THE AKAN LAW OF PROPERTY

being a Thesis submitted for

the Degree of Doctor of Philosophy

- by -

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PRECIS.

"The Akan Law of Property" endeavours to describe the present position of land-tenure in a homeonomic group of Gold Coast peoples. It attempts neither to expound the ancient customary law, nor to give a definitive restatement of the modern law - and that for a very good reason. The law of the Gold Coast today is a law in transition, from an entirely unwritten body of rules fortified by long-established usage, but subject as customary law so often is in its unwritten stages to local exceptions and shifting emphases, and designed for the simple needs of a people without commerce or permanent agriculture, to a twentieth-century legal system suitable for the requirements of a modern economy based on cash-crops and trade. The crystallization of valuable rights in land, claimed concurrently by a hierarchy of holders from the paramount stool to the individual cultivator, is illustrative of this change in purpose.

The complex and fluid nature of land-rights in the Southern Gold Coast at the present time, due to this transition and the partial reception of English law, has for long led responsible persons to call for a statement of the modern law, and at the same time has deterred anyone from making the attempt. The existing authorities are brief or out-of-date. No-one would minimise the valuable contributions of Sarbah, Danquah and Rattray to our knowledge of Akan law; but there has been up till now no book solely or even largely devoted to the Akan law of property, nor one which has set out to synthesize the developing customary law with the many decisions of the superior courts on that law. Nor has much attention been paid to the decisions of native courts, which often reflect changing attitudes in advance of official recognition.

"The Akan Law of Property" is divided into three Parts:

Part I deals with the Persons of Akan Law - the Stool, the Family, and the Individual.

Part II covers the Institutions of Akan Law - sale, pledge, tenancy, gift, caretakership, succession.

Part III deals with Miscellaneous Topics; the use of writing, the function of long possession, and the application of registration to Akan tenure.

Part I: the land-rights of stools are set out, the vague term "stool land" is analysed into its component parts, the modern separation (formerly inconceivable) between the chief and his stool is shown. The complicated and varied problems (both of fact and law in each particular case) whether a stool has rights of ownership, or only of jurisdiction, or both, are considered in a separate chapter. In the sphere of the family, the term "family property" is also divided, so as to show the exact interrelation between a family and its members, and especially the weakening control now exercised by a family over its members. The rights of citizens and "strangers" (the latter of increasing importance today) are also examined.

Part II: dealings with rights in land are considered in the complexity induced by concurrent separation of interests, and the diversity of possible subject-matter. The more interesting features here include:-

(1) the virtual disappearance of the ancient pledge;

(2) the growth of new forms of tenancy;

(3) the institution of "caretakership";

(4) developments in the customary law of testate and intestate succession, particularly through the demand that widows and children of males should be provided for.

Part III: the efforts of the superior courts to fill the gap caused by the absence of rules of prescription or limitation in Akan law are examined; whilst the chapter on WRITING reveals the consequences of the not always happy marriage between English and African law. In Chapter XIII present legislation and experiments relevant to registration of title, and a tentative scheme for recording titles, are set out, with an eye to the future development of Gold Coast land-law, in which it is expected that registration will play a large part.

Apart from the mass of new material presented here, the method used in collecting this material is largely novel. The Akan law being mainly unwritten, reliance had to be placed on the personal receipt of oral information on the spot: the method thus differs widely from that customary in legal research (except for the investigations into customary law in the Punjab and Indonesia). In Africa up to now most of the collection of information on customary laws has been made by anthropologists, and not by lawyers. "The Akan Law of Property" thus represents a new venture in the techniques of legal research.

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ABBREVIATIONS AND MODES OF CITATION.

(Notes: 1. For abbreviations of the names of authors and their works, see BIBLIOGRAPHY.

2. The following table gives accepted abbreviations and modes of citation for West African reports. The reader should also refer to Brandford Griffiths' Digest. (English reports are cited in the usual manner, hence they are not included here.)

Danquah, C.A.L.	: Vide BIBLIOGRAPHY
D. Ct	: Divisional Court(s).
hence	
D.Ct '26 - '29	: Cases decided in the D. Ct of the Gold Coast between 1926 & 1929.
D.Ct '29 - '31	: - ditto - 1929 & 1931.
D.Ct '31 - '37	: - ditto - 1931 & 1937.
D.& F.'11-'16	: Cases decided in the Divisional & Full Courts of the Gold Coast, 1911 - 1916.
Earn.	: Earnshaw's Report.
F.C.L.	: Cases reported in Sarbah's Fanti Customary Laws (cf. BIBLIOGRAPHY).
F. Ct	: Full Court.
hence	
F.Ct '20 - '21	: Cases decided in the Full Court of the Gold Coast 1920 - 1921.
F.Ct '22	: - ditto - 1922.
F.Ct '23 - '25	: - ditto - 1923 - 1925.
F.Ct '26 - '29	: - ditto - 1926 - 1929.
F.L.R.	: Fanti Law Report (second selection): by Sarbah: printed with his Fanti National Constitution (cf. BIBLIOGRAPHY).
I.A.	: Indian Appeals.
K-F.	: King-Farlow's Report.
N.L.R.	: Nigerian Law Reports.
P.C.	: Privy Council.
hence	
P.C. App.	: Privy Council Appeal.
P.C. '74 - '28	: Privy Council Judgments 1874 - 1928.
Red.	: Cases reported in Redwar's Comments (cf. BIBLIOGRAPHY).
Ren.	: Renner's Report.
W.A.C.A.	: West African Court of Appeal Reports.

TABLE OF STATUTES
including Ordinances, Proclamations, Rules, Orders and Bye-laws.

(Note: Chapter references are to the 1936 Revision of the Laws of the Gold Coast.)

TABLE OF CASES.

(Notes: 1. For Mode of Citation see ABBREVIATIONS AND MODES OF CITATION.
2. Cases are in general entered under the last name of each party, in alphabetical order.)

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GLOSSARY.

I. NATIVE WORDS.

(Note: The spelling of the Twi, Fante and Asante words adopted here is the author's own. The orthography of these languages has varied very widely in the past hundred years, and is not yet stabilized. Spellings given below are generally in conformity with accepted modern practice; but the reader may care to refer to J.G. Christaller: Dictionary of the Asante and Fante Language.)

Diacritics have been omitted.

Abusa	(also - ebusah, bu'sa) - lit. "division into three parts"; used here principally of abusa tenancies, where a tenant contracts to pay one-third of the yield (usu. cocoa) from the land which he holds.
Abusua	"Clan"; or "family" (matrilineal).
Abusuahene	"Head of the Chief's family group" - Warrington.
Abusuapanin	Head of an abusua or family; lit. "Elder of the Family".
Abusuatiri	Head of an abusua.
Adonten	The main body of the army.
Adontenhene	The chief of the Adonten wing of the army.
Ahenfie	"House of the chief" or palace.
Aseda	"Thank-offering"; a token of money, drink, etc., given by the recipient of a benefit to the donor in thanksgiving, and to seal the arrangement.
Bu'sa	See abusa.
Ebusah	See abusa.
Fie	"House", both literally and figuratively.
Fie-nipa	"People of the house"; often a euphemism for slaves, "domestics" (q.v.) or servants.

Fie-wura — "Master of a house"; head of a household.

Guaha — "Etymology uncertain; guaha is "cut" in order to complete a conveyance of land, especially by sale.

Kwae — Virgin forest, not yet brought under cultivation; in distinction to mfûwa (q.v.), land cultivated, and then allowed to revert to secondary bush.

Mailo — UGANDA. A native modification of the English word "miles", and referring to land allocated by the British Government to chiefs and others, in distinction to land held there by native tenure.

Mbusua — Plural of abusua, q.v.

Mfuwa — "Fallow-land"; cultivated land now uncultivated, resting, or lying fallow, in accordance with the native practice of shifting cultivation.

Mpaninfo — Plural of panin, q.v.

Nua — Brother, real or classificatory.

Ntome — A boundary tree, planted at the corner of a piece of land when it is sold or otherwise transferred.

Ntoro — (Ashanti Nton) Patrilineal, totemic(?) groupings, cutting across the Akan matrilineal system. Now apparently in decline.

Obaapanin — (Also obaapenin) lit. "the old woman"; the senior female member, or "female head", of a family.

Odikro — (Also odekro) "one who eats a village"; the political head of a village, often distinguished from a mere headman, usually on the ground that the odikro has a stool.

Ohemaa — The "Queen-Mother", or senior female relative of a chief.

Ohene — Chief. Freely used in compounds as "-hene" - e.g. Asantehene, Omanhene, meaning the chief of Ashanti, the chief of the oman or state (paramount chief).

Okyeame — The spokesman of a chief; in Gold Coast usage invariably called the "linguist" of a chief.

Oman — A community, the people of a particular area, the state.

Omanhene — Head of the state; in Ashanti used for the divisional chiefs (e.g., Adansihene, Mamponghene) serving the Asantehene directly; a Paramount Chief.

Panin — An "elder"; used of the elders of a chief, or of a family.

Panyin
Peyin — See Panin.

Safohene — (Also: Safohin) a chief serving a Paramount Chief; a senior or wing chief.

Samanfo — The departed ancestors.

Samansew — (Also: samansiw, samanse, nsamansie, saman-nse) customary oral will or declaration by a person on his death-bed. Lit. "what the ghost said" or "what the ghost set aside".

Sanahene — The official in charge of the Royal treasury.

Tramma — (Also: trimma, ntrimma, ntrama); lit. "cowries"; a token given to seal a sale; see SALE, pp. 353 et seq. "ton no ntrama" is used to mean "sell outright".

II. ENGLISH WORDS USED IN SPECIALIZED MEANINGS.

Arbitration — The customary mode of settling disputes out of court by reference to an "arbitrator", who may be the head of the family, a chief, or a private individual. His award is binding only when accepted by the parties; hence customary arbitration is not to be confused with the English institution of the same name.

Authorization — Permission given by A to B to deal with property, where title is with A and not with B; e.g., permission given by a family to one of its members to sell the inherited property which he holds, including the family's interest. Used in opposition to "consent", q.v.

Caretaker	One who looks after property for its owner, usually on customary terms (see Ch. VIII, post).
Citizen	A subject of a stool or state, bound thereto by birth into one of the families owing allegiance to that stool or state; used in opposition to "stranger" - one not so bound.
Class I Area	Areas or states where claim to the absolute title in the land is laid by the stools, and not by families or individuals; e.g., Ashanti.
Class II Area	Areas or states where claim to the absolute title in the land is laid by families or individuals, and not by stools (which claim at most jurisdictional rights); e.g., Fante.
Company	Groups of "young men" or ordinary citizens (perhaps originally for military purposes), especially in the coastalareas (e.g., Cape Coast, Elmina). Their main purpose now is social and religious. Although outside the customary legal framework, they claim at times special rights in regard to land as companies. There is no connexion with joint-stock companies.
Dash	A gift; often used of presents customarily given to seal a bargain, introduce an applicant, etc.
Domestic	An emancipated slave, or a descendant thereof; the status of domestic entails in customary law special privileges and special liabilities in the family of which he is an adoptive member.
Drink	Often used of customary presents or "dashes", especially in the giving of aseda (q.v.). Is either drink, or its value in money (calculated on a standard customary scale in "bottles").
Elder	A panin (q.v.), of a chief or a family.
Fallow-land	Twi mfuwa, q.v.
Family	The Akan matrilineal family or abusua, a legal person in Akan law. See Ch. IV, passim.
Family-head	The abusuapanin, or head of a whole family. He is appointed to this position by election by the other members of the family. See Ch. IV.

Family-house — A house which is family property; used especially of the principal family house, where the head of the family resides.

Family-member — One qualified by relationship strictly through the female line to share in the life of the family, to succeed to the property of other members, etc. See Ch. IX.

Family-property — In general, all property to which the family as a whole lays claim (apart from the interests of any political superior). The antithesis is with "self-acquired property" or "individual property". Although "inherited property" (q.v.) is family property in the wide sense, a distinction is made in this work between family property in the narrow sense (where the family as a whole has the title and the use); and inherited property (where the family has the title, the individual successor the use for the time being).

Family-stool — One of the two types of stool, the other being "town-stools". Primarily a stool to which the members of a family exclusively elect and depose; typically the stool of the head of a family (abusua-panin); but a family may have more than one stool.

Farm-stead — A synonym for fallow-land.

Foodstuffs — Subsistence, as opposed to cash or commercial, crops. The antithesis is usually made between "foodstuffs farms" (e.g., cassava, maize, etc.) and cocoa farms. Often different rules apply to each type of farm.

Gong-gong — An instrument used by the messengers or "town-criers" of chiefs to summon the inhabitants and give them information or instructions.

Inherited property — A species of the genus family property, q.v. Property to which an individual member of a family has succeeded on the death intestate of another member of that family. The antithesis is often made with "self-acquired property".

Knocking-fee — A present of drink or money often used to initiate bargaining, e.g., on sale of land or marriage.

Linguist — The okyeame or spokesman of a chief.

Oath — A customary method of commencing a case.

Queen-Mother — The ohemaa or senior female relative of a chief.

Rope — A customary measure of land, usually equalling 24 fathoms.

Section — A major segment, "branch", or "house", of a family.

Senior member of a family, a panin.

Sheep-money — A customary mode of reckoning money, originally tied to the price of sheep. Now used in reference to the mode of calculating money-rents.

Stamp — That which binds or confirms a transfer, or arrangement. Usually consists of something given by the person benefited to the person conferring the benefit. It may be drink, sheep, etc. Its effect is usually to make the transaction irrevocable.

Stool —
(1) a native chair.
(2) the blackened or consecrated stool(s) of the ancestors of a chief or head of a family.
(3) a legal person (="crown" or "throne"), the chief and his elders and councillors acting on behalf of his subjects.

Stool-servant — One who voluntarily or by custom renders customary services to a stool, of a domestic or ritual nature.

Stool-wife — The wives of a chief, who are stool property; they are enjoyed by the chief for the time being and passed on to his successor on the stool.

Wing — One of the major divisions of an Akan army, hence of an Akan state.

Young man —
(1) Ordinary citizen of a state, not being of royal or chiefly blood.
(2) Ordinary member of a family, not being its head or an elder.

INTRODUCTION.

The subject of this book is the Akan law of property. In order not to mislead the reader, it is, I think, essential to indicate its scope, the problems that it considers, and how far it can be said to provide answers for them.

First, it is necessary to say something about the word "Akan". This word is linguistic rather than ethnographic, but serves conveniently to delimit the Fante- and Twi-speaking peoples of the Colony of the Gold Coast and Ashanti. This group stands out, not merely on linguistic grounds, but by reason of institutions also, from its neighbours: the Akan peoples are matrilineal, they share a similar clan-system, they all have a political system based on the institution of the chieftaincy and in particular of the Stool. Some of the Akan peoples may have borrowed certain features of their organization from their more successful neighbours (the division, for instance, into "wings" (Nifa, Benkum, Adonten, etc., originally for military purposes); their non-Akan neighbours may have borrowed some of these typical institutions (for instance, among the Ga people); but the isolation appears to be justified. There are borderline cases: both in language, and perhaps in institutions, there is a certain shading off to the West - the Ahanta and Nzima peoples, and to the East - some of the Guang fragments; but I have not hesitated from mere con-

siderations of language to quote cases originating in Sekondi and Takoradi as evidence of general principles of Akan law.

From the personal point of view, it was impossible to investigate every aspect of the customary law in every tribe, state, or community within the Akan group. I hope that by taking representative samples from amongst the different peoples of the Gold Coast a sufficiently definite body of custom has been accumulated, and especially that certain principles and points of practice have been established: these principles are, I feel, of fairly general acceptance among the Akans; where it is alleged that there is a local difference, one's approach should be cautious though not entirely sceptical. Local differences undoubtedly exist. Some of these differences are brought out in the text; some are due to the varying ways in which local authorities have emended or supplemented the existing customary law to cope with modern difficulties and modern developments. Again, there is a radical difference between the relation of the stools to land in Ashanti on the one hand, and in Fanteland on the other. Further, in many cases differences are not so much between one locality and another, as between one family and another; this makes extremely difficult a detailed statement of certain aspects of the family law in regard to such matters as the appointment of the head of the family, the rights of a successor, and so on.

