise of appellate jurisdiction. It follows from the normal course of the judicial function that these words cannot be referring to the exercise of original jurisdiction. Hence this sub-section (4) is only applicable to courts in their exercise of appellate jurisdiction.

Finally, the expression "is satisfied that the party complaining of such non-compliance has suffered a miscarriage of justice by reason thereof" also stipulates the circumstances and the time when the sub-section is applicable. It is indisputable that the provision is only applicable in the exercise of appellate jurisdiction when the Court is satisfied in coming to a decision that although there was noncompliance with sub-section (1) of section 258, no miscarriage of justice has been suffered thereby. It can only be invoked and relied upon at the time of the exercise of the jurisdiction. In other words the question of consideration of retrospective application of the provision by reference to the date it came into force does not arise. It is the law applicable to the case and must be applied.

This in my opinion is the true construction of the provision by giving to the words their ordinary meaning, A provision should be construed consistent with its spirit. See *Onasile v. Sami* (1962) SCNLR 415; (1962) 1 All NLR 272. This is what I have endeavoured herein to do. If thus construed, the Court of Appeal would not have held that section 258(4), not being retrospective was not applicable to the case before them because it was decided by the High Court before the coming into force of the Decree No. 17 of 1985. The important consideration is that the appeal is before them, and it is their duty to have regard to the consideration of miscarriage of justice, which is relevant to the determination of the appeal before them. The Court below therefore was in serious error to have decided the appeal before them on the authority of *State v. Kpema* (1986) 1NWLR 396 and *Gafari v. Johnson & Anor* (1986) 5 NWLR 66. Consideration of *Kpema v. State* (1986) 1 NWLR (Pt.17) 396; *Taylor v. Methodist Church* (1986) 4 NWLR (Pt.34) 136. Chief Ajayi. S.A.N. has urged us to review the decisions of this Court in *Kpema* and *Taylor* as having been wrongly decided and that the decisions were given per incuriam.

In *Kpema* the issue was the application for extension of time to appeal against conviction for culpable homicide under the Court of Appeal

Act. The appellant was convicted of culpable homicide on 5th April, 1982. He filed his notice of appeal on the 19th March, 1983. The judgment appealed against was delivered after three months from conclusion of addresses and in contravention of section 258(1). The Court of Appeal (Amendment) Act 1982 which enabled extension of time in application for extension of time in this case came into effect on 15th July, 1982. The Court of Appeal struck out the application on the ground of lack of jurisdiction; the right of appeal having expired before the enabling amendment came into force on the 15th July, 1982. On a further appeal to this Court, the Court allowing the appeal held that in computing the proper exercise of the right of an appellant who was doing so from prison custody, the Court should take into consideration the constraints of the prisoner. The effective date should be the date when the accused person who is in prison custody handed the notice of appeal to the officer authorised by the Prison Authorities to take it. On a close examination of the notice of appeal in this case, to the Supreme Court, there is evidence that it was thumb-impressed by the appellant on the 24th April, 1985 and attested by an official of the Legal Aid Council 29 days from the date of the decision of the Court of Appeal. The notice was therefore prepared and given within the 30 days prescribed by section 3(2)(b) of the Supreme Court Act, 1960 although filed in the Court of Appeal out of time on the 3rd May, 1985.

The issue whether there was a competent appeal before the Supreme Court was raised by Mr. Achikeh, learned counsel to the appellant. The Court recognized the fact that the judgment was delivered in contravention of section 258(1) of the Constitution 1979 and accordingly a nullity. The Court however allowed the appeal because "... to allow the appellant to be executed on a conviction and sentence that are clearly null and void will amount to crass legalism leading to flagrant miscarriage of justice. In my opinion, if the constitutional point relied upon in this Court had been raised in the Court of Appeal, that Court would have come to the same conclusion." See (1986) 1 NWLR 396 at p.405 per Uwais, J.S.C. Although this Court stated that the provisions of section 258(4) of the Constitution 1979 was not applicable to the case in hand because the amendment came into force on the 27th August, 1985, the effect of the decision and the reason given are clearly consistent with the requirement of sub-section (4) of section 258. In this case the Supreme Court did not go into the merits of the case but considered it intolerable to allow a person to be executed on the basis of a judgment which is *prima facie* a nullity. It did not allow the fact of non-compliance to distract it from doing justice. Thus, non-compliance with section 258(1) was not allowed to impede the doing of justice in

the case.

It is not correct that *Kpema v. State* (supra) was decided per incuriam. A case is decided per incuriam where a statute or rule having statutory effect or other binding authority which would have affected the decision, had not been brought to the attention of the Court. - See *African Newspapers v. Federal Republic of Nigeria* (1985) 2 NWLR (Pt.6) 137. The Court was not unaware of sub-section (4) of section 258 of the Constitution, 1979 applicable to the case. The provision was in fact referred to in the judgment. The fact that it was considered not applicable did not make the decision one given per incuriam.

Taylor v. Methodist Church (1986) 4 NWLR (Pt. 34) 136 is a little different. The judgment in this case was adjourned for judgment on the 22nd August 1979 before the coming into force of section 258(1) of the Constitution of the Federation 1979 on October 1, of that year. The judgment was not delivered till the 28th March, 1980. The judgment was set aside on appeal to the Supreme Court on the ground that it was a nullity having been delivered in contravention of section 258(1). It is significant that Irikefe. C.J.N. in his judgment did not refer to section 258(4). Uwais, J.S.C. who referred to the sub-section, relied on *Kpema v. State* (supra) for the view that "*the provisions of section 258(4) of the Constitution which came into force on 27th August, 1985 has no application to this case since it has no retrospective effect...*"

Now, as I have already pointed out, a decision is only given per incuriam where the Court was not aware of the relevant applicable provision. - See *London Street Tramways v. L.C.C.* (1898) A.C. 375 at p. 380. It is not per incuriam because it had adopted an interpretation of the law subsequently found to be wrong - See *Royal Court Derby Porcelain Co. v. Russell* (1949) 2 KB 417. I have not been told that the decision was given in ignorance of a case which would have been binding on this Court. See *Morelle Ltd v. Wakeling* (1955) 2 QB 389 at P. 409. I adopt the view of Cross in his invaluable monograph *Precedent in England Law* (1961) at p. 139, where he said:

"The principle appears to be that a decision can only be said to be per incuriam if it is possible to point to a step in the reasoning and show that it was faulty because of a failure to mention a statute, a rule having statutory effect or an authoritative case which might have made the decision different from what it was."

I am not therefore satisfied from the arguments addressed to this Court that *Taylor v. Methodist Church* (supra) was decided per incuriam. It may be necessary for this Court to overrule a decision subsequently found to be

erroneous in principle. This is not necessarily because the decision so overruled was given per incuriam.

The course open to this Court in this circumstance is clear, namely to follow its established practice. The observation of Verity C.J., in *In re Sarah Adedevoh & Ors. In the matter of the Estate of Samuel Herbert Macaulay (Deceased)* (1951) 13 WACA 304. at P. 310, seems to me to have summed up the principle adopted by our courts. The learned Chief Justice declared:

"I am fully alive to the fact that grave inconvenience may arise from a judgment of this Court in such a matter which reverses a view of the law which has been held for upwards of ten years, but when the Court is faced with the alternative of perpetuating what it is satisfied is an erroneous decision which was reached per incuriam, and will, if it be followed, inflict hardship and injustice upon generations in the future of causing temporary disturbance of rights acquired under such a decision. I do not think we should hesitate to declare the law as we find it."

Writing the judgment of the Court in the more recent decision of this Court in *Bucknor-Maclean v. Inlaks Ltd* (1980) 8-11 S.C. I, Idigbe, J.S.C. endorsed the above view and justified departure from existing judgments of the Court to avoid perpetuation of recent 'errors. He said:

"With particular reference to the recent cases of Jammal (supra) and Owumi (supra) based as they are in part on some of the statements in another recent case of Jaffer v. Ladipo (supra). I see no more justification for perpetuating recent error than for retaining uncorrected any error in much older decisions of this Court."

In the light of the reasoning in this case and the construction of section 258(1) and (4), I have adopted in this case, the conclusion is that a judgment delivered in contravention of section 258(1) can only be treated as a nullity where no miscarriage of justice will result even from the non-compliance with the provision of section 258(1). Accordingly, the judgment is to be regarded as prima facie valid and binding notwithstanding the non-compliance with the provision. To the extent that both *Kpema v. State* (supra) and *Taylor v. Methodist Church*, espouse contrary principles, they cannot stand with the principle enunciated in this case. They are accordingly overruled. *Ojokolobo v. Alamu* (1987) 3 NWLR (Pt. 61) 377.

During consideration of this judgment, the issue arose whether in arriving at our conclusion we could depart from *Ojokolobo v. Alamu* (1987) 3 NWLR (Pt.61) 377, a decision of the full panel of this Court. Counsel did not in their brief of argument filed or in their oral address refer to the decision. Counsel were accordingly invited to address us on the issue, and

whether if our conclusion in the instant case is different, we can depart from it.

The issue we are concerned with is the construction of section 258(4) of the Constitution 1979 which has already been reproduced in this judgment. I have already construed the words of section 258(4). The construction I have adopted in this judgment is that *"...the provision is only applicable in the exercise of appellate jurisdiction when the Court is satisfied in coming to a decision that although there was non-compliance with sub-section (1) of section 258, no miscarriage of justice has been suffered thereby. It can only be invoked and relied upon at the time of the exercise of the jurisdiction. In other words the question of consideration of retrospective application of the provision by reference to the date it came into force does not arise. It is the law applicable to the case and must be applied."*

In *Ojokolobo v. Alamu* (supra) where the same provision has earlier been construed, affirmed *Kpema v. State* and *Taylor v. Trustee of Trinity Methodist Church*, a full panel of this Court held that the provision was not retrospective. Accordingly, the section did not apply to judgments decided prior to the 27th August, 1985 when the amendment came into force. Hence the section would only apply to judgments delivered after 27th August, 1985.

In coming to this conclusion Nnamani, J.S.C., who read the leading judgment relied on the literal rule of interpretation in his construction of the phrase, "shall be set aside" in section 258(4). He said:

"...the use in sub-section (4) of section 258, of the words shall (sic) set aside" referred to earlier and contemplates something in future, that is judgment delivered after the commencement date of the amendment which is 27th August, 1985."

He went further to refer to the phrase "or treated as nullity" as another expression confirming the construction that the sub-section was not intended to be retrospective. In his view the judgment being in violation of section 258(1) was already a nullity. There is no doubt that my conclusion in the instant case on the construction of section 258(4) is clearly different from the construction in *Ojokolobo v. Alamu*. The general principle of the rule of judicial precedent enjoins me to follow *Ojokolobo v. Alamu* except I can bring my situation within the accepted exceptions.

It seems to me clear from the reasoning in *Ojokolobo v. Aluma* (supra) that its ratio decidendi is that section 258(4) of the Constitution 1979 did not apply to cases decided in the High Court before 27th August, 1985. This was why the provision was held not to be retrospective and the decision therefore binding on *Kpema v. State* (supra) and *Taylor v. Trustees*

of Trinity Methodist Church (supra). This construction of the section in Ojokolobo v. Alamu (supra) was a decision of the majority.

It is the accepted view from which there has hardly been a departure that a case is only authority for what it actually decides - See Quin v. Leathem (1901) AC 495 at p. 506. The common law tradition which makes
5 decisions of superior courts binding on courts below them, and even courts being bound by their own previous decisions is subject to the rule that only the ratio decidendi for deciding the case is binding. It is conceded the essential facts in Ojokolobo v. Alamu (supra) and the instant case are hardly distinguishable. But we are here concerned with the construction of the
10 provisions of a statute.

Courts have always been cautious in their approach to decisions on the interpretation of statutes. This is not merely because the words used are capable of varied interpretations in different circumstances, it is also because the construction of different parts of the same sect. may by adopting a
15 different interpretative approach result in a different meaning. As Denning L. J. pointed out in Paisner v. Goodrich (1985) 2 Q.B 343 at P. 358.

*"Whenever a new situation emerges, not covered by previous decisions, the Court must be governed by the statute, and not by the words of the judges". Ideally, the Court construing the provisions of a statute should
20 construe the words in the light of the facts of the case before it. This is because the function of the Court in interpreting the words of a statute is to construe the words to apply the statute to a given situation. Interpretation is not made in vacuo. This is why there should be considerable caution in relying on the construction of the words in a decided case even of the
25 same statute even where the essential facts are similar.*

In Paisner v. Goodrich (supra) in the House of Lords, Lord Reid, not oblivious of the risk of adopting and relying unreflectingly on the construction of the words of a statute in a decided case said:

*'No Court is entitled to substitute its words for the words of the Act.
30 A court, however, can and must decide the appropriate test in a particular case and when the Court of Appeal has laid down a test, that test ought to be followed in all cases which do not present substantial differences That does not mean that the words used by the Court of Appeal are to be treated as if they were words in an Act of Parliament. In substantially
35 different circumstances they are only a guide, and not a rule.'* - (1987) AC 63, at p.88.

The same section 258(4) of the Constitution 1979 is the subject matter of construction in this case. This Court is now being urged to hold that the construction adopted in Ojokolobo v. Alamu (supra) must be adopted,

followed and applied even if found to be erroneous. This is because it is the decision of the full panel of this, Court. On the other hand Chief G.O.K. Ajayi. S.A.N. has argued that Ojokolobo v. Alamu (supra) was wrongly decided and that this Court should depart from that decision.

This Court has in many decisions stated the principles governing departure from its earlier decisions. Summarily stated, the Supreme Court 5 has always felt free to depart from its previous decisions found subsequently to be erroneous in principle or held per incuriam: or where the decision if followed perpetuates injustice. See the case of Odi v. Osafire (1985) 1 NWLR (Pt.1) 17; Cardoso v. Daniel (1986) 2 NWLR (Pt.20) 1; Ifediorah v. Ume (1988) 2 NWLR (Pt.74) 5; Bakare v. L.S.C.S.C. (1992) 7 NWLR 10 (Pt.262) 641. There is therefore no doubt that this Court can depart from its previous decision whether by the full Court.

The party seeking the court's exercise of this jurisdiction must bring himself within the principles stated above.