We are concerned with the "law of property". In case the

critical reader objects that the major portion of the text concerns the law of real property, that is, the law of land tenure, one may plead in extenuation the classic real property legislation of 1925, the principal statute of which was simply entitled "The Law of Property Act, 1925". And, secondly, customary rules do not seem to have reached such a stage of elaboration in regard to movable as to immovable property; where there are such rules, they frequently follow the general pattern of property law. Economic development brings its own difficulties: new classes of chattels, comparable in value to houses and farms, are now the subject of ownership - for instance, lorries and motor-cars. The English law of torts has found a similar difficulty with such chattels (in regard to the liability of the owner for injury suffered therein): in the African, as in the English, law there is a tendency to create a third class of property, intermediate between the time-honoured categories. The law for each class of property has been separately indicated wherever possible.

What is the law which is described here? It is not the ancient customary law; nor is it the modern customary law by itself. It is rather the modern customary law as established in practice and recognized by the native courts, together with modifications due to the influence of English legal ideas, and to the judgements of the superior courts. If the law which is as a result set out in the following pages appears a <u>mélange</u>

of rules and principles derived from more than one system, and not always wedded in a happy union, then the description does no more than picture forth the present state of Gold Coast law, which calls urgently for revision and codification.

A new Bentham, one who wished to codify the customary and other law of the Gold Coast, could not be expected to perform such an heroic task - whether he intended merely to record in indisputable form the law now existing, or to produce from existing elements adapted to new principles a workable law for this age of cocoa, timber and gold concessions, and town-planning, unless he had first beside him a statement of the law as it is now administered, even if that statement revealed serious gaps and uncertainties - for, after all, it is to settle such uncertainties and fill such gaps that he will be called on to draw up a uniform code. This treatise, by revealing the present state of Gold Coast law, may perhaps impel and encourage the demand for codification; and it is hoped that it may also assist the codifier in his task.

A few words must be said about the sources of the law described below. "Sources" in this context refers rather to the places to which one can go for information, than to the law-making power, or to the justification for treating custom as a source of law. Such jurisprudential questions are best left unbroached here, although it is important to note that modern legislation recognises custom as a source of law (<u>vide</u>

the Native Courts (Colony) Ordinance, 1944), provided it is fortified by established usage.[1] The Gold Coast is fortunate in comparison with most other British African possessions, in having a considerable literature on the subject of customary law. The works of Sarbah,[2] so long treated as an authority in the courts and elsewhere, (even for non-Fante custom), Rattray,[3] the distinguished anthropologist who also had a legal training (which sometimes led him into error[4]), and Danquah,[5] fortunately still with us, are a sufficient indication of the richness available in the field. Going more widely we find the valuable works of Hayes Redwar[6] and Casely Hayford[7] - two authorities frequently quoted in the courts. It is no coincidence that so many of these authors have been indigenous, a fact which may be considered to give them added insight into the background of the customary law in the Gold Coast. Various sociologists have also delved into the way of life of Africans in the Gold Coast,[8] but they naturally tend

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1. Such points are considered in J.N. Matson's work on Native Custom in the Courts, unfortunately not yet published; though not generally available, it is a most valuable critique of the courts' attitude.
2. His Fanti Customary Laws, Fanti Law Reports, Fanti National Constitution, etc.
3. In his series of books on Ashanti custom and institutions.
4. For example in his search for feudal parallels to Akan law.
5. In Akan Laws and Customs, and Cases in Akan Law.
6. Comments on the Gold Coast Ordinances.
7. Gold Coast Native Institutions.
8. E.g., Field and Fortes.

to approach the problems we are to consider from a different point of view: the sociologist treats the law as only one of the factors which go to make up the life of the community - he will look at law as "social engineering", in Pound's phrase. To the lawyer, evaluating law only as a body of rules enforceable in the courts, a narrower approach is essential.

Nor have the judicial personages of the Gold Coast been backward in making plain the rules of customary law as they see them; from Governor Maclean through the great Brandford Griffith to the present day, the country has not lacked those who have examined customary law with critical sympathy in their decisions. The series of reports of cases decided in the Supreme Court, the Full Court, and later in the West African Court of Appeal, are impressive by their volume; no-one examining the customary law dare ignore them. It is to be regretted that it was decided to cease reporting the decisions of the Supreme Court of the Gold Coast in 1937, since much of value subsequent to that date may thus have been lost. Fortunately, one may still find unpublished copies of some decisions of the court/after this date, which in some cases give important evidence of changes of mind in the attitude to certain customs, and an indication of the approach to new problems which have arisen (e.g., in connexion with swollen-shoot disease in cocoa). One must also note with regret that certain decisions in the superior courts have not dealt adequately with customary law,

whether by ignoring established custom, by putting on a custom a complexion which it does not bear, or by failing to make a sufficient distinction between the different customary laws of the Gold Coast.[9] One therefore approaches decided cases with respect, but sometimes with caution; and I must apologize to readers who may feel put out to find that I have not hesitated to indicate those cases where the courts have, in my opinion, gone wrong. In some instances, since the decision of the court is conclusive of the law, it is now too late to restore the right custom; in other, however, superior courts may be able to override previous decisions, even whenhallowed by antiquity; and certainly the most profitable method of doing so is by recognition of the mutable nature of custom, especially at the present time.

Besides, then, text-books and court decisions, there are other written sources of information. The files of the Administration often reveal a problem, or answer one. The reports of commissions of enquiry (of which the Gold Coast has,

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9. The most flagrant example of this is in connexion with the customary law of succession in Accra, which although not strictly within the present terms of reference, is too obvious to let pass. Ga succession is patrilineal, not matrilineal; and yet not only have the works of Sarbah, writing about Fante custom, been cited as decisively against patrilineal succession, but evidence from the Gas themselves has been rejected when in favour of succession through the father.
See my A Note on the Ga Law of Succession, B.S.O.A.S. (1953) Vol. XV, 1, p. 164.

through the years, had a considerable number) are also in some cases worth consultation.[10] Lastly, there is a rich field of material available in the shape of native court records, a field up till now largely untouched.[11] The records of the native courts vary greatly in quality as from one court to another (those from certain of the "A" Courts are excellent), and they may even be illegible or unintelligible; even when the judgements have been perverted for extra-judicial reasons, the customary law is often correctly stated: for this purpose, the examination of witnesses as recorded is often more valuable than the judgement itself, which may, for various reasons, omit almost all statement of principle or practice. Investigation of native court records - which in the Gold Coast are kept in English - is thus something which should be initiated on a larger scale: I cannot claim to have done more than touch the fringe of the subject in my investigations.[12]

There are also the unwritten sources of information. As is common practice throughout Africa, there are certain persons who by custom have been trained to a greater knowledge of the time-honoured principles of the customary law than other members of the tribe; and a large part of my information has been gathered by oral inquiry from these persons. I refer to

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10. E.g. of the Belfield Commission.
11. But not in Tanganyika, where Cory and Hartnoll derived most of their information for their Customary Law of the Haya Tribe from court records.
12. I should warn potential investigators that the examination and sifting of native court records is a most laborious business.

the elders and "linguists"[13] of the chiefs, who traditionally form the advisers of the Chief in legal matters, and the panel of native tribunals or courts. As in other parts of Africa, and in other fields of research, this is our last chance to tap this rich source of information - much of the ancient custom in which the elders are skilled is now being superseded in modern practice, and the membership of the native courts is being "democratized" by the inclusion of non-traditional members, so that a cleavage is developing between those who are experts in customary law, and those who try cases involving that law.

Besides these African experts, I did not hesitate to examine for myself the actual practice of the people, nor to question at length persons of all walks and ranks in life. Customary law is, after all, authenticated by its observation; a custom which is no longer followed has to that extent ceased to be a custom recognizable by the courts. This personal investigation and inquiry was also essential for fixing the sociological background in which the customary law operates, and to explain the reasons underlying its rules. It emphasized how customary law is the law of the possible, rather than a science for settling disputes; that the African (though often stigmatized as litigious) is more at home in a customary arbitration, and that the arbitrator will try, within the

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13. A term now exclusively used in the Gold Coast for the "okyeame" or "spokesman" of a chief.

framework of commonly-accepted principles, to produce a solution which will restore peace between the contending parties. The solution is one which will be acceptable to the parties, rather than one justified by strict adherence to legal rules, or even by an appeal to the doctrine of fair play.[14]

It would not be out of place to say a few words about the nature of the evidence upon which the account that follows is based. The statements of substantive law which are put forward here rest largely on oral information gathered by myself as the result of a process of question-and-answer. This may be a treacherous method if certain points are not kept clearly in mind:

(1) It is much better to ask informants for a statement of the customary law applicable to a particular set of facts, rather than for an enunciation of some general principle unrelated to actual instances. My experience was that questions of a general nature - "what is the customary law relating to the disposal of self-acquired property?", and the like - were most likely to mislead the informant, or cause him to give answers at variance with present practice. I therefore endeavoured to limit questions to concrete cases which could arise, or had arisen, and to elicit an answer restricted to such cases. By varying the details of a hypothetical case,

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14. Cf. my Customary Law of the Akan Peoples, African Studies, March 1953, 26.

more general rules of law gradually emerged. This method was more tedious than that of generalized questioning; but it was rewarding, since it could more easily be verified by court-cases and personal observation. After a sufficient multiplication of instances a general conclusion may form in the investigator's mind; and there is at this stage no objection to testing the conclusion by putting it to the informants.

It is for such reasons that I am suspicious of the "questionnaire" method of investigating customary law, since the questions which can be asked are usually general in nature (though such a questionnaire can usefully be drawn up, and kept by the investigator as a reminder of the main points he wishes to examine).

(2) Answers from informants may be coloured in either of two ways: (i) they give an idealised picture of customary law, either as it was, or as they would like it to be;

(ii) they ignore established custom in giving an account of actual practice, even where this runs counter to the accepted principles of customary law.

Evaluation of statements of customary law, if one bears these tendencies in mind, is nevertheless rendered difficult by the fact that sufficiently numerous infractions of ancient customary law over a period of years establish a new custom; and it is not easy to specify the exact point of change, to decide whether the information from our second type of inform-

ant represents an infraction (though a frequent one) of the customary law, or an acceptable change in usage.

(3) Besides unconscious prejudice, one finds also active bias, under which informants may tend to pervert the customary law deliberately in order to deceive the questioner. This may occur whenever the subject of enquiry is in actual dispute in the courts, or is likely to be brought there. Such bias was often detectable by looking through recent native court records, through "complaint files" held by the Administration, and so on.

(4) Where possible theoretical answers must be verified, not merely by repetition of questions to different groups of informants, but by observation of actual usage and scrutiny of court records. This was done wherever feasible.[15]

(5) Much of the information given here was received by way of interpreters, a notorious source of error. This was yet another reason why general questions on rules of custom were avoided, since the use of Twi words (such as di - "own") is as lax as that of the corresponding English terms in ordinary speech.

The impression which one derives from this investigation is of a fairly static basis of customary law, with a constantly changing surface, the result of adaptations by custom of ancient rules to new problems. I hope that in this account of the

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15. But a large part of the time of native courts is taken up with criminal work; and one cannot expect to find confirmation of every point made in oral questioning.

Akan law of property the basis of generally-accepted principles emerges through the surface of shifting material.[16]

It remains only to requite some debts of gratitude: the first duty of acknowledgement is owed to those who provided the finance without which the investigation would have been impossible. For financing my first visit to the Gold Coast[17] I have to thank the School of Oriental and African Studies, of the University of London. For the second visit,[18] I am indebted to assistance from the Colonial Social Science and Research Council, who provided the funds. On each visit, my work would have been impossible without the kind interest and aid provided by the Gold Coast Government in general, and its servants in particular, from whom I received all the co-operation possible.

Some personal debts of gratitude remain: to Mr. A.J. Loveridge, O.B.E., formerly Senior Judicial Adviser, and presently Chief Commissioner of the Colony, (who was in a sense the fons et origo of this inquiry); to his successors in the former post, Mr. A.C. Russell and Mr. J.N. Matson, who have not only provided assistance, but stimulation and comment; to Professor Vesey-FitzGerald, Q.C., LL.D., lately of the

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16. It is hoped to produce a brief manual of the principles of Akan law; but such a work must clearly rest on a previous expanded treatment such as is given here.
17. October 1949 - April 1950.
18. October 1950 - April 1951.

School of Oriental and African Studies, who as my supervisor has guided and watched over me; to the officers of the Political Administration in the Colony and Ashanti, and to a host of other government servants, whom I have found at all times willing, not merely to facilitate my investigations, but to devote some of their time to aiding me, in and out of office hours, and in many different ways; and finally, (and most important), to the Paramount Chiefs, Chiefs, Elders and Linguists, and to the employees of the Native Administrations - registrars, state secretaries - of the many states which I visited both in the Colony and Ashanti. It is impossible to overemphasize the importance of their willingness to discuss points of customary law, often at length, and to make available to me their resources.

P A R T I.

THE PERSONS OF AKAN LAW.

CHAPTER I.

THE STOOL AND PROPERTY.

A. WHAT IS A STOOL?

No examination of the Akan laws of property can fail to take into account the three major *personae* capable of enjoying interests in property; and it is the interplay between these three which makes such a fascinating study now and for the future. The three are the Stool,[1] the Family, and the Individual. Besides asking which of these three will eventually emerge as triumphant in the sphere of land-rights (a problem also much in evidence elsewhere in Africa), it is necessary to study their interrelations at the present day, and the historical process by which they have come into existence as *personae*.

The question of which of these three came first in point of time is an emotional rather than a logical or historical one. Today an answer to such a question will usually only be given to support the prejudices of the questioner; if he is opposed to the institution of the chief as the mark of an out-of-date political system, naturally the family or the individual will be placed first. If he is an individualist, he will play down the role of the family.

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1. The Twi for "stool" is *agua*, whether one is referring to the ordinary article of furniture or to the wider concept.

It is perhaps true that the family preceded the stool: the stool emerged from the family. The stool exercising political authority has developed from the family stool with "patriarchal" authority. Again, between family and individual, no family can take its roots or be composed from anything but the conjunction of individuals; equally, no individual does not belong to a family - in fact, it is the hen-and-egg problem all over again.

Whatever the truth of the matter, one has to deal with present-day problems. In this age all three are significant forces in the ordering and development of the Akan peoples; to ignore one of them would be fatal to an understanding of property and other customary law in the Gold Coast. The nature of the individual's interest in property as against political authority on the one hand (i.e., the Stool), and against the family on the other, must be considered: it is not sufficient to lay down - by a sweeping and inaccurate generalization - that all land belongs to the stool, or to families, or to individuals.

The position of the Stool in Akan law has been chosen for examination first, because it is the most striking feature of the customary law - the one most evident to outsiders - and the one most subject to misconceptions. It is nothing new in the field of African customary law to find that the Chief is considered to hold the lands of the tribe in trust for his

people; but the Stool as such (bearing some analogies to the position of the Crown in English law) is an advanced juridical concept, one which one would not expect to find in a customary law which not so long ago would have been miscalled a "primitive legal system". What is more, it is indigenous and not exotic, which speaks much for the capacity of the customary law for evolution, by a combination of native genius and the logic of events.

So much has already been written by those well-qualified by reason of birth or understanding on the subject of the stool as such,[2] that it would seem as impertinent as it is unnecessary to say more of this here. Constitutional questions - who may elect to a stool, who may depose, etc. - are outside the scope of this work, except insofar as they have something to tell us about the legal results in relation to property of the modes of election and destoolment, and the rights which the electors may be presumed to delegate or retain over the property and people entrusted to the stool.

Family and Town Stools:

Stools are of two kinds, the "family stool", and the "town stool". It would seem to an observer that this division, though patent in theory, is more difficult to elaborate in practice. The mark of the distinction appears to lie in

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2. See, for instance, Rattray, A.L.C., esp. at pp. 81 et seq; Danquah, A.L.C., esp. pp.109 et seq, and pp. 200 et seq; Busia, esp. Chapter II.

the class of electors to the stool - where the stool-occupant is appointed by the family of which he is a member, such a stool is called a family-stool.[3] Originally, nothing was known except family-stools: the head of a family who had distinguished himself and brought honour on the family during life, was himself honoured after death by having his stool consecrated and placed as a family relic in the family shrine or stool-house. As the family grew in size and importance, the number of stools thus consecrated grew with it, even though the occupant from time to time would still be described as occupying the stool of that distinguished ancestor. The notion of "stool" was thus generalized from the actual stools of the family-heads to an abstract conception, just as the see of a bishop is a generalization. But one must not make the mistake of taking the stool for a mere symbol: the analogy with the Crown is close, and therefore doubly likely to mislead.

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3. Ghambra v. Ewea, (1892) F.L.R. 64. (See also: Ren. 92). Warrington says (p.4) that: "Practically all Stools in Ashanti may be regarded as Family Stools, since only members of a particular branch of a particular family are eligible for election to any Stool; but the term is properly applicable to the Stools of the Abusuatiri..."

Also see: Amissah v. Krabah (1936) P.C., 2 W.A.C.A. 30, where it was found that the lands in dispute were attached to the town-stool of the Ohene of Dutch Sekondi, and not to the family-stool in his stool-family; and Wurapah v. Commonwealth Trust, (1922) F. Ct. '22, 80.

And Danquah, A.L.C. 114-5, maintains that "there is no town-stool in theory. Family stools are the real things". This is perfectly true if one bears in mind Warrington's explanation above.

It is true that both from the point of view of prestige and continuity the Crown is something larger than the actual crowns of the kings, or the heads on which they have rested. Nevertheless, it remains a symbol or a way of speech. But the ancestor's stool is something more than a symbol. Besides representing the family, it also enshrines the spirit of the family, and is thus a spiritual and social reality. (One's thoughts turn to those jurists who describe the state or other body corporate as an organism different from the persons who compose it, having a life of its own, and yet subsistent in its component parts).

The stool, then, began as a religious institution founded on the system of ancestor-worship dear to African and other peoples; but it grew to acquire other purposes and other meanings.

It has already been noted that the distinction between family and town stools is not always clear in practice. If a family acquired subjects who were not of the same blood, as might happen peacefully - through intermarriage and the foundation of new villages with the co-operation of other families - or by war, through the subjugation of the defeated, at first the family stool or stools (for there might be more than one) would be enjoying authority over persons of different blood, which would be in the nature of a political and not a family relationship. Family-heads have always had power of a patri-

archal kind over persons not of the blood - slaves, spouses of family-members, children of unions made by male members, who according to the matrilineal system of the Akans would follow their mother's, and not their father's, line, and so on. Such power was of a family nature, since the subjects were at least semi-dependents, or quasi-members, of the family.

Where, however, the family - or a member thereof - acquired political power, then it seems to have been recognized after a time that those governed should have some say in their mode of government; and the historical process is preserved by the present method of electing an occupant to a town-stool. It is for the family to make the suggestions or nominations, speaking through the Queen-Mother where there is one; for the citizens, through their representatives, to accept and confirm, or alternatively to reject, such nominations. So that which today is a polite fiction or matter of form represents the method by which the governed acquired an increasing voice in the government in accordance with the best democratic principles. If the distinction is still obscured in the method of enstoolment, the same cannot be said for the mode of destoolment. Here, where there is a town-stool, the people have complete control and the family little or none.[4] The "young men", having perhaps first acquired the right by

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4. Cf. Danquah, A.L.C., 121: "The Stool Family have no visible power in the matter of destoolment."

revolution against lawful but detested authority, (as a matter of expediency), now maintain it jealously as an inalienable right. Destoolment, and the question of who can destool, is thus a characteristic of a stool, and is useful to determine whether the stool is a town stool, or a family stool (sometimes with some political authority). Frequently, however, the question is whether a destoolment has been constitutional; and then one must know whether the stool is family or town. Such a mode of proof is therefore liable to become an unbreakable circle.

Family stools are those occupied by the head of the family (in the first place); but how is one to explain the transition from this type of stool to the town stool, of which the occupant is, as far as one can see, not - even perhaps never - the head of the stool family? A link is missing from the chain, and can be supplied only by surmise. Families today may have several stools, which will be described as family stools; obviously, only one of them can be occupied by the head of the family at any one time. It is worth while noting that the right to hold a stool appears to be sometimes conferred by political authority from above, as in the case of the clan-elders who advise a town-chief. This is a change from the original procedure; but helps to explain how more than one stool may be found in one family.

Again, in the field of property, there is no doubt that

a town-stool represents and contains the spirit of the people who serve that stool (who are in fact described as members of the stool); the best example is the Golden Stool of Ashanti, enshrining the spirit of the Ashanti nation. By virtue of this, one may conclude - as will be demonstrated later - that in the field of property the stool speaks for, and is, its people; so that a stool (or the stool-holder and his advisers for the time being) must administer the stool-property in the interests of its subjects. Family-stools representing only the family should represent also only the family-interest in property; and yet the family-stool of the founder of a village may come to represent members of other families who come to settle in that village, as the stool acquires political authority, and the village grows into a "town".

The relation of the family-stool properly so-called to the ownership and use of property will be examined in the subsequent chapter on THE FAMILY (Ch.IV). It is necessary only to add that it would be wrong to term such property, which is here called family-property, "stool property": the latter term is reserved for the property of the town-stool.[5] Here, one must discuss the stool in its political aspects, its relations with its subjects, the vexed question of the stool's claim to

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5. For cases which raise the difference between town and family stools, see: Tawiah v. Mensah: (1934) D. Ct '31-'37, 65; and Mensah v. Toku: (1887) F.L.R. 42.

the ultimate title to land in its dominion, and whether the interest that the stool claims is one of ownership, expressed through the payment of rent, or jurisdiction, paramountcy or the right to allegiance, expressed through payment of tributes and tolls, and through control of the use and disposal of land.[6]

The institution of the stool is not primordial in the history of the Akan peoples, although now a typical feature of their society. As a certain African versed in the customary law once remarked to the author, giving the aphorism as his parting shot: "Remember, the family came first."[7] This is no doubt true. The family existed when the stool was not; and it was the families, or their members, who cleared the bush and made the first farms in the transition from a hunting to an agricultural community. Throughout the history of the stool jurisdiction over persons has been confused with control over the land which they occupied. At the time when the Akans were hunters, it was the personal relationship which counted. The people, if they served anyone (and were not merely small family groups) served a chief in a personal capacity even where the allegiance was devolved. The machinery was one of government and organization in peace (partly for ritual functions)

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6. Discussion of JURISDICTION AND OWNERSHIP is generally relegated to the chapter of that name below.
7. And compare Ratt. Ash, 219-220: "I am convinced that stool lands had their origin in family lands and not vice versa." (at p.220).

and leadership in war or migration (much the same thing at that time). Land-rights did not enter the picture, because they were negligible. As the land filled up and society became more stabilized, stools tended to assert rudimentary boundaries for themselves and their peoples as between one hunting-tract and another, even though the boundaries at this time may well have been vague. At that time, for strangers to cross such boundaries was an act of aggression, but it was invasion, and not trespass.

The relation of the Stool to the Chief occupying it:

The salient fact which must be grasped at the start is that the stool is not equivalent to, or co-extensive with, the person occupying it for the time being, or even to a succession of such persons.[8] The stool is more than the chief who holds it; and where we find in the customary law that the "Stool" can do such-and-such, this by no means implies that the chief has similar powers. This truth is not always kept clearly in sight, even by the Africans themselves; so that it will be found that chiefs claim payments or powers for them-

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8. "The occupant of a stool is not regarded as the owner of the lands attached to it, but as being in some sense a trustee for the clan, tribe or family subject to the stool." - Amissah v. Krabah: (1936) P.C. 2 W.A.C.A. 30.
One regrets the use of the term "trustee", if this is held to connote any of the rights or duties prescribed by technical Equity in England. A better word is "manager".
For a further consideration of the relation between a stool and the chief who occupies it, see Danquah, A.L.C. 200 et seq.

selves, when it is for their stools that such claims should be made. An act affecting stool property performed by the chief in his own capacity is therefore unconstitutional. Grants or sales of land by chiefs alone are thus of no validity; but here again confusion is possible. To begin with, in former times chiefs may have been despotic, and exacted for themselves what should have come to the stool. There was not the same temptation then, however, for a chief to attempt to enrich himself by use of his official position, since everything which he possessed was adjudged to be stool property; and at first a chief had no private property.

Again, a chief may be the instrument by which the stool acts, so that a stool may sue in the name of its occupant, or land may be granted in the same way.[9] In such cases one must pay attention both to the form and the causa of the transaction to decide whether it is the stool acting, though in the name of the chief. Even where a chief has acted in an unauthorized manner in selling or granting land, such a transaction, though prima facie void, may be recognized by the subjects of the stool, who, instead of trying to restore the status quo, often express their disapproval against the chief personally, by destoolment or otherwise.

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9. A stool may further delegate specific powers to individuals, to act as agents in buying or selling interests, or to manage some part of the stool properties (as "caretakers").

Juristic distinctions between stool and stool-holder were not elaborated formerly; as has been noted above, all a chief's property belonged to the stool. Nowadays, of course, a chief is allowed to keep his own property separate from the stool-property - but more of this below.

Stool, Elders, and Councillors:

Other personalities enter the picture as agents of the stool, viz., the elders and councillors of that stool. These are a most important class of persons, representative of those who serve that stool, whose consent is essential for dealings with the stool property.[10] If one may attempt an analogy (not to be carried too far) they are the Board of Directors of the stool, in which the subjects are "share-holders"; and to the chief falls the task of chairman of the Board. It is not suggested for a moment that a stool is a limited liability company; but at least the comparison serves to underline the facts that:

(a) the chief, with his elders and councillors, are the managers of the stool and its property;

(b) this power of management is to be presumed to be

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10. See: Amissah v. Krabah: (1936) P.C. 2 W.A.C.A. 30, at p. 31. Sales and leases of stool lands "take place in the case of a state or town stool with the consent of the Ohene, the elders and the councillors".
And U.A.C. v. Apaw: (1936) 3 W.A.C.A. 114: a chief cannot bind the stool by an agreement (in this case a written lease), "unless the elders, or at all events the linguist had been a party thereto".

delegated to them by the members or subjects of that stool;

(c) the members of the stool have the power (in the correct constitutional procedure) to change any of the members of the "Board" (by destoolment) if they are dissatisfied with the administration of their affairs.

The Stool and its subjects:

In African society, a stool without subjects is an empty thing, unless the holder has assumed the rank for personal ostentation and display only. The interesting fact is that persons can be both members of a stool and its subjects at the same time. This is explained by the stool's being a corporation, but an organic one, in which it resembles another great organism, the Christian Church. Paradoxically, it lives alone, but it lives in its members.

If one takes a Paramount Stool, its proximate subjects may again be stools which are subordinate to it, and one may proceed down the chain of allegiance until we come to the human beings who form the broad base of the pyramid. The hierarchy of lordship might seem to imply a divided allegiance in the minds of the citizens. No such divided allegiance exists in their minds; they clearly recognize the natural condition of hierarchical organisation - no-one but has a lord, until we come to the Lord himself.[11] But Akan structure is

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11. A notion which one might compare with the medieval feudal theory.

not feudal; it is rather hierarchical. In practice divisions occur; but this does not affect the underlying theory.

The citizens are the base of the pyramid of power which is an Akan tribe or state. Like so many bases they tend to be taken for granted or ignored; but on them rests the whole structure, and it is right that more prominence should be given to them. They are the wealth of the stool; their labours and services have built it up: and where the stool's wealth is converted into property, this represents the economic endeavour of its citizens. Their right to share in the ownership and control of such property, the resources of the stool, should not be lightly alienated or passed over.

B. THE STOOL AND PROPERTY.

In the forthcoming discussion of the relationship between a stool and property, it should be understood that we refer to town or political stools; the rights of a family stool over its "stool" property are the rights of the family over family property in the general sense, and they therefore do not fall for consideration here.

The terminology of African customary law - vague though it is - transcends itself in the matter of "stool property", since it is possible to extract several meanings from this expression, and in addition distinguish other forms of property

which should not be called "stool" property.

First, we have what are called "tribal lands": this may mean either the whole extent of the land occupied by a tribe; or only those parts - virgin forest and waste land - not under cultivation. Whichever sense is given to the term, "stool lands" is also frequently used as a synonym.

Then comes stool property in a narrow sense: farms, houses, chattels, definitely acquired by the stool by use, gift, purchase or escheat.

After that there is stool-family property, or the property which belongs to the family from which stool-holders are chosen.

Finally there is the chief's property.

The claim of the relevant stool to the reversion in tribal lands, whether unoccupied, or occupied by subordinate stools, families and individuals, is a claim to ultimate title; whereas the claim to stool property in the narrow sense is a claim to an interest in property such as is capable of being possessed by ordinary individuals.

1. UNOCCUPIED TRIBAL LANDS:

By "tribal lands" is meant the territory in the sphere of effective occupation of a tribe: of such lands part will have been occupied and put to use by the members of the tribe; and part will remain unused, though this will diminish in time. The term "tribal lands" is thus sometimes used to mean

the whole of the land occupied by members of the tribe, or under their control; and sometimes only that part which has not been brought under cultivation. The term "stool lands" is often used to signify the same thing (also in a dual sense). Perhaps "tribal lands" is better, since it avoids confusion with other categories of stool land; and also underlines the point that such land is a reservoir on which any citizen may draw for fresh plots to cultivate.

It is well-known that stools lay claim to possess the reversion to unoccupied tribal lands; and it is also obvious that the claim is to a right which differs in nature from that of members of a tribe, actually farming lands, to their farms. The claim of the stool is to the absolute title in such tribal lands; whereas the individual farmer or family creates no more than a limited interest. (One must not be misled by terminology: because the stool's title is called an "absolute" one, it must not be presumed that it may do as it pleases with such lands, unfettered by any obligation or restriction. The control of the stool over such lands is exercised for the benefit of and in the interests of the members of the tribe who serve that stool.)

It must also be noted that there are areas where stools do not lay proprietary claim to the title in all the tribal lands (or have only recently begun to do so); or at most claim only a jurisdictional right over such lands. This is

especially so in some of the coastal regions of the Colony and the only property known there appears to be stool-family property. In this work such areas are distinguished by calling them "Class II Areas", whereas areas where stools do make such a claim to title are here termed "Class I Areas".

It is a commonly-stated principle of Akan law that there is no land in the Southern Gold Coast without an owner. So, for instance, in the Belfield Report it was said at p. 39:

> "157. Section 2: 'Unoccupied land', The people take exception to the use of this term, contending that it implies the existence of land over which no right of ownership or occupancy is practised or claimed, and that the expression is inconsistent with the fact that all land is the property of some tribe or individual. The objection is probably not of much value..."

The discussion was in regard to s. 2 of the Forest Ordinance, 1912; it was suggested that the term "undeveloped land" might be substituted.

The then Attorney-General, Arthur Hudson, K.C., in the same report said at p. 45:

> "...I acquiesce in the opinion that all land in the Colony is owned by someone. Ordinarily the land belongs to a chiefdom. Usually in every chiefdom so much land belongs to the stool. This land is not actually rented by the stool but is let out to families, who live upon it."

(The last statement is peculiar, to say the least.)

And, at p. 46 of the Report, Mr. T. Hutton-Mills said:

> "There is no land in the Colony without an owner; it is all the property of some tribe, family or individual."

In such a position Mr. C.J. Bannerman concurred at p. 51, Mr. Crowther, S.N.A., at p. 55, Mr. Grimshaw at p. 61, the Omanhene of Akumfi at p. 78, the Omanhene of Yamuransa (near Cape Coast) at p. 79. But in Aradzie v. Adiankah,[12] whilst the Court were prepared to admit the truth of the rule at present, they doubted whether it had always been so, Smyly, C.J., saying at p. 58 that "it was certainly not so 200 years ago".