I think if it could be established, and I think it could in this case, that 15 the construction of section 258(4) adopted in Ojokolobo v. Alamu (supra) was erroneous in point of law, and that adhering to that construction on the grounds of binding precedent will perpetuate injustice, this Court will be entitled to depart from it. See Odi v. Osafire (supra); Abdulkarim v. Incar (Nig) Ltd (1992) 7 NWLR (Pt.251) 1. The view of Lord Morris in Conway v. 20 Rimmer (1968) 1 All E.R. 874 at p.892 will appear to me worth recalling. He said:

"Though precedent is an indispensable foundation on which to decide what is the law there may be times when a departure from precedent is in the interest of justice and the proper development of the law." 25

In this instant case, Ojokolobo v. Alamu (supra) was decided on the ground that the word "decision" referred to in sub-section (4) of section 258 is the decision of the High Court. The court did not consider that the expression "...the Court exercising jurisdiction by way of appeal from or review of that decision." Though referring to the decision hitherto treated as a nullity solely 30 on the ground of non compliance with the provisions of sub-section (1), could not possible be referring to the exercise of jurisdiction by the High Court. It is clear from the ipsissima verba that it is a reference to the exercise of appellate jurisdiction. Hence, though subsection (4) cannot be held to be 35 retrospective, it is appropriate and properly applicable to a Court in the exercise of its appellate jurisdiction. It is therefore irrelevant that the decision of the High Court the non-compliance of which is the subject-matter of compliant was decided before the provision came into force. This is surely not retrospective operation of the provision.

The view taken in *Ojokolobo v. Alamu* (supra) is that only decisions of the High Court after the 27th August, 1985 and on appeal to the Court of Appeal come under the ameliorating provision. In other words, both the non-compliance with sub-section (1) and the appeal must have occurred after the 27th August, 1985. There is nothing in sub-section (4) to suggest
 5 such a construction.

The object of sub-section 4 is to save non-compliance with sub-section (1) of section 258 before the Court exercising jurisdiction to set the judgment aside on the grounds of non-compliance with section 258(1). In my view to limit the exercise of jurisdiction as suggested will produce a
 10 limping situation and defeat the object of the amendment.

I agree that the principle of certainty demands that where once certain words in a statute have received judicial construction in one of the superior courts, subsequent courts should be cautious and slow in departing from such construction - See *Exparte Campbell* (1869) L.R. 5 Ch. 763
 15 at p. 766. More than this, the Court will be slow to overrule a previous decision on the interpretation of a statute when it has long been acted upon - See *Royal Court Derby Porcelain Ltd. v. Raymond Russell* (1949) 2 KB 417 at p. 429. But above these considerations is the important factor of construing the words of the statute in accordance with the intent of the law
 20 maker. A judge's primary obligation in the interpretation of a statutory provision is to give effect to the words used.

I have already pointed out that the construction of the words of sub-section 4 of section 258 in *Ojokolobo v. Alamu* (supra) is clearly erroneous in principle at variance with the intention of the legislation. The intention
 25 was to vest jurisdiction on appellate courts as at 27th August, 1985 with respect to all cases of non-compliance with section 258(1) irrespective of when the non-compliance in the High Court occurred. By limiting the date of non-compliance to 27th August, 1985 this discriminates between the cases over which appellate courts can exercise jurisdiction in respect of the
 30 non-compliance with section 258(1).

This court has always in such cases, as we have before us, not considered it too difficult to depart from such of its decisions which lead to the perpetuation of injustice. Verity C.J. has expressed it quite clearly and forcefully when in *In re Sarah Adedevoh & Ors* (1951) 13 WACA 304 at P.
 35 310 he said:-

"....but when the Court is faced with the alternative of perpetuating what it is satisfied is an erroneous decision which was reached per incuriam. and will it be followed, inflict hardship and injustice upon generations in the future I do not think we should hesitate to declare the law as we

find it."

I consider it of critical importance to give the correct construction to section 258(4) of the Constitution 1979. The construction in *Ojokolobo v. Alamu* (supra) is at variance with the provision construed and erroneous in principle. It will undoubtedly perpetuate injustice by discriminatory application limiting dates of decisions on appeal: that is the cases to which the provision will apply and those it will not and those to which section S. 258(1) will continue to apply. I am not unmindful of the warning of *Eso J.S.C.* in *Odi v. Osafie* (1985) 1 NWLR (Pt.1) 17 to avoid overruling the decision on the slightest pretext. It does no violence to the observance of the principle of binding judicial precedent to overrule a decision found to have been patently wrongly decided.

Chief G.O.K. Ajayi SAN is right. *Ojokolobo v. Alamu*. (supra) was wrongly decided and the construction of section 258 (4) herein should not be binding in this case. I have no hesitation in refusing to follow that decision. Certainty ought not to be maintained on the altar of erroneous construction clearly at variance with the express words and intention of the provision construed. A docile adherence to the rule of binding precedent even where the decision is found to be erroneous is more productive of injustice. I do not subscribe to the view expressed by the English Court of Appeal in *Jones v. Secretary of State for Social Services* (1972) AC 944 and approved by the House of Lords in *Carter v. Bradbeer* (1975) 3 All ER 158; that a recent binding decision should not be overruled even where the reasoning is found to be fallacious.

The paramount objective of the Court is the doing of justice to the parties before it. It is intolerable disservice to the ideals of justice to perpetuate injustice by sustaining an erroneous decision on the grounds of maintaining principle of certainty and the doctrine of binding judicial precedent. The reasoning in *Ojokolobo v. Alamu* (supra) was wrong and ought not to be followed.

The issue of Reference

I now come to the second issue which is the rejection of the Court of Appeal of the application to refer to issue of the application of section 258(4) to this Court for determination.

In the Court below, Chief Ajayi, S.A.N. for the respondents/cross-appellants had applied under section 259(3) of the constitution 1979 to refer to this Court the question of the interpretation of section 258(4). This arose from the opposing construction adopted in respect of the constitutional amendment. Chief Ajayi was of the view that the Supreme Court may review the decision in *Kpema v. State* (supra) relied upon in the light of

the Privy Council decision in Isaacs v. Robertson (1984) 3 All ER 140.

The Court of Appeal, per Kutigi, J.C.A. .. rejected the request holding that:

"The point in issue in this appeal having been previously decided by the Supreme Court there is nothing left to be referred to it. All we need to do is to apply the law as decided by the Supreme Court, the highest court of the land. And that is exactly what I have done here."

All the justices of the court below, Mohammed, Kolawole, J.J.C.A., agreed that the issue subject matter of reference, that is the application of section 258(4) raised a substantial question of law. But they felt they were bound by judicial precedent to follow the decision in Kpema v. State (supra). Chief Ajayi has contended that the Court below was wrong to have refused to make reference.

The enabling provision for a reference is contained in section 259 of the Constitution 1979. Sub-section (3) is applicable in this case, and states:

"(3) Where any question as to the interpretation or application of this Constitution arises in any proceedings in the Court of Appeal, and the Court is of opinion that the question involves a substantial question of law, the Court may, and shall, if any party to the proceedings so requests, refer the question to the Supreme Court which shall give its decision upon the question and give such directions to the Court of Appeal as it deems appropriate."

The provisions of section 259 are in pari materia with sections 108 of the 1960 Constitution, and section 115 of the 1963 Constitution. The sub-section (3) will seem to provide for cases, where the Court suo motu may initiate a reference in which case it may refer the matter to this Court in its discretion. But it would seem that where any party to the proceedings so requests, reference is mandatory.

But a reference is predicated upon satisfying the following conditions:-

1. The matter for reference must involve "a substantial question of law as to the interpretation and/or application of a provision of the Constitution.
2. The interpretation must have arisen from the proceedings and should affect the determination of the matter in issue.
3. The Court must be of the opinion that a substantial question of law is involved.
4. The interpretation urged has no binding precedent.