Where there is unoccupied land, it is maintained that the land belongs to the adjacent or paramount stool, depending on the local custom. This was stated by Brandford Griffiths, C.J., in Wiapa v. Solomon:[13]

> "Though the principle obtains that all unowned land under the authority of a paramount stool belongs to such stool, in practice this is much modified, at any rate in the Eastern parts of the Colony. In these parts each subordinate stool has attached to it large portions of land.."

which he wrongly - as it is submitted - thought had been

> "carved out of the territory originally belonging to the Paramount Stool...
> Any unoccupied land within the recognized boundaries of the subordinate stool land or the family land or private land would, of course, belong to the subordinate stool, or the family, or the private individual, as the case might be; but any unoccupied land not being part of the land of a subordinate stool or family, or a private individual, would be attached to the paramount stool."

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12. (1923) F.Ct '23-'25, 52; and see Sarbah, F.C.L., 66.
13. (1905) F.Ct Ren. 405.

The proposition raises certain points:

(a) "Unoccupied" or "uninhabited" land is not the same as "unowned" or "unclaimed" land: Atta v. Fua[14] held that the lands in dispute had been "uninhabited"; the Court laid down the rule that

> "these lands being uninhabited lands situated between two paramount stools would according to native law and custom accrete to the paramount stools...[15]

(b) Atta v. Fua ruled that the paramount stools (of Eastern and Western Akim) had, though claiming through sub-chiefs, sufficient interest in the land to bring them under the Concessions Ordinance; the question of the interests of the sub-chiefs was specifically reserved. To whom does the absolute interest in the unoccupied adjacent land accrete? (The right claimed in Atta v. Fua seems to be no more than one of jurisdiction.) Deane, C.J., in Ababio v. Kanga[16] suggests "the nearest stool". (Hammond v. Ababio[17] was a Ga case, but it was a contest between the right of the Ga Mantse, as

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14. (1913) D. & F. '11-'16, 65.
15. In opposition to the finding in Akuamankra v. Paul & Ajare: (1912) D. & F. '11-'16, 26, that as regards a contest between the Akwapim Paramount Stool and the Tutu subordinate stool, the Akwapim stool had no claim to the land in dispute, and that the land was "up to 1899 unowned land, adjacent to the Tutu Nyago stool". (This case was distinguished by Brandford Griffith in his Digest from Wiapa v. Solomon on the ground that in the latter case the contest was between the Akwapim Paramount Stool and one of its subjects.)
16. (1932) 1 W.A.C.A. 253.
17. (1913) D. & F. '11-'16, 23.

paramount chief, and the Asere Mantse, a subordinate chief. The case is of little assistance, although decided on the ground of want of sufficient evidence of title in plaintiff.)

Whatever the position in the past, at least in Class I areas today the claim of stools to unoccupied lands within their boundaries or immediately adjacent thereto must be recognized.

Is the claim of the stool to title in tribal lands analogous to the fee simple vested in an English landlord? Are the relations between stool and subjects similar to those between landlord and tenant? The answer is emphatically in the negative. The stool has various rights and duties in regard to such unoccupied tribal lands.

DUTIES:

Its first duty is that of <u>conservation</u> of the tribal lands. In the past this conservation was principally against alien invaders. Today, as regards interference with the rights of a tribe by strangers, the legal system is used instead of warfare. Such contests are both against alien stools, claiming absolute title for themselves; and against individual strangers, who may infiltrate and squat on the lands. Part of the stool's duties today is therefore the orderly allocation of limited farming interests to strangers, and the prevention of unauthorized alienations. The stool must also prevent <u>waste</u> of the tribal resources. This implies

both prevention of negative waste, and abstention from positive waste. The latter is one of the main sources of diminution of the tribe's interests. It includes the reckless alienation of the timber and minerals of the land, or the wholesale alienation of parts of the land to strangers. No-one can deny today that a stool has authority to put the tribal land to the best use; but this should be done in such a way as not to impair to any serious extent the tribe's interest. This cannot be said to have been observed, especially in the Colony, where some stools have denuded themselves of all reserves of land. This might be considered a betrayal of trust to the subjects of the stool; it could not have occurred before land-sales came into general use, except, in a comparable way, through the loss of tribal land by warfare. In several areas the inconsistency of such sales with the duty of the stool to conserve the property of the tribe has been recognized.

The stool has a duty to <u>control</u> the tribal lands, which was formerly exercised through its powers of jurisdiction; and by regulation of the occupation and use of the land by its subjects and others.

The stool also has the duty to <u>protect</u> the individual interests of its subjects. This does not imply that in every case where a citizen is liable to forfeit his land because he has fallen into debt, the stool must step in to prevent his losing this interest. But it extends to such matters as

assistance of subordinate stools in litigation against neighbouring states, etc., wherein the interests of the superior stool may incidentally be jeopardised.

RIGHTS:

Correlative with its duties, the stool also has rights. It has the right and the power to take action to conserve the tribal lands, and to control their use. This finds expression today in such matters as control of alienations, regulation of farming practice, forest reserves by-laws.[18] It also has a right to exploit the tribal lands in the best interests of its subjects. Such exploitation includes the right to sell, lease, mortgage, or grant farming or other rights on the tribal land, to permit the exploitation of timber, minerals, to permit fishing or hunting, and so on. These rights are definitely proprietary. A stool requires no day-to-day authority to exercise these powers; but its actions are subject to control. The citizens have at their disposal the weapon of destoolment, and a chief who abuses his position on the stool to the detriment of the interests of the citizens may be forced to quit. Such action affects only the power of the chief to misbehave for the future; past alienations, if unauthorized, informal, or fraudulent, may be disclaimed by the stool subjects; but

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18. Stools are losing, or have lost, practically all their jurisdictional rights to native or local authorities; they retain their proprietary rights (except, apparently, powers of management).

it seems obvious that this right should be exercised in a reasonable time, otherwise the subjects of the stool must be taken to have acquiesced in the dealings of the chief. It appears to be frequently the practice to allow past alienations to stand, in order to avoid disturbance of rights which may have come into existence since the alienations. Where a purchaser at such an unauthorized sale is evicted, it is customary to give him an alternative portion of land. This is not obligatory, but it is preferable to the legal (but not always fair) eviction of the purchaser coupled with refund of the purchase-price. Exactly what authority a stool possesses in connexion with stool lands is not certain; it varies from state to state, and in accordance with practice for the time being. Cases do not really help us on this subject.

Concurrently with its right to exploit the tribal lands there is the correlative right to receive the revenues from the land. It is the stool in the first place which receives the revenue, and not the stool-holder; though ancient custom provides for the distribution of revenues from land and other sources between the various parties concerned. It is most important to note that formerly a good deal of revenues from stool lands, although receivable by the stools themselves, were in practice paid into local stool or Native Authority treasuries.[19]

19. Though this was by no means invariably the case for revenues from stool property in the narrow sense (farms, etc.).

The new Local Government Ordinance, 1951, provides by s. 74(1) that

> " The revenues from Stool lands within the area of authority of an Urban or Local Council shall be collected by such council and deposited in such special fund or funds in the custody of the Accountant-General as the Minister may direct. "

The division of the revenues between the Local Council and the Stool concerned is left to be decided by agreement from time to time between the two parties; until a proportion has been agreed, it will be governed by any laid down in the Instrument relating to the council concerned (s. 74 (2)). If there is at any time disagreement as to the proportion, the matter may be referred to the Minister (s. 74 (3)). Provision is made for lawful payments out of the fund; but nothing is said about who may give a valid receipt (from the point of view of the payer) for payments into the fund. Is it the council, the authorized representative of the stool, or the Accountant-General?

The most important parts of the stool's powers and rights in regard to tribal lands are those relating to the grant of concessions, and other interests in the land. It is to the stool that applications are made by strangers for permission to farm on unoccupied tribal land. The stool is represented by the chief, so that Africans may say that one must ask the chief for permission to farm; it is, of course, the stool

which gives permission and receives the revenues. Strangers come under the head of persons who are "not entitled by customary law to the free use of land" in s. 74 (1) of the Local Government Ordinance. Permission to farm or build houses granted to strangers appears to be caught by the Ordinance whether any valuable consideration is paid or not. Therefore today such transactions need the "concurrence" of the Local Council.

Power to grant concessions: this term is used here more widely than it is in the Concessions Ordinance, and refers to the grant of a licence to take minerals, prospect, cut timber, or otherwise obtain something of value from the land, without permanent interference with the potentialities of the land for farming. Such transactions may or may not be caught by the Ordinance; but in the nature of things such grants are of fairly recent origin, although gold-mining has been practised in Ashanti before the advent of the British. All these grants are similar to the grants of profits à prendre in English law. The stool is the proper agent of the citizen body for the granting of concessions. Where the right is of little value, form is not of much importance. But where conveyances are drawn up in proper form, then the stool must be the granting body. In former times the consideration for the grant of such rights to strangers was a percentage of the kill, catch or yield. Today, valuable consideration is exacted. If citizens

occupy some of the tribal land for farming purposes, then the land becomes of a different character, and ceases to be unoccupied tribal land, so that the grant of concessions over such land is impeded or altogether lost. Where the land is made the subject of concession to get minerals, or fell timber, to fish or to hunt, etc., then it still retains its character of unoccupied tribal land.

2. OCCUPIED TRIBAL LANDS:

It is evident that the majority of the land within the confines of any state is no longer in the category of unoccupied land, having been taken up by the citizens for farming and other purposes. Such land comes within the area of land occupied by the tribe as a whole, and so merits the designation "tribal land"; but since interests of limited extent in the usufruct not previously in existence have been created in favour of families and individuals, from the point of view of these last the land would be described as "family land" or "individual property". As such, they are considered in their proper place;[20] here we wish to examine only the interests in such land of the stool, as representing the tribe.

It may be objected that it is needlessly confusing to term such lands occupied by families or individuals "tribal lands". (They are often termed by a stool its "stool lands"). Such a

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20. See: THE INDIVIDUAL, pp. 126 et seq., 174 et seq; and THE FAMILY, pp. 211 et seq.

terminology underlines the fact that the lands are part of the whole tribal area, out of which the farmer-citizens have carved their individual interests, and that the tribe or stool retains some interest in such lands. It also serves to show that not all family or individual holdings can be considered as also tribal lands, since

(a) acquisitions by members of the tribe outside the tribal territory are not subject to tribal interests;

(b) it is possible for families or individuals to acquire the absolute interest in Class I areas;

(c) in those states which do not recognize the paramount interest or reversion of the stool in land occupied by families or individuals it would be incorrect to call their lands tribal lands: the tribal interest has dwindled or has never existed as a right; in its place there is at best a shadowy sentiment. These are the Class II areas.[21]

The nature of the stool's claim to reversion in family land:

In Class I areas (e.g. Ashanti, Akim) it is generally recognized that stools have an interest in all the land in the state, even if occupied by the farms or houses of the citizens.[22]

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21. Especially Fante, Ahanta, and other coastal areas. Cf. Amissah v. Krabah: (1936) P.C. 2 W.A.C.A. 30 at p. 31: "..it is common ground that it is part of the Fante customary law that lands may be attached to the Stool of an Ohene, or to the stool of a family, and no doubt (as appears from other cases) there may be privately owned lands". This is an understatement, it is respectfully submitted, of the actual situation.

22. (See next page)

In such a case, not only cannot the citizen dispose of the absolute title to the land which he occupies, since that absolute title is within the custody of the stool; but he may be subject to the control of the stool even when he attempts to deal with his own limited interest in his farm or house. This fact is frequently described by the African as follows: "the farmer owns his farm, but the stool owns the land; and so the farmer cannot sell the land - only the stool can do that". Expressed in other words, the farmer can create for himself only a limited interest of usufruct; he is without capacity to sell the land itself. Originally, too, the stool could not sell the land, even though it had an interest, which was a mixture, as we see, of jurisdictional and proprietary rights. The stool performs one of its duties in recognizing the individual interest of the citizen who makes a farm out of the forest, namely, to preserve it free for the citizens, and permit them to farm it freely. Once citizens have begun to farm, the stool ceases to exercise such a close control over the land; and there is no interference with the farmer.

Occupied tribal land illustrates perfectly the typical Akan structure of concurrent interests; it perhaps oversimplifies too much to talk of the "stool's reversion" without more. One may have a given piece of land, in which a family

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22. (From previous page)
Which stool is the landowner depends on the area and the actual circumstances: vide JURISDICTION AND OWNERSHIP post.

has a family interest, with one member holding an inherited interest over part of it; this forms part of a village, again subordinate to a wing chief's stool, and thence under the paramount stool. Rattray pictured these interests as a series of circles; some of these circles are concentric, but of differing radii; others are eccentric, but a portion of their circumferences overlaps. Each such circle represents a viable group in Akan structure, with an external unity and an internal diversity. My own picture is that of a pyramid; to the English lawyer it is difficult to analyse them without bringing in such terms as freehold and leasehold, legal and equitable estates. They are in fact sui generis, without exact parallel in English law. It cannot be truly said that there is an upward limit to such a pyramid, since no group or institution can be characterised as possessing the ultimate of rights. One sees this where formerly independent chiefs are placed under another as paramount. There is no lower limit to the creation of subordinate interests.

Which came first - the stool or the family?: It so happens that in the Fante states (and others) of the coastal regions the rights of the stools in land are vestigial, and the families claim absolute title in their own lands. In Ashanti and the states of the interior, the reverse is the case, the stools claiming absolute title. There is no doubt that the family as a social element antedates the stool-

conception; but probably when the first claims to rights in land were asserted stools were already in existence. The argument is now academic.

Powers of the stool over family (and individual) lands:

(a) Control of occupation: the relevant stool may in certain cases exercise a control over taking into use by its subjects of unoccupied land. But this is probably the exception. One finds that a farmer may inform his Odikro where he is going to farm, or where he has made a farm; the purpose of this is to prevent rival claims, and ensure planned use of the village resources. It is possible that one would be required to see the chief before farming on land which is already being put to some use - for mining, or timber.

It is possible that one should make a distinction between holdings of land by citizens, which have been occupied by their families since "time immemorial", and those which are newly acquired today. It is at least customary that where a person from one village goes to farm in another, or where he moves from the area of his own chief to that of another in the same state, he should ask permission for farming the virgin forest there. Drink will customarily be given as a token acknowledgement.

Occupation by strangers is of course more rigidly controlled.

(b) Control of use: there is little attempt to control

the use or misuse of citizens' holdings; and there seems to be no general rule - as there is in some other African communities - that a man forfeits his usufructuary right to land if he does not employ it profitably. Any apparent interference with this right is traceable to other causes: e.g., where a man declares his intention of farming in a particular area, and then abandons his farms, the courts today are prepared to hold that he has forfeited his right to the land, if it can be shown that he has displayed this intention, either by open act, or by tacit implication (as where he has not endeavoured to evict another who adversely takes possession). Control of farming practices is really a matter of jurisdiction, and is exercised sometimes by Native Authorities through the making of rules.

(c) Control of disposal: the most frequent interference with the right of the farmer to undisturbed enjoyment of his holding lies in the stool's control of alienation. Where the stool claims title to the land, then it can demand that no transaction should take place which would impair this right. Hence the rule that sales to strangers must be registered with the stool, which must give its consent. In certain states it is declared to be the custom for all sales of land to be referred to the stool, whether the purchaser is a stranger or not - but this may be doubted, and is certainly not always observed in practice. And the general rule is that only alienations to strangers are controlled.

There is a lack of logical rule for lesser forms of alienation: mortgages, for instance, may be disguised methods of passing an interest to another; and in any case may result in judicial sale of the holding if the debt for which the security is given is not satisfied in the specified period. Yet in many places it seems that there is no control over the giving of real security by citizens to strangers, and what control there is is limited to notification by the stranger-mortgagee to the stool if he sells or forecloses. Especially where writs of fi. fa. are concerned, the present law needs clarification; the conflict caused by it with customary law is left in obscurity. No control seems to be exercised either by the stool, or by the native or other courts, over the seizure of the property of citizens in execution, especially where the eventual purchaser is a stranger. To take one example, does the provision of s. 75 of the Local Government Ordinance, 1951, relating to the disposal of interests in land, apply to a judicial sale of property seized in execution? Such a sale is not made either by a stool, or "by any person" (i.e., the citizen judgement-debtor).

In urban areas especially some control is exercised by stools (and now by local authorities?) over dealings in houses and plots, building on plots acquired, and so on.

(d) The stool's right to a share: stools possess rights

to a share in certain cases in the land and its fruits.[23] These include the traditional claims to share in gold nuggets, percentage of snail-catches, portions of game, portions of fish caught; and all claims to a share of extraordinary revenue arising from land, which includes the right to a share from proceeds of the sale of land held by subordinates. Some of these customs have fallen into desuetude, owing to the immensely more valuable rights (royalties from timber and gold) which a stool may now enjoy.

(e) The stool's right to take land for national purposes: this right is limited, and stools cannot as a rule take land occupied by their subjects without the latter's consent, or without tendering compensation. Such a right must be exercised, for instance, in determining the plans for extension of towns (laying out streets, drains, and so on); where farming land is taken, agreed compensation (in at least one case a fixed amount per cocoa tree) is paid.

3. STOOL PROPERTY IN THE NARROW SENSE:

So far the type of stool property which has been discussed is that which involves the possession of absolute interests, or at least of a dependent interest such as only a stool may enjoy (e.g., that of a wing stool from its paramount), which is distinct in kind from the limited interests

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23. Cf. Sarbah, F.C.L. 73-4; and also s.v. INDIVIDUAL, at pp. 158-160.

of the citizens farming on that land. Now we turn to a consideration of property enjoyed by a stool, whose interest in this case is a limited one, similar in kind to that which may be possessed by its subjects. Between the claim by a stool to the reversion in tribal land, and the claim by a stool to own certain cocoa-farms or houses, there is obviously a wide distinction. Although the stool owns certain limited interests of this kind in common with its subjects, the rules dealing with this kind of property may vary widely owing to the special position of the stool. The distinction exists theoretically in English law, between the title of the Crown as lord of all tenants in fee simple, and the title of the King to his royal estates.

This type of stool property is perhaps the most representative, since it is the property of the stool (and not of the chief), combining its general claim to the ultimate title to the land, and its specific claim of a limited interest in the res, be it farms, houses, or chattels. It would have been better if one could reserve the term "stool property" for this type alone; but usage unfortunately allows a wider meaning for the term.

(a) Derivation of such stool property: The juridical distinction between this kind of stool property and the wider kind of stool property is clearly illustrated if one considers its possible derivation, i.e., whence the stool may have

acquired it. It is possible, and indeed probable, that most of the property is acquired from subjects of the stool, and from the stool family, which would not be possible if the interest were an absolute one, which a subject would not be capable of possessing or transferring.

(1) From the Stool Family: it will presently be shown that the property of the stool family, which is just like any other family property, is kept quite separate from the stool property; in fact, a frequent source of argument between the members of a stool family is whether a certain property is stool-, or stool-family-, property. Since the stool family is an ordinary Akan family which has risen to greatness, its possessions have been used to provide for the needs of the stool. With some stool families it is the custom for each incoming stool-occupant to present one of his properties to the stool, thus ensuring that the stool gets ever wealthier. The stool family may assign some of its properties, by a family act, to the stool; usually this dedication will be irrevocable, on the principle that "once stool property, always stool property".[24]

It seems possible that the "ahenfie" or palace of the chief, now occupied by the stool-occupant as his official

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24. Perhaps it will be thought of little importance whether property belongs to the stool or the stool family. The difference is in fact vital: control of the property is in different hands, alienation is made by different persons, the revenues go to different destinations.

residence, was originally one of the family-houses (perhaps that of the original head). Many of these palaces are now built specially for their chief by the oman or people of the state.

(ii) From the individual chiefs' property: in former times when all the property which a chief brought on to the stool with him became stool property, and any subsequent acquisitions by him became stool property, this was an important source of increase of the stool properties. Today, as is noted below, the rule has changed, and chiefs' properties do not merge in general stool property.

(iii) From the subjects of the state: in the past subjects were called on to make certain contributions to the stool on special occasions, which Rattray compared (rather wildly) to feudal incidents.[25] Besides these forced or semi-voluntary contributions, it has always been customary for individuals to show their appreciation of the stool by presenting gifts in return for favours received, and one can find many instances of farms being "dashed" to the stool by a subject at his death. It is sometimes a difficult task for a court to decide whether the gift was made to the chief personally, or to the stool. Previously, this would have been immaterial; but one cannot say that there is any presumption today in favour of the stool.

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25. In Ashanti.

The stool has always been accustomed to call on its citizens to pay for the expenses of warfare, litigation, administration, and so on. Today a distinction has been made: there are regular annual levies, payable by all adult citizens; these go to the Native Administration, are exacted under ordinance, and are applied to all residents. There are also special levies designed to cover any unusual expense - often today to cover the cost of litigation. These are still payable to the stool by its subjects. If the stool receives such payments, they are wealth in its hands, which may be turned into real property by the next mode of acquisition of stool property.

(iv) By purchase: part of the purchases made by a stool are financed from the general revenue - from the taxation of strangers, profits from land transactions, and so on. Part are derived from the contributions of citizens ad hoc: this may especially apply to such things as regalia and ornaments. Although in general limited interests are purchased, it seems likely that where large tracts of land are bought, these are assimilated to the other tracts of tribal land, and similar rules apply.[26]

Purchases made by a chief from his own money belong to

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26. Cf. the disputed "purchase" from the Kukurantumi Stool of land for the benefit of the Juaben settlers at Koforidua.

him now, even where they are made from the allowances paid to chiefs in substitution for the customary dues and tithes which they were entitled to receive. Formerly (if it could be said that a chief had any private funds to dispose of) purchases accrued to the stool. Properties purchased out of the proceeds of stool properties are themselves stool properties.

(v) By succession to strangers: it is most unusual, and I do not think that instances could be given (except in the case of subjects banished from the state in former times) for any escheat to operate in the case of citizens' property. But many of the stool properties (especially cocoa farms) in certain states have come to the stool from succession to strangers, who have made (with permission) farms on stool lands, and then died or departed without leaving a successor. As pointed out elsewhere,[27] this rule no longer operates to such an extent as formerly.

(vi) By succession to stool servants: this covers cases where grants of land were made by chiefs to servants of the stool, conditioned on the rendering of certain services by them and their successors. Such grants may be forfeited by, for example, failure to continue to render such services.

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27. Cf. INDIVIDUAL, pp. 186, 187.

(b) Types of such stool property: Stool property in the narrow sense falls under various heads: even within the headings, rules may vary as to control and disposal.

(i) Real property:

Farms, usually cocoa farms, palm trees and the like.

Ferry- and other water-rights.

Fisheries.

Certain other commercial enterprises.

Houses: the ahenfie is the royal palace; there may be more than one royal residence. The ahenfie, together with the stool house, is considered inalienable. Whole villages have been set aside in the past as estates for certain members of royal families; in Ashanti the Queen-Mothers have been provided with villages of their own. In the old days, there were slave-villages, occupied by slaves and their descendants, regrettably kept to provide a reservoir of human life for the purpose of sacrifices at the death of royal personages.

Where the stool owns farms, these are usually administered by caretakers on behalf of the stool. Such a caretakership is of course quite different from that where a subordinate stool is said to be caretaker for the paramount stool.

(ii) Chattels: The stool regalia - umbrellas, ornaments, and the like, which are presumably inalienable; although

I was told that there was a case of a stool which purported to sell the whole of its regalia! Modern chiefs now have a great number of chattels placed at their disposal, which are stool properties. Such are motor-cars, and other appurtenances of modern living.

(iii) Stool wives: The stool wives are part of the appurtenances of the stool.[28] By this is meant that there are wives who on the death or destoolment of the chief pass to the next occupant of the stool, and do not go with the ex-chief. The latter is usually allowed to take one or more of his wives with him by grace of the elders of the stool. It is to be expected, and hoped, that this custom, although not ruled by the Courts as contrary to natural justice and morality, will tend to disappear with the growth of monogamous Christianity. Difficulties already appear where a chief who is a Christian finds himself on enstoolment with twenty or thirty stool wives.

(iv) State enterprises: There is no real conflict between the stool, with its councillors, and the modern Native Authority, in law the creation of statute. Although the personalities of the members of both may be the same (which they need not be) juridically they are distinct, since the authority of the stool rests on due observance of custom, and the authority of N.A.'s rests on the ordinances. Nevertheless, there is no cause for worry if stool revenues (or what would have been

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28. Cf. Danquah, A.L.C., 203.

stool revenues in the old days) are paid into the N.A. Treasury, and are used to finance what may be termed State enterprises, such as the building of schools and clinics, the making of roads, the digging of wells, and so on, since such enterprises are to the benefit of the subjects of the stool. Where buildings are erected from N.A. funds, such transactions are subject to audit and control; the speculations of the stool from its own funds, untouched by the Native Authority Ordinances, are not so subject. But the stool is obliged by custom not to enrich itself at the expense of its subjects. No-one has much worried whether the land was provided by the stool, and the money for a school by the N.A. At the present time there is not much need for clarification; but the demand for it will be insistent when the personnel of the local authorities begins to differ substantially from that of the stools and their customary councillors. Under the present system, money goes hand-in-hand with responsibilities for its proper use for the benefit of the people. Such may not be the case in the future.[29] No-one wishes to see the traditional author-

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29. The above was written before the provisions of the Local Government Ordinance, 1951, became law. Under this Ordinance, only one-third of the members of the new Local Councils will be "traditional" (an unhappy word). The revenues from stool lands are to be collected by the Local Council, and- after deposit in a special fund - to be divided in unspecified proportions between the Council and the stool concerned (s. 74 (1)). The disposal of any interest in land by stools (or citizens) is subject to the concurrence of the Council (s. 75). It appears

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ities dwindle from their responsible positions to become mere hereditary landlords, stripped of all administrative power.

Often the business enterprises of the stool will be carried out through the agency of the chief. Warrington[30] says that the old custom was that

> "If a Chief engages in any business undertaking he must obtain the consent of the Elders before doing so: any profit he makes is then a gain to the Stool and any loss a Stool debt."

This, insofar as it is true today, applies not to a Chief's private dealings with his own property, but to the necessity for the approval of the elders in any activity he undertakes on behalf of the stool.

(v) Stool debts: Warrington gives three rules with regard to stool debts:

> "A Chief has no right to become security for any person without the consent of his elders, and if by so doing he involves the Stool in debt, this would be sufficient ground for destoolment." [31]

It is doubtful today whether a chief could involve his stool in debt by this method, even if a chief is permitted by custom to act as a surety.

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29. (cont. from previous page) - that the rights of the stool in regard to land will tend to become empty ones; and that the former position by which N.A.'s made use of stool land free will perhaps not apply in the future.
30. p. 32.
31. p. 32.

> "If a candidate /for the stool/ ... declares his /private/ debts /before his election/ and is nevertheless elected to the stool his private debts are thereby accepted by the stool and become stool debts." If he fails to do so, they become debts of his family.[32]

This is the corollary of the former rule that all the private property of a chief became stool property when he came to the stool. As this rule no longer applies, it is dubious whether the rule in regard to private debts applies either.

> "A Chief is not entitled to incur any debt on behalf of the Stool without the consent and approval of his Elders; and if money is borrowed by the Stool at least two of the Elders must be actual parties to the loan; if this is not done the Elders may deny any liability on behalf of the Stool."[33]

This rule (apart from the specification of the exact number of elders who must be present) applies in substance today.

Stool debts, however incurred, are a charge on the members of that stool; and the stool can call on its subjects (citizens only, and not strangers) for special contributions to defray them.

The incurring of stool debts has been much limited by legislation, notably the Stool Property Protection Ordinance, No. 22 of 1940, for Ashanti, and s. 27A of the Native Authority (Colony) Ordinance, 1944,[34] for the Colony.

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32. loc. cit.
33. loc. cit.
34. As amended by the Native Authority (Colony) (Amendment) Ordinance, No. 13 of 1947, s. 6.

Whereas the Ashanti Ordinance applies to stool land, the definition in the Colony Ordinance of stool property limits its effect only to stool insignia "and such other property as may be attached for customary, traditional and ceremonial purposes to the Stool of any Chief", and so presumably does not include stool land, or stool property in the narrow sense.

(c) Control of such stool property:

The control of the stool properties is in the hands of the chief, together with his elders and councillors, as is the case with stool property in the broader sense.[35] The sharp distinction between such stool property and stool family property is therefore evident, since the latter is under the control of the stool family, and especially as represented by the head of the family. In Enoo v. Anessi II:[36] a stool family claimed to be entitled to 1/3 share in the proceeds of sale by a chief of stool lands. The claim was rejected. The Royal Treasurer, in Ashanti the Sanahene, was formerly responsible to the stool for keeping the accounts of the stool; and he presumably still has functions in the more private aspects of stool affairs today. Where control of State property and funds is not in the hands of the N.A., and more particularly in the cases of stool farms and the like, the Elders and Councillors

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35. E.G., a lease, signed by the chief alone, without reference to his elders or councillors, does not bind the stool: U.A.C. v. Apaw: (1936) 3 W.A.C.A. 114.
36. (1910) Ren. 576.

retain all their power. It is the duty of the stool to preserve the stool properties as far as possible; unilateral action by either the chief alone, or some of the elders alone, is not sufficient to dispose of it.

(d) Disposal of stool property:

Disposal of stool property is open to the same parties who are competent to control the use of stool property. Certain forms of stool property cannot be disposed of. It is customary, if a chief is destooled, to provide for him by allowing him to take one or two farms, or other property, with him. Except for this, disposal of stool property to individuals without consideration is not encouraged.

Here we must consider the effect of the Local Government Ordinance, 1951, with regard to the disposal of stool property. S. 75 regulates the disposal of "any interest or right in land" for a consideration or "which could, by reason of its being to a person not entitled by customary law to the free use of land, involve the payment of any such consideration", and prescribes that in such cases the concurrence of the Local Council is required. The Ordinance covers disposals both by a stool, and by "any person who, by reason of his being so entitled under customary law, has acquired possession of such land either without payment of any consideration or in exchange for a nominal consideration" (i.e. citizens). (One may note in passing here the unhappy side-note "Disposal of Stool Lands", since we

find that disposals by a citizen of "any interest or right in land" are included - and such is certainly not disposal of stool land.)

Our first question is: "What is 'Stool land'?" This is in a sense a supererogatory task, since s. 75 in its body does not speak anywhere of "stool land", but only of "any interest or right in land"; and whilst it is true that the side-note specifies the subject of the section as the disposal of stool lands, one does not legislate by side-notes. In S. 2 of the Ordinance it is defined as follows:

> "'Stool land' includes any land or interest in land controlled by a Stool, head of a tribe or company captain for the benefit of the subjects of the Stool, tribe or company, as the case may be, and 'Stool' means the person or body of persons having such control."

This definition is unfortunate in many respects: although it appears to define "stool", its definition is circular. It fails to make any distinction between "town" and "family" stools, so that presumably interests in land controlled by the head of a family with a stool fall within the definition of stool land. One must also regret the perversion of the term "stool land" to include land controlled by a company captain (presumably inserted in the first place to take account of the special conditions which exist, for example, in some of the coastal towns). Our next concern is the phrase "any land or interest in land controlled by...". The word "controlled"

is most ambiguous: does one read the phrase as "any land controlled by; and any interest in land, the land being controlled by.."; or does it mean "... any interest in land, the interest being controlled by"? In the former case interests enjoyed by citizens and others in land the absolute title (or a dependent title) in which is owned by a stool are presumably caught within the definition of stool land. In the latter case, they are not.