The conditions are conjunction and unless satisfied a reference within the provisions is not possible: See Adesanya v. President of the Federation (1981) 2 NCLR 358; African Newspapers v. Nigeria (1985) 2 NWLR (Pt.6)

138.

It has always been necessary for the Court making the reference to determine what is a substantial question of law. - See *Gamiobu v. Ezezi II* (1961) 2 SCNLR 237; (1961) 1 All NLR 584. It would appear that this is so whether the reference is made by the Court suo motu or by request a party. The question of law must be one in which the matter in contention is 5 capable of more than one reasonable interpretation.

It seems to me unarguable that since in the instant case all the justices are ad idem that the interpretation of section 258(4) involves a substantial question of law; and there is little doubt that the construction is necessary for the determination of the issue before the Court, the request for reference 10 must be granted and reference must be made. However, where the Court is able to show that the interpretation for which reference is sought has been made in several binding decisions, and that the law is not recondite, it can refuse the request for reference; See *Olawoyin v. Attorney-General for North- 15 ern Nigeria* (1961) NRNLR 84.

In the instant case the interpretation in the decision in *Kpema v. State* (supra) relied upon for refusing the application is the interpretation actually challenged. I do not think therefore reliance on it for rejecting the applica- 20 tion for reference takes the Court outside the preconditions enabling a mandatory request for reference.

The Court of Appeal was wrong to have refused the request for reference. Since the Court was satisfied that the matter involved a substan- tial question of law, and that it was necessary for the determination of the case before them, and it is an interpretation of the provision of section 258(4) of the Constitution, the reference to the Supreme Court on the 25 application of a party to the dispute is mandatory.

The main conclusions I have reached in this case is that:

- (a) Section 258(1) and (4) read together enable the appellate Court where a miscarriage of justice is not occasioned by a non- 30 compliance with section 258(1) to ignore the mandatory provisions of section 258(1) in the determination of the validity of the judgment. The Court of Appeal was under obligation to apply the sections and was wrong not to have done so.
- (b) The construction of S.258(4) given in *Kpema v. State* (supra) and 35 *Taylor v. Methodist Church* (supra) are not consistent with the legislative intention of the amendment. The sub-section should be applied as the law applicable to the matter as at the time of its determination.

- (c) The Court of appeal was wrong to have refused to grant the request

for reference, when the Court was itself satisfied that a substantial question of law was involved, and they were aware that the interpretation was necessary for the determination of the matter before them.

I have read the judgment of any Lord the Chief Justice of Nigeria. I agree with his conclusion allowing the appeal and the costs awarded to the respondents. I also abide by the consequential order made in the judgment of my Lord, the Chief Justice.

BELGORE JSC

10 The cases of Ifezue v. Mbadugha & Anor. (1984) 5 SC. 79 (1984) 1 SCNLR 427, Odi v. Osafire (1985) 1 NWLR 17, Richard Boyi v. Attorney-General of Bendel State (1984) 9 SC. 66 were decided strictly on S. 258 (1) of the Constitution of Federal Republic of Nigeria 1979 prior to 27th day of August, 1985. By the Constitution (Suspension and Modification) Decree (No.17) of 1985 there came in the amendment of S. 258 whereby two new subsection were added as subsections 4 and 5 respectively as quoted in extenso in the lead judgment of my learned brother Ogundare, J.S.C. The subsection 4 is a substantive law, not a procedural law because the Constitution as fountain of all laws cannot be procedural. The amendment came into effect on 27th day of August, 1985 and this means that all the decisions of the Court of first instance prior to this date were governed by S.258(1) which required that three months limit for judgment to be delivered. The amendment does not mean that what was null and void at trial Court could be validated by an amendment with no retrospective application whereby an appellate court would hold that the section is procedural. Our Constitution, unlike many in other countries, avoid general principles and lays down clear guidelines on how this country should be governed. As the fountain of all laws it must be read in its clear and ordinary meaning. To subject a clear portion of the Constitution to compartments of substantive and procedural laws will result in mischief of interpretation. There is no way whereby judgment delivered on 16th February, 1981, outside the mandatory three months provided in S. 258(1) (supra), can be validated by amendment occasioned by S. 258 (4) (supra) coming into effect on 27th August 1985, some five years later. The law must look back at the situation at trial not the new relief at appeal to decide whether the judgment was a nullity or not.

I am therefore of the firm view that what I said in Ojokolobo v. Alamu in 1987 is valid up to now and I will not review my stand. I agree with Ogundare, J.S.C that this appeal ought to be dismissed. I dismiss this

appeal and affirm the decision of the Court below. I will award N1,000.00 as costs against the appellant in favour of the 1st respondent.

ONU JSC

In this appeal, judgment in which we had reserved to 10th September, 1993 from 14th June, 1993, that is to say, after arguments by learned counsel had been concluded, our attention was later drawn to the all important decision of this court in *Ojokolobo v. Alamu* (1987) 3 NWLR (Pt.61) 377, which hitherto was conspicuously missing in both the briefs as well as in the submissions of counsel on all sides to the contest. Fresh submissions were therefore called against the 21st of September, 1993 but before that event, a member of the full court of seven that earlier sat on the matter, Omo, J.S.C., had retired from the Supreme Court Bench. His place on the newly reconstituted panel was taken by learned brother Uwais, J.S.C, and the further hearing necessitated by the change in panel therefore transformed into a full hearing that became a rehearing. Thereafter, judgment was reserved to today, the 29th of October, 1993.

I deem it unnecessary to review all the arguments proffered by learned counsel on all sides, who had relied on their briefs of argument and made oral expatiations thereon in so far as the decision in *Ojokolobo* (Supra) sheds light or otherwise on the main question (Issue No. I herein to which I will later come) that calls for determination in this appeal to wit: does subsection (4) of section 258 of the Constitution of the Federal Republic of Nigeria, 1979 (hereinafter referred to simply as the 1979 Constitution) have retrospective effect to have judgment delivered out of time prior to 27th August, 1985 when the Constitution (Suspension and Modification (Amendment) Decree No. 17 of 1985 came into force? In addition, I wish to say that my learned brother Ogundare, J.S.C. has so made such a comprehensive review of those submissions by counsel in his judgment that I do not feel the need to set out the same here. However, for purposes of clarity and emphasis the two questions posed by learned Senior Advocate for the appellants, Chief G.O.K Ajayi with whom Mr. O.A. Ogunmodede, learned counsel for the 3rd respondent, associated in oral argument (Mr. Solesi did not react thereto) for our consideration and answer in this appeal, are:-

1. *"Was the Court of Appeal in November, 1986 bound to apply the provisions of Section 258(4) of the Constitution of the Federal Republic of Nigeria, 1979 as amended by Decree No. 17 of 1985 to a decision given Decree No. 1 of 1985 to a decision given by the High Court in*

February, 1981?.