What is the meaning of the word "control" itself? It will be remarked that such words as "owned", "enjoyed", "possessed", etc., have been passed over in favour of the colourless word "controlled". Control refers to management rather than ownership, one would have thought. The question whether land over which a stool possesses a jurisdictional right only, as well as land over which a stool has proprietary rights, is included in the definition, remains in the dark.

It will be noted further that the definition says that "'Stool land' <u>includes</u>", not that it "means", "any land...etc." The choice of the word "includes" implies that the definition is the minimal content of the words "Stool land"; but that further meanings of the words are not excluded by the definition. What such further meanings are could be the subject of wild speculation, lamentable in a context where the greatest precision is surely required.

Our next regret is the phrase "land or interest in land".

This form of words is inelegant, since the former is the subject-matter of rights and interests, and the latter is the interest in that subject-matter. But what is meant by "land", or by "interest in land"? It is notorious, as should be apparent through our treatment of the interests which stools, families and individuals may possess in Akan Law, that the customary law does not share the English legal definition of "land"; and specifically, that the customary law permits a separation - not possible in English Law - between the land itself and the things in or on it, such as trees and houses. Is "land" to be taken in the normal English sense, applying the maxim quicquid plantatur solo, solo cedit? One presumes that it must be so taken. Such an assumption can lead to difficulties.

The definition of "stool land" from section 2 of the Ordinance is operative for s. 74 - Revenues of Stool lands, presumably for s. 73 (side-note - Declaration of Stool lands), and not for s. 75 - despite the side-note - Disposal of Stool lands.

Now we turn to section 75, and a consideration of its meaning and effect. It affects all disposals of any interest or right in land by certain persons, and to certain persons. Our first question is the meaning of the word "disposal". Its primary and commonsense connotation is "getting rid of", and, if for a consideration, "sale". Does it mean (since the

section covers certain transfers for no consideration) "any outright alienation or transfer"? Or does it cover also arrangements which are not outright, since only part of an interest passes, or because the transfer is only temporary? This, it is submitted, must be its intended effect, when read in conjunction with the words "of any interest or right in land", since a grantor transferring only a portion of the bundle of rights which makes up his interest can be said to be transferring a right or rights. The phrase may therefore be taken to include, not only sales and absolute gifts, but also leases, tenancies, mortgages and pledges, and perhaps even caretakerships and offers of lodging.

The section comprehends disposals by two classes of persons: "a stool", and "any person who, by reason of his being so entitled under customary law, has acquired possession of such land (it would have been better to have said: 'of any interest or right in land') either without payment of any consideration or in exchange for a nominal consideration". "Stool" (following s. 2 of the Ordinance) means a person or body of persons controlling land or an interest in land controlled by a Stool, head of a tribe or company captain for the benefit of the subjects of the Stool, tribe or company! The second class of persons - "any person..." - includes citizens who have either inherited interests in land from their family, or received them as the result of a bequest under a samansew(?),

or cleared a portion of the virgin forest for their own use, or built a house on a plot which they are entitled to take by custom; but does not presumably include citizens who have taken possession of land by pledge or mortgage, or by means of a gift inter vivos, or by purchase from a citizen, since a citizen in such a case has not acquired possession without consideration or in return for a nominal consideration by reason of being so entitled under customary law. This class of persons also does not include strangers who have acquired land by purchase, or lease, tenancy, gift, pledge, succession, etc., since in no case are they persons entitled to the free use of land.

The class of persons to whom the interest or right in land is transferred includes:

(a) all those to whom it is transferred for a valuable consideration;

(b) those to whom it is transferred, if "by reason of its being to a person not entitled by customary law to the free use of land" it could involve the payment of such consideration, even if no such consideration is in fact paid.

The anomalous position results that transfers between citizens for a valuable consideration of an interest or right in land are caught by the section; whilst a transfer by a stranger to a citizen would not be caught. This is an exact reversal of the principles of Akan Law. Such transactions as

those by which a temporary tenancy of land is granted by a man (who is a citizen) to his wife, or children, or servants (who might well not be citizens) might therefore technically fall under the section. In those states where stools claim a general proprietary interest in the land, the previous practice has been that transactions between citizens are not normally the subject of control. Only where strangers are parties (and not always then) has the stool stepped in. Where stools claim no more than a right of paramountcy (e.g., in the coastal areas), no transactions have been the subject of scrutiny. One may respectfully doubt whether this section was drafted with these points in mind.

S. 75 provides that disposals caught by the section shall be subject to the concurrence of the Local Council; and that they "shall be of no effect unless and until such concurrence has been obtained and certified in writing under the hand of the chairman or clerk of the council". One wonders whether in fact such disposals will be of no effect.[37] Does the purchaser, before such concurrence has been obtained, obtain any kind of equitable interest in the subject-matter? Is he entitled to possession as against the grantor? Is he entitled

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37. Remembering the fate in English Law of such provisions as that of the Infants' Relief Act, 1874, providing that certain contracts with infants shall be "absolutely void". In fact, even where transactions are declared "void", the innocent party may acquire equities in the subject-matter, third parties may acquire rights, etc.

to mesne profits, and if so, from the time of the transfer, or from that of the concurrence? If he re-transfers, or charges the property, does the third party acquire any rights?[38]

4. STOOL FAMILY PROPERTY:

The property of the stool family, and the rules which relate to it, are considered here (even though the stool family property is family property like any other), because certain questions relating to its use and control, and more especially the relation existing between the chief and the property of his family, are bound to arise.

(a) The relations of the stool family, the stool, and the chief in regard to stool family property:

Each stool family has family property, and in general the rules covering this form of property are fully dealt with in the chapter on family property. But in addition there is the problem of the membership of the chief in that family. The family have a considerable say in the nomination of a candidate for the stool, and may exercise some influence on the chief indirectly. But the whole conduct of the stool's affairs rests with the chief, his elders and councillors; and the stool family are not meant to interfere. Similarly, the stool family is left alone by the stool in the conduct of its business, and in particular the chief is not expected to

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38. The words "of no effect" may mean no more than that the transaction is valid but unenforceable.

interfere in the management of the family property, which it is for the head of the stool family, together with the elders of the family (the family council) to administer.

From the property of the stool family one must trace the origins of the property (or some of it) now in the possession of the stool. Each chief will have added more to the stool's property - this being an entirely praiseworthy tradition within the family; and he will perhaps have obtained the means to do so from the family.

Conflicts between the stool and the stool family as to the ownership of lands controlled by the stool or family are of relatively frequent occurrence: for example, in Amissah v. Krabah[39] the contest was between the town-stool of Dutch Sekondi and the stool-family. The latter's claim to the property in question was rejected. And in Paramount Stool of Breman Esiam v. Yaw Akyirefi[40] the paramount stool won before Quist, J., on the ground that E., a member of the stool family, was pledgee of the land in dispute from a section of the family. E. ascended the stool; and therefore the land became attached to the stool, and remained so on his death. The ground of decision, it is respectfully submitted, is now suspect, since it was based on the rule, at present out-of-date, that a chief's private property not declared at the time

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39. (1936) P.C. 2 W.A.C.A. 30.
40. (1948) Unreported: Land Ct. Cape Coast, 1.10.48.

of his accession becomes stool property. In any case, as E. was only a pledgee of the land, it is difficult to see how the land could become attached to the stool for longer than the duration of the pledge. One may also refer to Aginfram v. Broquassie.[41]

In these cases the findings were reached on the basis of the evidence presented in favour of the property being stool, and not stool family, property. The Privy Council, for instance, found obiter in Amissah v. Krabah that "the evidence as to the consents necessary in the case of a family stool /selling stool (family) property/ was left in some uncertainty". There is no presumption in favour of either party. (If a stool is a family stool, there can obviously be no such conflict.)

It has sometimes been maintained in disputes between the stool family and the stool that certain property was given to the chief for his own use while he was on the stool; so that, if he was subsequently destooled, the property should revert to the stool family. In many cases disputes regarding stool family property have to do with what may be termed unwarranted interference by the chief with the affairs of the family. It is difficult at times to decide whether a chief has received a gift as chief, or as a member of the family, or whether it was intended to give the property to the stool in perpetuity.

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41. (1878) Ren. 40.

It cannot be stressed too emphatically that the stool family has a head, whose duty - as with any ordinary head of a family - it is to supervise the family and the family property. And further that in the family councils the chief for the time being does not rate much more consideration than any other member of the family. In one dispute in a native court plaintiff said in evidence that:

> "I sued defendant being the head of the family. Defendant is a young-man in the family but he is the head of the family regardless the stool-holder."

Frequently, too, the stool family is divided into sections, which further complicates disputes over the ownership of property within the family. The organisation of their family is a subject which chiefs and others are sometimes reluctant to disucss; but the isolation of the chief from the ordinary affairs of the family seems clear. It should not be forgotten that it is possible for royal houses to possess more than one stool, and in particular that the Queen-Mother will have a stool of her own, which will behave, for these purposes, like a political stool - that is, the affairs of the stool are kept separate from the ordinary family business.

(b) Control, use and disposal of stool family property:

The family control of stool family property lies with the head and elders of the family, as is the case with any other family. The use of the property is divided up between the

sections and members, again in accordance with the normal rules. Where a chief has, before his election as chief, possessed family property, this will be kept separate from the stool property on his enstoolment; or else the family may decide to give the property to the stool. It appears good law that a chief could not, by a unilateral act, give such property permanently to the stool without the approval of the stool family; otherwise, one would be forced to attribute to him wider powers over the family interest than a member of an ordinary family would have.

Disposal of the family property follows the control of its use, i.e., it is with the head and elders of the family.

(c) Succession to stool family property:

Succession to family property follows the usual rules; but an exception must be made where the personality of the chief is involved. Succession to the private property of the chief follows custom; but it is stated that it is unusual for a chief on the stool to be appointed successor to a deceased member of the stool family.

5. CHIEF'S PRIVATE PROPERTY:

(a) By a chief's private property is meant that property which is self-acquired by him, and not by virtue of his position as occupant of the stool, in which case he would acquire for the stool. There has been a definite change of custom in regard to such property.

(i) The former rule in regard to the chief's property: The former rule in regard to property which a chief might either bring with him to the stool, or which he might acquire once he was on the stool, was that all such property became stool property, over which he might retain a right of temporary enjoyment, but the permanent title to which became vested in the stool. If the chief was destooled, he therefore stood to lose everything, except such as the grace of the elders or the new occupant chose to allow him. Such a rule was certainly salutary, since it meant that it was very difficult for a chief to make a personal profit out of his position; and it made becoming a chief a more hazardous operation if a possible outcome was penury.

This rule is given by Warrington:

> "When a Chief is in occupation of the Stool he is according to ancient custom incapable of owning any property apart from the Stool, he and the Stool are one.
> Before he accepts the Stool, he is entitled to dispossess himself of his private property, particularly lands, and any family property which he is in possession of will revert to the family." [42]

And he mentions subsequently that the stool will owe money to a chief, if the chief contracts debts on behalf of the stool at the request of the elders.[43] The old custom was found proved in Jasi v. Tchum.[44]

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42. At p. 31.
43. At p. 32.
44. (1911) D. & F. '11-'16, 9.

(ii) Next, the rule underwent some amelioration, and self-acquired property which a chief possessed when he was installed he was allowed to retain as his own - even on destoolment - provided that he had declared his possessions to the elders and councillors of the stool at the time when he ascended the stool. In the case of Antu v. Buedu[45] the modified rule was admitted. Michelin, J. said at p. 477:

> "I entirely agree with the learned Judge in his enunciation of the principle of native law, both in this Colony and Ashanti, 'that unless a chief's private property is earmarked when he ascends the stool it becomes mixed up with the stool property and cannot be claimed by him on deposition'."

U.A.C. v. Apaw[46] recognized that it is possible for a chief in Ashanti to have private property. In Yamuah v. Sekyi[47] the requirements were further watered down. It is not necessary to "earmark" the property, or make an inventory; all that is required is:

> "Now a stool-holder who has kept his self-acquired property distinct from the Stool property, to the knowledge of the senior and immediate members of the Stool, can make a valid testamentary disposition of such self-acquired property to a member of his family - vide Sarbah's Fanti Customary Laws, page 99.."[48]

This was an exception to the rule in Antu v. Buedu. That all that is required is that the facts should be known to the

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45. (1929) F.Ct. '26-'29, 474.
46. (1936) 3 W.A.C.A. 114.
47. (1936) 3 W.A.C.A. 57.
48. At p. 59, per Yates, J.

elders of the stool - thus making it an equitable fraud on their part to act otherwise - was confirmed by the judgement of Jackson, J. in Nkansah v. Apau.[49] Counsel pleaded the rule in Antu v. Buedu; the learned judge held:

> "Provided that the stool holder and his councillors are aware of the true facts, namely that the farms were self-acquired property and acting upon that knowledge permitted them to be treated as such, it would be a close approach to fraud for the Stool to attempt to set up a claim to title on the ground that there had been no formal pronouncement of such rights, i.e., when such rights are so clearly known to the other party; and in my judgement it would be inequitable to apply this strict principle of customary law as to the merger of such estates in such circumstances."

With this judgement I respectfully concur.

(iii) It is possible, however, that the rule in regard to chief's private property is still weaker today. Matson[50] cites a case from the Asantehene's Court, Dadzie v. Poku, which lessens the rights of the stool still more:

> "The farm in dispute having been made by K.A. before his enstoolment as Dwirahene, the Dwira Stool according to custom could not inherit the farm, except by the expressed wish of K.A. before his death."

My own information varied in its extent; one informant said that when a chief is enstooled, he has to declare, at the

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49. (1949) Unreported: Land Ct, Cape Coast, 16/2/49.
50. See Judicial Process in the Gold Coast, (1953) 2 I.L.Q. 47 (1948) Asantehene's Court, on appeal from Kokofu Native Court.

time of his enstoolment, all his private property to the elders. If he fails to declare it, it becomes stool property; so that, if destooled, the property remaining undeclared would remain with the stool. Private property acquired by a chief whilst on the stool is his own property, which he keeps if he is destooled. If a chief dies on the stool, his self-acquired property goes to his line in the stool family. But other informants did not indicate the need for actual declaration; one said:

> "A chief when enstooled keeps his private property, such as cocoa farms, etc. The people enstooling him will know which is stool property, and which the chief's private property, so that there is no need for a declaration by the chief of his private property on enstoolment. It does not matter whether a declaration is made or not. Chiefs whilst on the stool draw an allowance, and anything purchased with this money is the chief's private property, and not stool property (if anything is purchased with stool funds, it is stool property); a similar rule applies to gifts either in money or in kind. When destooled, a chief keeps all such private properties."

Another informant was curter:

> "A chief's self-acquired property remains his when he goes on the stool. And whilst he is on the stool, his self-acquired property remains separate."

And in a case before a native court, evidence was given that any personal properties other than those expressly given to the stool by the chief cannot be added to the stool properties.

The general custom at present (though it may vary in the

case of particular stools) is that there need be no express declaration by a chief of his private property when he ascends the stool; that it will be known to the elders which are stool properties (through inventories taken when the succession to the stool changes and otherwise); that private acquisitions by a chief whilst on the stool remain the property of the chief (unless given to or acquired by him as representative of the stool); but that in many cases chiefs reserve their private properties when enstooled in order to prevent later confusion - as a precautionary matter only.

(b) The derivation of a chief's self-acquired property:

A chief may acquire property which is then his individual property in any of the ways open to other men before he becomes chief. The portion of the ancestral stool family property which is included in his assets does not fall within this classification - since the title is with the family, and it is for them to preserve it as against the claims of the stool.

Once a chief is on the stool, gifts are frequently given to him. Some of these gifts are for customary purposes; and certainly none of them goes through the normal accounting procedure laid down for Native Authorities. In any case where custom prescribes the gift of drink, this is given to the chief (even though one would expect it to be due to the stool). The chief by custom, however, shares it among his councillors.

Where gifts are not of a transient character - e.g., where a farm is "dashed" to a chief - one has to ask: "is it then his personal and private property?" The answer to this depends on the circumstances of the case; but although modern customary law is far readier to hold that the gift is intended for the chief in his personal capacity, there nevertheless remains a burden of proof, however slight it has now become, that the gift is not intended for the stool.