2. *Did the issue of whether section 258(4) of the Constitution of the Federal Republic of Nigeria 1979 as amended by Decree No. 17 of 1985 applied to the judgment herein raise a substantial question of law which ought to have been referred to the Supreme Court under the provisions of section 259 of the Constitution?*

I will first of all deal with question 2 in respect of which I wish to say that it has been clearly decided on the authorities of Senator Abraham Adesanya v. President of the Federal Republic and Anor (1981) N.C.L.R. 358; (1981) 1 NSCC 146, and African Newspapers Limited v. Federal Republic of Nigeria (1985) 4 S.C. (Pt.2) 76; (1985) 1 N.S.C.C. 405 (1985) 2 NWLR (Pt.6) 137 by this Court and by the Court of Appeal in Monday Ogbonna and 50 Others. v. The President, Federal Republic of Nigeria and 14 Others (1990) 4 NWLR (Pt.142) 124 at 137, that section 259(3) of the 1979 Constitution is invoked where a substantial question of law is involved and a party requests the Court of Appeal to refer the question to the Supreme Court. In that case, the Court of Appeal is mandatorily required under the sub-section to refer the question and failure to do so amounts to an error in law. Now, the reasons for refusing reference given by the Court of Appeal in the instant case are as stated below:-

"Mr. Ajayi learned Senior Counsel for the 1st, 2nd and 3rd respondents while agreeing that this Court is bound by the Supreme Court decision in Kpema v. State (Supra) and that we are also bound by our own decision in Gafari v. Ajayi Johnson and Anor (supra), was of the view that the Constitutional point should be referred to the Supreme Court. He was also of the view that the Supreme Court may decide to have a second look at its decision in Kpema v. State (supra) in the light of the Privy Council decision in Isaacs v. Robertson (1984) 3 WLR 705, which according to him was not referred to in Kpema v. State (Supra). I must state that most of the submissions of the learned Senior Advocate, Mr. Ajayi are stuff for consumption by the Supreme Court and not for an intermediate Court of Appeal like we are. We cannot overrule the Supreme Court. We are bound by its decisions Isaacs v. Robertson notwithstanding." (Per Kutigi, J.S.C.) as he then was).

Kolawole, J.C.A's view was that:

"The judgment which Mr. Ajayi had advanced in support of the judgment of the High Court appears to be such a simple matter but it is. I venture to say, an important legal question which, I

hope will sooner engage the attention of the Supreme Court."

The Constitution provision relating to reference as stipulated in Section 259(3) of the 1979 Constitution states:-

"259(3) Where any question as to the interpretation of application of this Constitution arises in any proceedings in the Court of Appeal and the Court is of opinion that the question involves a substantial question of law, the Court may, and shall if any party to the proceedings so requests, refer the question to the Supreme Court which shall give its decision upon the question and give such directions to the Court of Appeal as it deems appropriate."

From the above enactment, the conditions which must be satisfied before the Court of Appeal can refer any question of law to the Supreme Court under the section are that the question must:-

- (a) Concern the interpretation or application of any provisions of the Constitution;
- (b) have arisen in the proceedings before the Court;
- (c) in the opinion of the Court, involve a substantial point of law.

These conditions, in my view, are to be read conjunctively and not disjunctively and failure to comply with any of them would have adverse effect on the merit of any application. In the Adesanya and African Newspaper Cases (Supra) the questions which arose for interpretation concerned sections 6(6) (b), 141(1), 236 and 277(1) as well as section 230, 231 and 236 respectively of the 1979 Constitution. In Ogbonna v. President (Supra) the question for reference which arose before the Court of Appeal (which ruled them premature and so dismissed the suit) pertained inter alia the interpretation of Decree No. 2 of 1984 in so far as it excluded both Chapter IV of the 1979 Constitution and the powers of the Courts to determine questions under Section 2 thereof.

Now, in the instant appeal, what informed the learned Senior Advocate, Chief Ajayi's submission in paragraph 506 of his brief for the appellant (then plaintiffs/respondents) in the Court of Appeal (now couched as issue No.2 herein) to the effect that:-

"In the alternative, the plaintiffs submit that the issue of whether section 258 (3) (sic) as amended applies to have the judgment of the High Court of Lagos State delivered in the instant case raised a substantial question of law with regard to the interpretation or application of the Constitution. They therefore request that if the Court of Appeal finds that the delay in delivering judgment has not occasioned any miscarriage of justice, the issue ought to be

referred to the Supreme Court of Nigeria under the provisions of section 259(3) of the Constitution. It is submitted that from the majority of the decisions in the recent case of *Florence Taylor v. The Trustees of Trinity Methodist Church*, an unreported decision of the Supreme Court delivered in Suit No. Sc. 29/1985, (1986) 4 NWLR (Pt. 34) 136 on the 1st of April, 1986, that the court was not addressed on the effect of the amendment contained in section 258(3) (sic) of the Constitution; and that the position of the law is therefore still unclear, such as to warrant a reference to the Supreme Court."

was in what Kolawole, J.C.A.'s judgment herein before set out, constituted "an important legal question" which he hoped would "sooner engage the attention of the Supreme Court." Be it noted that the decision of the Court of Appeal in the instant appeal (Mohammed, Kutigi, J.J.C.A. as they then were, and Kolawole, J.C.A.) was given on 18th November, 1986. That in Kpema's Case was given on the 7th of February, 1986 while that in Taylor was delivered on the 1st day of April, 1986. Ojokolobo's case was the type, in the instant case Kolawole, J.C.A. had yearned for would soon thereafter engage the attention of the Supreme Court. It did not take long in coming; it indeed came on the 9th of July, 1987, whereof a full court of seven Justices, two out of whom dissented, affirmed the dicta in Kpema, and Taylor. The issue of Kpema and Taylor therefore even if decided per incuriam in relation to the Constitutional interpretation regarding section 259(3) of the Constitution, became from the date of the decision in Ojokolobo, no longer in my view, a potent or live issue calling for reference - there being no substantial question of law except of course the rule of practice relating to Stare decisis or precedent, which appropriately comes in for consideration under Issue one to which I will shortly come.

It is for the above reasons that I agree entirely with the views expressed by my learned brothers Uwais and Belgore J.J.S.C. in their judgments, previews of which I have been privileged to have before now. Should I be wrong in holding that no substantial question for reference had arisen pursuant to section 259(3) of the 1979 Constitution and that the decision of the Court of Appeal thereto could be faulted, which is not conceded, I adopt in their entirety the reasoning and conclusions so eloquently set out in the judgment of my learned brother Ogundare, J.S.C. The question is accordingly answered in the negative.

Coming to Issue 1, while I agree that in construing section 258 of the 1979 Constitution, its two related sub-section (1) and (4) ought to be read together. Yet, although the former admits of no ambiguity in the role it

assigns to the court of trial i.e. the High Court, the latter does not admit of such an easy construction in relation to the appellate or reviewing court. In the appellate court's role of reviewing the case, such a case -

"shall not be set aside or be treated as a nullity solely on the ground of non-compliance."

The appellate court in the further exercise of its functions must in addition be:

"Satisfied that the party complaining of such non-compliance has suffered a miscarriage of justice by reason thereof."

Sub-section (4) as clearly exemplified, was therefore enacted in the amendment to section 258 of Decree No. 17 of 1985 to complement sub-section (1) to ameliorate or remove the rigours of the mandatory nullity provision imposed by sub-section (1) and in appropriate circumstances, where the party complaining of such non-compliance has suffered a miscarriage of justice by reason thereof. Sub-section (4) in its application to an appeal would not, in my view, therefore apply retrospectively to a judgment delivered outside the three months limit provided in sub-section (1) by the High Court, namely before the 27th of August, 1985 but rather prospectively, to judgments delivered after the 27th of August, 1985. In addition I wish to say briefly as follows:-

Firstly, that the amendment to section 258 of the Constitution with effect from 27th August, 1985 was an amendment to a substantive law - the Constitution itself being the organic law from which the State derives its legal foundation and existence. Hence, I take the firm view that the decisions in *Ifezue v. Mbadugha* (1984) 5 S.C. 79; (1984) 1 SCNLR 427 and *Odi v. Osafire* (1985) 1 NWLR 17, based as they were, on the interpretation of the provisions of section 258(1) of the 1979 Constitution were rightly decided. Sub-section 1 of section 258 was aimed at checking erring judges who unduly delayed in writing their judgments; hence the importance of the 3 months limitation.