It is open to a chief to provide for himself by using the funds which he may have from allowances, etc., for his own benefit. It must be admitted that in practice no fine line is always drawn between the private and public life of the chief, and that a certain confusion of funds is quite possible.

(c) Rules regarding its declaration to the elders:

A certain amount has already been said above about this question. To put the matter briefly:

The old rule that all the chief's property becomes stool property is obsolete; in most places the variation on this rule that a chief must declare his private property to the elders, otherwise it is forfeit to the stool, also does not apply.

(i) Property acquired before enstoolment: the chief is recommended to declare this before he is installed. The penalty of automatic forfeiture no longer holds. In some cases it is stated that provided he either declares the property

within a reasonable time, or not at all where the elders are aware of the true facts, he may keep this property. The best rule is that which recommends him to declare the property at once to the elders, but which does not penalize failure to do so, unless the omission is such as to give rise to a belief that the property is stool property. In fact, this rule is comparable with that for the barring of claims by long possession adverse to the owner bona fide, where the owner is constructively held to have the desire to abandon his property, or to permit adverse interests to develop. In many cases a declaration of property is part of the formalities of ascending the stool, when an inventory of the stool properties is taken.

(ii) Property acquired by the chief on the stool: there is no rule which states that property acquired personally by a chief on the stool is stool property. Today, it is really a question of fact: did the chief acquire the property as stool-holder, or in his personal capacity?

(d) Use, control and disposal of the property:

The rules regarding these are the same as for any self-acquired property.

(e) Succession to such property:

It has been pointed out that it is not the incoming chief who succeeds to the self-acquired property of his predecessor, nor the elders and councillors.[51] It is true that in the old

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51. Cf. Dadzie v. Poku (mentioned above).

days a chief was stripped of all his property when he quitted the stool: this is not the custom today. When the chief dies, succession to his self-acquired property goes to his line in the stool family. Disputes sometimes occur between his relatives and the stool, the latter maintaining that certain property left by the chief is stool property which he cannot bequeath.

6. CUSTODY OF STOOL PROPERTY DURING AN INTERREGNUM:

During an interregnum a Regent is frequently appointed, to act in the place of the chief. He will be thereby entitled to sign conveyances, etc., in cases where the signature of the chief would otherwise have been required.

Warrington[52] gives some rules regarding the custody of stool property:

(a) Death of a chief: The Wirempifu (or Gyase subjects) take custody of the stool property (sc. stool property in the narrow sense). The members of the royal family do not take custody.

(b) Destoolment: "Gyasihene is the proper guardian for all Stool property during the time that the Stool is vacant." The Queen-Mother has no power.

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52. At p. 31.

CHAPTER II.

JURISDICTION AND OWNERSHIP.

It is necessary to consider the vexed question of jurisdiction and land-ownership at some length, and in some detail. The Stool Lands Boundaries Settlement Ordinance[1] makes provision for the delimitation of stool boundaries, both jurisdictional and proprietary. As is observed in the Chapter on REGISTRATION (q.v.) certain difficulties are already experienced with regard to the conflict between the jurisdiction of a stool (over both land and peoples), and its proprietary rights. These difficulties are aggravated when an attempt is made to delimit the boundaries of a stool, since the stool may have ownership without jurisdiction, jurisdiction without ownership, jurisdiction partly co-extensive with ownership, and jurisdiction co-extensive with its ownership of lands. It will be necessary for the Commissioner to declare at the time of settlement how far the boundaries settled refer to jurisdiction, and how far to ownership.

Questions relating to a stool's ownership of land are at present judicial questions, cognisable by the courts.

Questions relating to a stool's jurisdiction over land or persons are administrative questions, not cognisable by the

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1. No. 49 of 1950.

courts (except insofar as concerned in or evidencing claims of ownership), but are rather the subject of executive decision and action.

The dichotomy above, though clear, is not allowed to operate fully; since it is commonly conceded that a judicial decision with regard to the ownership of land may have an incidental consequence in determining the extent of a stool's jurisdiction. The converse does not apply; a determination of jurisdiction cannot as such affect questions of ownership.

It appears that the following questions will have to be considered in some detail:

(1) With whom is the ownership of land, with a Paramount Stool, or a subordinate stool?

(2) Which is the fundamental right, jurisdiction or ownership?

(3) What powers and rights are attributable to jurisdiction, and what to ownership?

(4) How may a. ownership, b. jurisdiction, be acquired or relinquished by a stool?

Before attempting an answer to these questions, one must consider the historical process by which both jurisdiction and ownership have evolved. Some of the history has already been considered, so that it will be sufficient to give it only briefly here.

A. ANCIENT CUSTOM.

Most of the questions above would formerly have been meaningless, since there was no juristic separation between ownership and jurisdiction. Ownership is a meaningful term only when the right owned is capable of disposal, or when it is capable of being challenged by others. Before land was the subject of sale, and whilst there remained large portions of unoccupied land available for taking up by members of a tribe, ownership of the land itself (as opposed to a claim to a farm or house made on it) could not develop. Whatever is the position now, there can be no doubt that in historical times there was land in the Gold Coast without an owner, partly because, from the practical aspect, there was an excess of land available for occupation, and belts of forest between the tribes in some cases; and partly from the legal aspect, because the conception of ownership of land as such had not yet appeared.

The area of land under the control of a stool could be divided into the nuclear lands, under the effective occupation of the members of the stool; and the peripheral lands, presently used for hunting and collection of forest-products, and potentially a source of land for occupation in the future. The boundaries of the tribe or community rested primarily on the limits of the nuclear lands, and secondarily stretched to the vague limits of the peripheral hunting tracts.

Jurisdiction was originally exercised as a function of the right to allegiance; this right to allegiance was originally personal, i.e., over persons. It is obvious that allegiance could and did exist without reference to land-control or land-ownership. A tribe or community on the move - whether migratory, or occupying the lands of a defeated enemy - owed allegiance to its ruling chief or stool, independent of land-control. But conversely, land-control could not exist without the right to allegiance. The land controlled by a stool was the land within the effective (or potentially effective) occupation of the persons serving that stool. If the land ceased to be occupied, actually or constructively, by the stool's subjects (for instance, if ejected by a neighbouring tribe) the stool lost its jurisdiction over that area.

In the olden times, the land thus controlled by a stool or tribe was compact, and the persons occupying the land were homogeneous (members of the same tribe).

A member of a tribe proceeding individually to another tribe did not acquire land-rights for his former chief or tribe; his allegiance to his previous chief might remain. But the allegiance he owed would not import jurisdiction for his previous chief over the land he occupied. Cases could arise where the tribe's control or jurisdiction was extended; one instance would be where individual members pushed out their effective occupation into their peripheral region, or even into

the region of a neighbouring tribe.

The primary right, then, was to allegiance, which carried with it in general: (a) jurisdiction over the persons owing allegiance; and (b) jurisdiction over the territory occupied by the persons owing allegiance - or land-control.

Jurisdiction and land-control were thus at this stage inseparable. Transfers of allegiance were possible: such transfers were either voluntary or involuntary.

Voluntary: (i) by pledge: - a stool could transfer the allegiance of some of its subjects, individually or as a group. Once money was existent, but before land-rights as such became valuable, a stool might pledge one of its villages to a neighbouring stool in satisfaction of a debt. Such a transfer was temporary or indefinite in its duration, and occurred particularly in Ashanti as a result of expenses incurred in warfare. By the transaction passed:

the allegiance of the subjects:

personal jurisdiction;

land-control over the territory in actual occupation of the persons. The persons and their land passed en bloc. The transaction was redeemable, being a form of indefinite alienation. In more recent times a form of redeemable sale appeared, but there was little nice distinction between this and the indefinite pledge.

(ii) by submission by a stool and its people to

another stool: this occurred in two main ways: -

it was one of the methods by which the native states were built up, as a confederation of chiefs under a paramount leader;

it might involve a transfer of allegiance from one superior stool to another.

In neither case does it appear that the land-rights of the stool that passed into subjection were affected. The occupation of the land remained static, and all that happened was that either allegiance was directed to a different lord, or else that the stool's jurisdiction became subject to the paramountcy of an overlord.

(iii) by immigration and settlement: individual strangers or blocks of strangers who settled within the confines of an alien tribe transferred both their occupation and their allegiance, becoming, as it were, adoptive members of the new community.

Involuntary: (iv) by conquest: where a formerly independent people were conquered, various consequences are recorded in history, into which one cannot go in detail here. Remnants of aboriginal tribes are to be found here and there, the Guang peoples (Akwapim, Efutu, etc.) and the Etsifo in Fanteland being examples; these aborigines were either forced onto the periphery, or remained as co-tenants of the land. Is is possible that their former control of the land is indicated by the

asasewura, who is reported from certain areas (cf. Field);[2] but - although there may be analogies with the tendana in the Northern Territories, the word of itself means no more than "land-owner" or "owner of the land".

In more modern times the usual plan of the conquerors was that either they left the inhabitants as they were, only requiring that they owe allegiance and render tribute to their new lords; or else the land was parcelled out by the paramount chief amongst his underlings, the conquered being allowed to retain a portion, or being entirely expelled.

Since at this date allegiance and jurisdiction were the major issues, one cannot say that land-rights (apart from land control) were thereby affected.

B. MODERN CUSTOM.

Today there has been a splitting off. Allegiance remains personal, but it has been separated from jurisdiction over persons (partly as a result of ordinances, partly as a concomitant of modern migrations and economic and political developments).

Jurisdiction over land has also been separated from ownership.

Jurisdiction over persons has become separated from jurisdiction over land.

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2. See: Akim Kotoku, pp. 13, 59-63.

The rights of land-control of the stool are now partly attributable to jurisdiction, and partly to ownership.

Rights over persons are attributable to:

the right to allegiance, now important only insofar as certain customary duties owed by citizens are concerned, and as a basis for a claim by a State to extra-territorial rights over its citizens; it is also sometimes used to base a claim of ownership by a stool;

territorial jurisdiction, which operates to cover both citizens (or subjects of a stool) within the confines of the State (or the Stool's jurisdictional area), and strangers, within the boundaries of the State. This jurisdiction is a product of the Native Administration Ordinances, but whilst diverting some of the former powers of the Stool from it to the new Native Authorities, and creating fresh statutory duties, they otherwise leave the powers of the Stool by custom more or less untouched.

1. With whom is the ownership of the land, the Paramount Stool, or a subordinate stool?

The answer to this question depends partially on the area in question, since the legal position varies from state to state; and partially on recent changes or assertions of rights. Let us take some instances:

ASHANTI:

Who is the owner of land situate within the stool lands of a Wing Chief serving a Divisional Chief in Ashanti? That is, with whom, if anyone, is the absolute interest in such land?

There are certain theoretical possibilities: (a) that all the land in Ashanti is ultimately owned by the Golden Stool, i.e., by the Asantehene in his official capacity, in trust for the people of Ashanti; (b) that the land is owned by the Divisional Chief (equivalent to a Paramount Chief of a state in the Colony),[3] and the Wing Chief has a right as "caretaker", the rights of the Asantehene being attributable to his paramountcy; (c) that the land is owned by the Wing Chief's stool, the Divisional Chief has a jurisdictional right, and the Asantehene a further superior jurisdictional right. (There is also the possibility that a chief or Odikro serving the Wing Chief owns this particular portion of land, so that all superior rights are jurisdictional only.)

First one must consider the rights of the Asantehene. In practice, the Divisional Chiefs are considered as owning

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3. To avoid confusion, it must be noted that in Ashanti each state making up the Confederacy is called a "Division" ("divisional chief" = omanhene or Paramount Chief); each Division is divided up between the different "Wing Chiefs" (sometimes called "senior divisional chiefs" by informants). In the Colony the largest unit is the "State" (with its Paramount Chief), each state being composed of "Divisions" (which = "wings").

the absolute title to the land within their Divisions, which is reasonable if it is remembered that Ashanti is a confederacy. The evidence of Ashanti witnesses in the Belfield Report must be carefully considered in the light of the absence of the Asantehene in exile at the time of the Commission. Hence Chief Frimpon[4] could say:

> "When the King of Ashanti was in the country he claimed the land as paramount chief, but it actually belonged to the Chiefs and tribes."

It is difficult to get an exact answer from African informants with regard to the Asantehene's position in regard to the land within the divisions. His right of supervision over land-use is traceable to his overlordship, and is now exercised, if at all, in a markedly moderate and constitutional manner. One informant put it that title to all the land in Ashanti was theoretically with the Asantehene, but that he did not press the claim in practice, rather allowing his divisional chiefs to behave as though ultimate title was with them. The Ashanti Confederacy Council, in discussing the subject,[5] resolved that all the land in Ashanti is the property of the stools of various chiefs. One of the chiefs endeavoured to lay down that all the land belonged to the Asantehene; the latter, however, demurred. Several informants held that there was a difference between former times and today: perhaps the

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4. At p. 94 of the Report.
5. See Matson, Digest, paras. 81 and 82, p. 18.

interregnum, and the absence of an Asantehene, led the divisional chiefs to assert an absolute title not dependent on any other. This attitude has been retained since the restoration of the confederacy, with the change that they now owe allegiance to the Asantehene, and this qualifies their holding of land.

It thus appears that the Asantehene's right (where he does not operate as Kumasihene) is one of paramountcy; claims to land-control and tribute or share of extraordinary wealth are attributable to allegiance and not to title to land. This finding does not answer the next problem: within the Division, who owns the land?

It is commonly observable that the lands of a division have been divided up between the different wing-chiefs, leaving only a minor portion - sometimes only scattered villages - reserved for the Omanhene. In line with this the KOKOFUHENE could say before the Belfield Commission:

> "All the land in my country belongs to my stool; but it is divided amongst my sub-chiefs."

These sub-chiefs "have charge" of the land.

This sub-division may represent an actual event in the past, the granting of feuds or fees, as it were; or it may be a subsequent rationalisation. Warrington says on this subject:[6]

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6. pp. 35 - 36.

> "In former times all land in Ashanti belonged to the Asantehene and ownership was vested in the Golden Stool; the land belonged to the Asantehene by right of conquest and he gave the land to the various chiefs. Such at any rate was the general principle, but it is difficult now to say what were the legal rights of the Asantehene, in respect of the lands of his Abrempon or to what extent such rights were exercised, if indeed they were ever defined.
>
> There was no land which belonged to the Golden Stool as distinct from the land occupied by the Chiefs who served the Stool, and in so far as the lands of those Chiefs who were the Asafohin of the Asantehene were concerned there is little doubt that ownership was vested in the Golden Stool, and that the Asafohin held their land from the Asantehene; but with regard to the lands of the more powerful Abrempon it is probably more accurate to say that these Chiefs served the Asantehene with their lands and that the rights he exercised in respect of such lands depended upon the relations existing at any particular time between the Asantehene and the Birempon concerned.
>
> Whether the Divisional Chief was formerly the owner or the caretaker of the land in his possession, in the absence of an Asantehene he exercises all the rights of ownership and his Asafohin hold their lands in trust for his Stool."

(The head chief becomes a party if one of his "asafohin" has a land dispute with the "safohin" of a neighbouring chief.)

Warrington wrote at a time when the Ashanti Confederacy had not been restored; his use of the word "ownership", depending as he did on the evidence of informants naturally lax in their use of this word, is a little confusing.

However, there seems no doubt that at the present day in most Ashanti Divisions the ultimate title is with the Paramount Stool of each Division, and a dependent title with the Wing

and other chiefs serving the paramount stool direct.[7] The wing chiefs are often described as caretakers for the paramount chief. The control of the paramount stool is indicated by, for instance, the fact that stranger-farmers are admitted by the paramount stool, even if they approach the stool by way of a subordinate chief. The practice in different divisions varies: in BEKWAI the paramount stool has more control, even though for all matters except the admission of strangers the sub-chief in charge of the land is the land-controller. In ESSUMEGYA it was stated that if a contractor wished to cut down timber in a village under a senior chief, then the agreement would be made by the senior chief; but it would be sent to the Omanhene for confirmation. This is only a change of emphasis, since the proceeds are paid to the Omanhene by custom, who gives a proportion to the chief in charge of the land. (Since N.A. Treasuries have come into being, this practice is naturally no more.)