Secondly, that as at 18th November, 1986 when the judgment in the instant case was decided, the Court of Appeal by reason of the doctrine of *Stare decisis* became bound by the Supreme Court decisions in *Kpema* and *Taylor* as well as *Gafari* (Court of Appeal's own earlier decision). By the same token, the Court of Appeal, in my respectful view, was not bound to apply the provisions of section 258(4) of the 1979 Constitution with retrospective effect - that is, to cases decided in the High Court before 27th August, 1985.

Thirdly, that *Kpema* and *Taylor* having, so to say, in my view been crystallized in their affirmation in the *Ojokolobo* Case, they no longer can

be said to have been decided *Obiter* and so rendered *per incuriam* as postulated in the Honourable the Chief Justice's judgment.

Fourthly, that *Ojokolobo Case* which learned Senior Advocate, Chief Ajayi, for the appellants and given support by Mr. Ogunmodede (for 3rd respondent), submitted was not rightly decided - thereby adopting a stance
 5 basically different from the premise on which this court stood - coupled with his insistence that until a judgment is set aside it is bound to be regarded as valid; hence that the language of section 258 (4) of the Constitution being clear in the case herein, the Court of Appeal was obliged to look at the judgment and see if a miscarriage of justice had occurred, is to my
 10 mind an issue brought by him (Chief Ajayi) that does not arise. Be that as it may, the principles governing departure from its earlier decisions by the Supreme Court broadly stated are that it has always felt free to depart from its previous decisions found subsequently to be erroneous in principle or held *per incuriam*, or where the decision if followed will perpetuate injustice. See *Odi v. Osafire* (Supra); *Cardoso v. Daniel* (1986) 2 NWLR (Pt. 74)
 15 105 and *Ifediorah v. Ume* (1988) 2 NWLR (Pt. 20) 1. Suffice it to say, that we need only remind ourselves of what Nnamani, J.S.C. pertinently said in *Bronik Motors v. Wema Bank Limited* (1983) 1 SCNLR 296 at page 317:

20 *"I believe this Court is not unconcerned with the principle of Stare decisis and the need to maintain certainty of the law. But it would not be obliged to perpetuate a decision if it is satisfied that such a decision is manifestly wrong or was given per incuriam on relevant statutory Constitutional provision."*

In the result, I respectfully would not disturb Kpema and Taylor rightly
 25 relied upon by the Court of Appeal as precedents and answer Issue 1 submitted on behalf of the H appellants, also in the negative. For these reasons and the fuller ones contained in the judgments of my learned brothers Uwais, and Ogundare, J.J.S.C. with which I agree in toto, this appeal fails and it is accordingly dismissed by me. The decision of the Court of Appeal
 30 given on 18th November, 1986 is hereby affirmed with N1,000.00 costs to the 1st respondent against the appellants.

OLATAWURA JSC(Dissented)

The facts of the case as found by the learned trial Judge have been
 35 stated in the judgments of my learned Lords already delivered, I do not wish to repeat them again. Two issues formulated by the appellants are as follows:-

1. Was the Court of Appeal in November, 1986 bound to apply the provisions of section 258(4) of the Constitution of the Federal Re

public of Nigeria 1979 as amended by Decree No. 17 of 1985 to a decision given by the High Court in February 1981?

2. Did the issue of whether section 258(4) of the Constitution of the Federal Republic of Nigeria as amended by Decree No. 17 of 1985 applied to the judgment herein raise a substantial question of law which ought to have been referred to the Supreme Court under the provisions of section 259 of the Constitution? 5

As the main issue really is issue No.1. I will make only a brief reference to issue 2. The guidelines in respect of the provision of section 259(3) of the 1979 Constitution which deals with interpretation or application of the Constitution which is issue No. 2 above were stated in *Adesanya v. President of the Federal Republic of Nigeria* (1981) 2 NCLR 358; (1981) 1 NSCC 146; and *African Newspaper Ltd. v. Federal Republic of Nigeria* (1985) 2 NWLR (Pt.6) 137; (1985) 1 NSCC 405. Where a party requests the court for a reference under this section, it is of utmost importance that the court be guided by the conditions stipulated in the Constitution. There is a difference even if slight between a case based on binding precedents and interpretation of the Constitution envisaged under S.259(3) of the 1979 Constitution. The doctrine of binding precedents is not in any way mechanical. Reference under section 259 of the 1979 Constitution must involve the real issue of interpretation of a "substantial question of law" which covers the scope and extent of the constitutional issue requiring reference to this Court. 10 15 20

It is now necessary to reproduce section 259 subsection (3) of the 1979 Constitution which states:-

"Where any question as to the interpretation or application of this Constitution arises in any proceedings in the Federal Court of Appeal and the court is of opinion that the question involves a substantial question of law, the court may, and shall if any party to the proceedings so requests refer the question to the Supreme Court which shall give its decision upon the question and give such directions to the Federal Court of Appeal as it deems appropriate." 25 30

In order to comply with this subsection under consideration it must be shown that there is a substantial question of law which involves the interpretation and/or application of the Constitution itself. In *Gamioba & Ors. v. Ezezi II & Ors.* (1961) 2 SCNLR 237; (1961) All NLR 608 Brett, F.J. delivering the judgment on what amounts to a substantial question of law said on p.613 as follows:- 35

"..... but it must clearly be one on which arguments in favour of more than one interpretation might reasonably be adduced."

The request for the reference is based on the interpretation of section 258(4)

of the 1979 Constitution. The reason given by the lower court for its refusal to refer the matter to this court was that the Supreme Court had interpreted the same S.258(4) of the said Constitution and therefore it was unnecessary for the court to make the reference. Kutigi, J.C.A. (as he then was) said:-

5 *"The Supreme Court in Kpema v. State (supra) made it clear that there is nothing in section 258 subsection 4 to show that it was intended to have retrospective effect. The logical conclusion therefore is that all judgments, including the present judgment, which were delivered before 27th August, 1985 and which were delivered*
 10 *more than three months of the conclusion of final addresses were automatically null and void by reason of section 258 subsection 1 of the 1979 Constitution.*

I am in complete agreement with Chief Solesi for the appellant that the point in issue in this appeal having being
 15 *previously decided by the Supreme Court there is nothing left to be referred to it. All we need to do is to apply the law as decided by the Supreme Court, the highest court of the land. And that is exactly what I have done here."*

If it was true that this court had decided on that line, then the Court of
 20 Appeal would have been right in its conclusion and the reasons for its refusal. But a close look at the cases relied on especially Kpema v. State would show that section 258(4) of the 1979 Constitution was not the issue before the court and therefore any reference to it in my view was an obiter dictum. As at the time of that judgment there was no decision in respect of
 25 section 258(4) of the 1979 Constitution. As could be seen later in the case of Ojokolobo & Ors. v. Alamu there was no unanimity on the correct interpretation of section 258(4) of the 1979 Constitution notwithstanding that the majority decision was against retrospective interpretation but that was not the position in Kpema's case. I am therefore of the view that the lower
 30 court was wrong in its refusal to refer the issue of the interpretation of section 258(4) to this court.

The facts in this appeal are not strictly relevant to the main reason why the appellants have brought this appeal. The issue at stake is the interpretation of sections 258(1) and 258(4) of the Constitution of the Federal
 35 Republic of Nigeria 1979 (hereinafter referred to as the 1979 Constitution). The appeal was re-heard before a re-constituted panel on 21st September, 1993 because of the case of Ojokolobo & Ors. v. Alamu & Anor. (1987) 3 NWLR (Pt.61) 377; (1987) 2 NSCC 991. On 26th August, 1993, Decree No. 61 of 1993 called the Interim Government (Basic Constitu-

tional Provisions) Decree 1993 was promulgated. Sections 180(1) and 180(5) of the said Decree 61 of 1993 provide:-

"180(1) Every court established under this Decree shall deliver its decision in writing not later than 90 days after the conclusion of evidence and final address, and furnish all parties to the cause or matter determined with duly authenticated copies of the decision within 7 days of the delivery thereof." 5

180(5) The decision of a court shall not be set aside or treated as a nullity solely on the ground of non-compliance with the provisions of this section unless the court exercising jurisdiction by way of appeal from or review of that decision is satisfied that the party complaining has suffered a miscarriage of justice by reason thereof" 10

These provisions basically replace section 258(1) and 258(4) of the 1979 Constitution. However in the case of S.258(1) of the 1979 Constitution, section 180(1) of Decree 61 of 1993 has now altered the provision of "3 months" and the supply of authenticated copies of the decision "on the date of the delivery" to "90 days" and "within 7 days of the delivery thereof" respectively. The issue now being considered in this appeal will not be affected by Decree 61 of 1993. 20

The main thrust of Chief Ajayi's submission is that the amendment which was brought about as a result of the case of Ifezue v. Mbadugha & Anor. (1984) 5 S.c. 79 i.e. S. 258 (4) of the 1979 Constitution is a directive to the court exercising appellate jurisdiction where an appeal is the remedy or to a court that is competent to review that decision. The question which really arises therefore is whether section 258(4) of the 1979 Constitution affects an appeal on the date it is heard notwithstanding that the amendment came into force after the judgment of the trial court was delivered. It is not in dispute that the judgment of Oluwa. J. delivered on 16th February, 1981 was clearly outside the time limit prescribed by section 258(1) of the 1979 Constitution. The appeal was heard on 23rd September, 1986 by the Court of Appeal and judgment of that court was delivered on 18th November, 1986. 25

Chief Ajayi S.A.N.. the learned counsel for the appellants, appreciated the onerous task before him should he decide to re-open the mandatory provision of section 258(1) of the 1979 Constitution. Learned senior counsel submitted. And rightly in my view, that unless and until a judgment, whether null and void is set aside that judgment subsists and is binding: Williams v. Sanusi (1961) 2 SCNLR 29: (1961) 1 All NLR 334 at 35

337: Adebayo v. Johnson (1969) 1 All NLR 176 at 194: Ajao v. Alao (1986) 5 NWLR (Pt.45) 802. Learned senior counsel laid emphasis on the date of the judgment delivered by the lower court and that S.258(4) of the 1979 Constitution had come into force. In my view the significance of section 258(4) of the 1979 Constitution is to save a situation which may
5 lead into anarchy as a result of individuals interpretations of a court's judgment and/or a resolve by parties or individuals to obey or not to obey an order of court which in their opinion is a nullity. Consequently, this subsection has succeeded in preventing arbitrary interpretation, wilful disobedience of an order of court declared a nullity by individuals but which until
10 set aside is a subsisting decision of the court.

An invalid order of court remains an order of the court until necessary proceedings are taken to question it or set it aside. It remains an order and will not be ignored. It carries the stamp of validity, a valid order which must be obeyed. I will therefore hold that when the appeal was being heard
15 by the Court of Appeal, the judgment of the High Court delivered outside the three-month limit and contrary to S.258(1) of the 1979 Constitution was a valid and subsisting judgment. The amendment is also to ameliorate the severity brought out by our decisions in Ifezue v. Mbadugha & Anor. (supra): Odi & Anor. v. Osafire & Anor. (1985) 1 NWLR (Pt.1) 17; (1985)
20 1 NSCC 14 to mention a few.

It will now be necessary to revisit the earlier decisions in respect of which much emphasis was laid so as to drive home the point that we should not depart from our earlier decisions unless it is shown that to follow it will lead to perpetuation of injustice. Reference was made to Kpema v.
25 State (1986) 1 NWLR (Pt.17) 396; (1986) 1 NSCC 212; Taylor v. Trustees of Trinity Methodist Church (1986) 4 NWLR (Pt.34) 136; (1986) 1 NSCC 449; Odi & Anor. v. Osafire & Anor (supra): Ojokolobo & Ors. v. Alamu & Anor (1987) 3 NWLR (Pt.61) 377; (1987) 2 NSCC 991.

Before making a full analysis of the rationes decidendi of the cases
30 cited above, I will point out that Chief Solesi's submission is against retrospective legislation, which S.258(4) of the 1979 Constitution will have, should we uphold the submission of Chief Ajayi, S.A.N. There is this interesting submission of Chief Solesi to the effect that the law to be applied
"when an appeal comes for review or hearing can only be the law in force at
35 the time the presiding Justice was writing his judgment and not the law that came to the statute books when the presiding Judge has no opportunity to examine and consider such amendment introduced into the existing law years thereafter". On its face value this submission supports Chief Ajayi's contention that the law applicable is the law in force when the appeal is

being heard or reviewed. At the time this appeal was heard in 1986 the amendment had already come into force. I still bear in mind Chief Solesi's earlier submission that the amendment deals with substantive and not procedural law.

With this background I now come to the analysis of the cases cited above. In *Kpema v. State* (supra), Uwais, J.S.C. delivering the leading judgment of the Court said on page 216 as follows:-

"In Chief Ifezue v. Mbadugha & Anor. (1984) 1 SCNLR 427; (1984) 5 S.C. 79; this Court (Irikefe, J.S.C. (as he then was), Bello, J.S.C. (dissentiente) and Obaseki, Eso, Aniagolu, Nnamani and Uwais, (J.J.S.C.) held that the provisions of section 258 subsection (1) were mandatory and any judgment delivered outside the period of three months was null and void. The same decision was followed in Paul Odi & Anor. v. Osafie & Anor (1985) 1 NWLR (Pt.1) 17 (Sowemimo, C.J.N., Irikefe, J.S.C. (as he then was) Bello, Obaseki, Eso, Kazeem & Coker, J.J.S.C.). It is clear therefore that the judgment delivered by Aghahowa, J. sentencing the appellant to death was a nullity. Since it was a nullity the learned trial Judge had the inhereilt jurisdiction ex-debito justitiae to declare it null and void - Craig v. Kanseen (1943) 1 All E.R. 108; and Kafi Forfie v. Barima Kwabena Seifa (1958) A.C. 59. But he did not do so as the point did not, apparently, occur to him nor was it raised before him because the decision of this court in Ifezue's case was not given until more than a period of 2 years had elapsed after his judgment was delivered."

In the latter part of the judgment, the learned justice made a brief reference to s.258(4) of the 1979 Constitution which however was not part of the issues raised before the court, and I will regard that aspect of the judgment as obiter dictum: *Adams v. Naylor* (1946) A.C. 543. I will come to the case of *Macfoy v. U.A.C.* (1962) A.C. 162 which has been cited several times on the issue of nullity later.

In *Taylor v. Trustees of Trinity Methodist Church* (supra) the issue raised was in respect of S.258(1) of the 1979 Constitution and the court declared the judgment of the trial court a nullity. The case of *Paul Odi v. Osafie* (supra) was also relied upon by the court. The legal consequence of non-compliance with section 258(1) of the 1979 Constitution has not been in doubt, but the amendment brought about by Decree No. 17 of 1985 which is S.258(4) of the 1979 Constitution came for the consideration of the full court in *Ojokolobo & Ors. v. Alamu & Anor* (supra). The majority decision was that S.258(4) of the 1979 Constitution is not retrospective in its appli-

cation to appeals which were not heard before 27th August, 1985 when that section came into force. However Bello, C.J.N. with regard to S.258(4) of the NWLR 1979 Constitution said:-

"....The foregoing decisions seem to me to show that a statute making provision for "time" within which judicial proceedings can be taken is
5 retrospective. I cannot see any good reason why a statute prescribing the time within which a court should dispose of proceeding ought not to be so construed. The fact that the time limit prescribed by section 258 is a constitutional provision cannot be a valid reason because we have been applying the ordinary rules of interpretation of statutes in the interpretation of the
10 several provisions of our Constitution past and present."

The objection to retrospective interpretation which is traceable to the commencement date overlooks the clear provision of what the court should do when the appeal is heard. Definitely s.258(4) of the 1979 Constitution was not designed to amend s.258(1) of the same Constitution to the extent that
15 the three month limit should no longer apply but the amendment enjoins the court hearing the appeal to look into the issue raised under s.258(1) of the 1979 Constitution so that there cannot be automatic nullity based solely on the ground that the judgment was delivered outside the three month limit. The judgment, caught by s.258(1) of the 1979 Constitution as
20 at the time the appeal is being heard remains valid until set aside. In *Selangor United Rubber Estate Ltd. v. Cradock (No.2)*(1968) 1 WLR 319-321. Ungood-Thomas, J. considered section 50 of the Companies Act, 1967.

Section 50 of the Companies Act, 1967 deals with admissibility of evidence in respect of certain mailer. The section reads:-

25 "An answer given by a person to a question put to him in exercise of powers conferred by:

(a) section 167 of the principal Act (as originally enacted or as applied by section 172 of that Act or section 32 of this Act); or

(b) general rules made under section 365(1) of the principal Act for
30 carrying into effect the objects of that Act so far as relates to the winding up of companies; may be used in evidence against him, and a statement required by section 235 of the principal Act (statement of company's affairs to be made to official receiver) may be used in evidence against any person making or concurring in making it."

35 The principal Act referred to was the Companies Act of 1948. The learned Judge Ungood-Thomas, J. said:-

"This is a procedural provision providing for the admissibility of evidence before a court when it comes to hear a case and deal with the evidence. It implies to future hearings after the 1967 Act came into opera-

tion but it then applies even though the hearing be in respect of mailers which arose before the Act was passed."

The whole scope and intention of the legislature appears to me manifest when subsections (1) and (4) of section 258 of the 1979 Constitution are read together. The crucial time to apply s.258(4) of the 1979 Constitution is when the appeal is heard notwithstanding that it was not in force at the time of trial of the case in the court of first instance. It will therefore, in my view, amount to a narrow and restrictive interpretation of section 258(1) of the 1979 Constitution to say that section 258(4) of the same Constitution applies to cases (and not appeals) which were tried as from 27th August, 1985.

The dominant reason why a statute should not be construed retrospectively is the protection of vested rights. I will now go back to the dictum of Lord Denning in *Macfoy. V. United African Co. Ltd.* (1962) A.C. 152-160 where he said:-

"If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court to declare it to be so."

Chief Ajayi, S.A.N, has referred us to the case of *Isaacs v. Robertson* (1984) 3 WLR 705 where the statements of Lord Denning had been explained; the effect of which supports our decisions that a judgment which is a nullity unless set aside remains valid. It is true that this court is not bound by the decisions of other jurisdictions but we accord them respect and in some cases follow them. I will therefore adopt the reasoning in that case. Since the majority decision in *Ojokolobo* (supra) is that s.258(4) of the 1979 Constitution is not retrospective, under what condition can we depart from the decision of the full court?

The doctrine of binding precedent is strong that the lower courts can hardly depart from it except when they can successfully distinguish the case on hand from the precedents they are bound to follow. In the Supreme Court however the principle guiding departure from earlier decision has been stated in some cases so as to avoid injustice and perpetuate errors: *Bucknor Maclean v. Inlaks Ltd*, (1980) 8-11 S.C. 1; *Oduola & Ors. v. Nabhan & Ors.* (1981) 5 S.C. 197,

We are now face to face with the issue of certainty in the law otherwise called precedent and the justice in a case. We must therefore ensure that "certainty does not become the certainty of injustice". It is true that litigants will be at a disadvantage when they cannot be advised as to the position of the law should it keep on changing at will; but we must when

occasions arise just like the case in hand, re-examine past decisions not with a view to showing that we know better but to demonstrate that we can correct the past errors. The legislature appreciated the injustice created by s.258(1) of the 1979 Constitution hence the amendment which for purposes of re-examination I again reproduce hereunder. It reads:

5 *"258(4) The decision of a court shall not be set aside or treated as a nullity solely on the ground of non-compliance with the provisions of this section unless the court exercising jurisdiction by way of appeal from or review of that decision is satisfied that the party complaining of such non-compliance has suffered a miscarriage of justice by reason thereof."*

10 It is not arguable now that the rigours which followed the decision in Ifezue (supra) led to this amendment. I will in this aspect of the amendment adopt with respect the words of Lord Simonds in Chapman v. Chapman (1954) A.C. 429 at p.444 where he said:

15 *"It is even possible that we are not wiser than our ancestors. It is not for the legislature... to determine whether there should be a change in the law and what that change should be."*

The change in the law is the product of this subsection i.e, s.258(4) of the 1979 Constitution reproduced above. It is to ameliorate the havoc and injustice brought about by s. 258(1) of the same 1979 Constitution before
20 the amendment. The overriding intention of the legislature is that the section shall apply at the time of the hearing of the appeal notwithstanding when the case was tried. The amendment does not specifically state it shall not apply to any appeal pending, hence the time element is when the appeal is being heard or reviewed: Wright v. Hale (1860) 30 L.J. Ex.40-42.

25 It is for these reasons that I think we should not follow Ojokolobo. I will therefore over-rule it.

I had the advantage of reading the judgment of my Lord the Chief Justice of Nigeria. I agree with him that there will be greater injustice in sending the case back for retrial for the articulate reasons contained in the
30 said judgment. We must therefore avoid too rigid adherence to precedent, which will lead to or perpetuate injustice.

I will therefore for the foregoing reasons allow the appeal and I hereby set aside the judgment of the Court of Appeal dated 18th November, 1986 and direct that the appeal be heard on its merits. Costs of
35 N1,000.00 (One Thousand Naira only) against the 1st respondent in favour of the appellants. Appeal Dismissed.