In certain cases it does not appear that title is with the paramount stool. Certainly for instance in ADANSI, there are stools owning their own lands, with the Adansi Paramount Stool as paramount in authority rather than in title. In Adansi,

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7. Cf. Rattray, A.L.C., 351, (quoting an informant):

> "All land whatsoever belongs to the Head-Stool, but the 'use of it' may have all been given away to sub-Stools..."

both Wing Chiefs and certain other stool-holders appears to own their own lands.

Again, in KUMASI Division, there is the distinction between stools owning their stool lands, and those which are merely caretakers.

Warrington,[8] in discussing this question of stools which own their lands, and those which do not own their lands, says:

> "The ownership of land is in general the distinguishing feature of a Safohene as distinct from an Odikro, but there are numerous exceptions to this rule: a newly created Safohene might be given subjects although no land was available, similarly an Odikro might purchase land for his stool but did not thereby become a Safohene."

It appears, however, as noticed before, that Warrington uses "ownership" in a special sense. It is practically impossible to find an ownership of land in sub-stools, independent of the Paramount. Where the sub-stool is a so-called owner, it may still be unable to alienate unless the Paramount Chief concurs, or confirms; grants of lesser interests (e.g., permitting strangers to farm) are made without the knowledge of the Paramount Stool, or with subsequent notification to that stool.

Can one distinguish between the "Abrempon",[9] "serving with their lands", and other chiefs? One test which appears

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8. p. 10.
9. For a discussion of the word "Birempon", see Ratt. A.L.C.94.

reasonable to apply among others is the compactness of the stool lands: some Wing Chiefs are to be found with their villages scattered through the breadth of the state (as in Bekwai); others with their lands a single, isolable, whole. The latter are more probably "owners" of their lands than the former, but this is not a perfect test. Taken in conjunction with history, however, it seems that where a chief with his own compact stool lands commended himself to a superior chief, such a one from then on "served with his lands"; and I interpret this phrase to mean that the interest of the superior stool was one of paramountcy and not of ownership; even if the rights of the subordinate stool were conditioned by the political allegiance it owed, this need not imply that its proprietary rights were thereby taken away from it. This combination of tests certainly seems to work in other parts of the Gold Coast; but it must be admitted that the position is baffling in the extreme, and that it is difficult to give a clear answer one way or the other, owing to the former confusion between jurisdictional and proprietary rights, and the fact that land-owning rights have been a recent development.

COLONY:

If we turn to the Colony proper, there is a good deal of evidence from the AKIM states. The leading series of cases dealing with the position in AKIM ABUAKWA are to do with the Asamangkese Arbitration, and the subsequent law-suits which

tested the finding of the arbitrator. It was claimed[10] that Asamangkese - a stool serving the Paramount Stool of Akim Abuakwa - held their lands subject to the following conditions:

(a) They serve the Paramount Stool with their lands.

(b) Gold nuggets found on the land must be submitted to the Paramount Stool which is entitled to appropriate one-third of the value.

(c) Treasure trove must be submitted in like manner and is subject to a like reduction.

(d) There were further conditions of tribute and toll as to hunting and snailing.

(e) Alienations of land to persons not subjects of the State were contrary to custom, and had to be reported to the Omanhene who was then entitled to a proportion of the purchase-money.

The arbitrator said that:

> "There has not been sufficient evidence brought before me as to the meaning of the term 'serving with the land', which is not an English expression, to enable me to come to a decision on this claim."

He also found that the assent of the Paramount Stool is not according to custom necessary for the valid alienation of lands held by the stools of Asamangkese and Akwatia; but also that the Paramount Stool is entitled to 1/3 of all rents and profits

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10. See: (1929) D. Ct, '26-'29, 220, coram Hall, J.

of land alienated by the stools of Asamangkese and Akwatia or either of them.

When the arbitrator's award was considered before W.A.C.A.,[11] Deane, C.J., said that, in regard to counsel's contention that the arbitrator had confused abusa and tribute:[12]

> "the contention is that the arbitrator has really made an award which is contrary to all the principles of the native customary law of land on the Gold Coast, since, while finding that the Omanhene's ancestor granted the land to the ancestors of the Ohene and thereby ceased to be the owner, he has in effect awarded him ebusa which is the one-third share payable to the owner of land by an occupier or person having charge of the land for the owner; and that the conception of a person who is not the owner of land being entitled to ebusa which is the first and principal right of ownership is a palpable contradiction of ideas, a thing so alien to all native ideas of land tenure that the arbitrator may be said to have fathered a monstrous hybrid notion which if allowed to stand will reduce that tenure to chaos."

Casely Hayford[13] was quoted in support of these contentions; but the Chief Justice said:[14]

> "from this passage I think it is clear that paramountcy is not in all cases merely a personal relationship divorced from all connection with the land, but that the King, even although he may not be the owner, has a very real interest in all the lands of his state."

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11. In Ofori Atta v. Amoah: (1930) 1 W.A.C.A. 15.
12. At p. 24.
13. G.C.N.I., 44.
14. Atta v. Amoah, at p. 26.

And further that:

> "the true test of what is ebusa and what is tribute is not to be found in the manner of payment but in the nature of the payment." [15]

It was also objected that only 1/9 had been awarded from Akwatia, and not 1/3. The objection was overruled, Sarbah[16] being cited to show that the King is entitled to an abusa of the sub-ruler's abusa.

One can sympathize with counsel's contention that payments attributable to ownership have been confused with payments attributable to paramountcy; in particular, the true test of what is abusa and what is tribute is surely to be found neither in the manner of payment nor in the nature of the payment, but in the causa of payment. Since the causa is the point which in this and other cases is the main question to decide, this test is not very helpful.

A point which must be made about the Asamangkese arbitration is that the full force of the word "abusa" has probably not been appreciated. Of itself the word signifies no more than "division into thirds"; and it can be used equally for the division into thirds which takes place when a caretaker renders accounts, and when a tenant does the same. The vital question is: to whom does each of these three parts go? In

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15. loc. cit., p. 27.
16. F.N.C., 17.

the case of an abusa tenancy, one-third of the produce goes to the land-owner; payment of the one-third is evidence of his ownership; and it will be used in the courts to rebut the statement that the tenant is in fact the owner of the land. If the caretaker relationship exists, two-thirds are payable to the land-owner; and the fact that two and not one of the parts are so paid rebuts the presumption of an abusa tenancy. In the case of the Paramount Stool, and the subordinate stools, somewhat similar considerations apply. The "paramountcy" involved, which I term "jurisdiction", is not merely personal, but territorial. Some rights with regard to the land are attributable to territorial jurisdiction, and some to a proprietary interest. Where there is ownership in a sub-stool, but that latter serves a superior stool with its lands, it is preferable to avoid describing the latter's interest as a proprietary interest. The powers and claims which it possesses are jurisdictional; such powers may include the power to prohibit outright alienations of land outside the citizen-body, a power sufficient to entitle the superior stool to sign a conveyance as "confirming party", or even as one of joint-grantors.[17]

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17. In Odjidji v. Nuame: (Unreported) Land Ct, Accra, 19.5.1949, from Akim Abuakwa, where sub-stools conveyed to plaintiff in fee simple, and the Omanhene gave a licence to defendant to fell timber on plaintiff's land, Smith, J., held:
    1. The Omanhene does not own all the land in Akim Abuakwa.
    2. Sub-stools own their own land.
    3. The Omanhene is entitled to 1/3 of timber felled on the land.

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Its signature in such a case indicates a withdrawal of certain powers and claims for the future, powers which it would otherwise possess; it thus bars - through the Stool - its subjects' powers and claims (e.g., to take up land for farming). In Ofori Atta v. Atta Fua[18] it was said in regard to the nature of this interest:

> "As regards the question of ownership, both paramount stools claiming through sub-chiefs, I consider that where the paramount stool has the power to grant concessions whether alone or jointly, there is sufficient ownership shewn to bring it within the purview of the Ordinance."

The Ordinance was the Concessions Ordinance, and the judgement must be considered only within the terms of that Ordinance; but it is sufficient to illustrate the fact that the powers of paramount stools - even when less than the ownership of which we speak, but including the right to countersign concessions - may be taken as an indication of some kind of proprietary title by the courts of the Gold Coast.

What does the state of Akim Abuakwa itself say in regard to these problems?[19]

> "Every Odikro has some land attached to his Stool. A Chief would not be an Odikro but a headman, unless he had a stool with land

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17. (cont. from previous page) -
    4. The conveyance to plaintiff was valid.
    5. Neither the Omanhene nor the sub-stool alone had a right to grant timber-rights over the land to a third party.
18. (1913) D. & F. '11-'16, 65.
19. In answers given by the Okyenhene and some of his councillors in 1951 to myself.

> attached, though the converse is not true, namely, a headman may have land and be the head of a village, and not be an Odikro.
>
> To speak of an Odikro as 'caretaker' of his Stool land will be misleading in the English sense. As between one Odikro and another Odikro each is owner. As between an Odikro and the Okyenhene [20] the land is held in trust for the people of the Odikro's town as also for all citizens, i.e., persons of true Abuakwa birth...
>
> Both the Okyenhene and the Odikro are owners in the sense that they are joint trustees, one local and the other paramount. In common parlance, the paramount Chief is owner (ne dea) and the Odikro is caretaker (ohwe so), but the reality goes deeper than than..."

And the Akim Abuakwa Declaration[21] says at paragraph 1:

> "The ownership of all Stool land in the State of Akyem Abuakwa is vested jointly in the occupants for the time being of the Paramount Stool and the several Subordinate Stools to which the respective portions of such Stool land are attached. These portions of stool land the Paramount Chief and the Subordinate Chief concerned administer as trustees on behalf of the members of such Subordinate Stool. But the occupant of one Subordinate Stool has no right of control over the land attached to another Subordinate Stool."

At the present day sales and concessions, etc., are made by the local landowning stool and the Paramount Stool jointly.

There has been a tendency away from the Paramount Stool

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20. (This is the term for the Paramount Chief of Akim Abuakwa.)
21. State of Akyem Abuakwa (Declaration of Native Customary Law) Proclamation, 1932, No. 4 of 1932; made under s. 123 of the old Native Administration Ordinance; rejected and re-submitted with certain modifications in 1939. It is still not law.

merely signing as confirming party, to signing as a joint grantor.[22] This represents, no doubt, an historical process by which the Paramount Stool has tended to assert more concrete rights and powers over the land; this has marched in step with the development of proprietary rights by the immediate land-owning stool, and also by the individual. Such a process is not regrettable, since the "dual trusteeship" brought out in the citations[23] means, for instance, that a citizen of Akim Abuakwa may cultivate any forest-land anywhere within the confines of the State. The Akim Abuakwa Declaration has recognised this right, although differentiating between the case where a citizen cultivates the land of his own Stool, and of another stool in Akim Abuakwa: in the latter case, he is required to notify the land-owning stool first. A similar requirement is observed in, for instance, Adansi, where ownership is divided between the stools. The modern rule that a

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22. Danquah, A.L.C. 214, deals with the position in Akim Abuakwa. He says:
"Therefore, to obtain an unimpeachable title to stool land in Akim Abuakwa, it is necessary first to acquire an option over the land from the Chief of the town or village owning the stool by which such land is mediately held, and then obtain the sanction and approval of the Paramount Chief. It is rightly becoming the custom now to approach the Paramount Chief in the first instance who will then introduce the sub-stool owner of land to the applicant."

23. But it will be noted that the "beneficiaries" are in one case the local inhabitants and all citizens, and in the other the former only.

citizen of a state may cultivate anywhere within the State free is a development to be welcomed as indicating the welding of the component parts of a state into a whole. Citizenship has triumphed over local allegiance.

The judgement of Brandford Griffith, C.J., in the leading case of Wiapa v. Solomon[24] is also of interest, even though it has to deal in this instance with questions arising in Akwapim (which is a neighbour of Akim Abuakwa):

> "Though the principle obtains that all unowned land under the authority of a paramount stool belongs to such stool, in practice this is much modified, at any rate in the Eastern parts of the Colony. In these parts each subordinate stool has attached to it large portions of land apparently carved out of the territory originally belonging to the Paramount Stool; similarly, families have large tracts of land carved out of the subordinate stool lands, and finally we get down to individuals with private worship (sic: sc. "ownership") of particular parts of family land; or private individuals may have part of stool land not being family land. Any unoccupied land within the recognized boundaries of the subordinate stool land or the family land or private land would, of course, belong to the subordinate stool, or the family, or the private individual, as the case might be; but any unoccupied land not being a part of the land of a subordinate stool or family or a private individual would be attached to the paramount stool."

This case was concerned with a contest between the Paramount Stool of Akwapim and one of its subjects. It was therefore distinguished by Brandford Griffith in his Digest from a contrary decision in Akuamankra v. Paul and Ajare[25] on the ground

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24. (1905) F.Ct Ren. 405.
25. (1912) D. & F. '11-'16, 26.

that the latter concerned a conflict between a paramount stool and one of its subordinate stools.

The quotation from Wiapa v. Solomon represents an almost exact reversal of historical facts. This occurs, doubtless, through the importation of English notions (the "carving out" of estates) into customary law. There is, it is true, one method by which land within a state has been divided out in this manner; one can, however, distinguish two modes:

(a) in the first family land develops from the acquisitions of its members, stool land from the accretion of families, and the lands of the paramount stool from a confederation or joining together of these separate entities;

(b) in the other newly seized lands have been parcelled out by the paramount chief among his sub-chiefs, and thence down to the subjects.

The first is, I feel, typical of Ashanti, and the second of some states in the Colony. But in most cases there has been a mixture of the two methods.

In Eastern Akim - Akim Bosome, Akim Kotoku - the subordinate stools claim title to the land.[26] The pesition is

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26. In Sintim v. Apeatu: (1934) 2 W.A.C.A. 197, and (1936) P.C. 2 W.A.C.A. 201, the question was of the right of a subordinate stool of Akim Kotoku to sell land; but the debate was about the right of an Odikro to sell his land without the consent of his overlord, the Stool of Mansu, the latter being of a divisional chief. The dictum of Yates, Acting C.J., (at p. 198) - "it is recognised customary law that no lands which are subservient to the dominant stool can be

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complicated by the fact that in some cases the land itself is owned by one stool, but the persons occupying the land are under the jurisdiction of another stool; (this is also found in Ashanti). Their constitutions appear to be on the confederated pattern - Field[27] says:

> "When the oman unions were set up it was entirely a matter of military convenience, choice, or sentiment which of these any one town chose to join. No question of land entered into the contract."

And again,

> "...to this day land control is independent of oman control." [28]

But the Oman, as represented by the Omanhene, do have certain rights in regard to land:

> "If such a town sells any of its land or timber, or lets out its land on hire to be used for any abnormal - i.e., non-agricultural - purpose (for instance, mining) the Omanhene is given one-third of the proceeds. If it lets out its land for rent or on the bu'sa system, the Omanhene gets nothing so long as the land is used in the normal agricultural manner. That is to say, the Omanhene has nothing to do with the land as such, but as soon as his subjects acquire any extra-ordinary wealth, whether by exchanging their land for it or by any other means, then he can claim a share in this wealth for the needs

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26. (cont. from previous page) - sold without the consent of the Paramount Chief and his elders" must be read subject to this explanation, the Paramount Stool of Akim Kotoku not being involved.
27. In Akim Kotoku, p. 4.
28. Ibid., p. 5.

> of the oman of which the town in question is a member." [29]

I did not find it possible to check the information given above on the spot; but the Declaration of Akim Abuakwa customary law, already referred to,[30] although not entirely reliable in certain points, states definitely that

> "27. The Paramount Stool is entitled to one-third share of the proceeds from the sale of all Stool land and to one-third share of all forms of revenue accruing from Stool land."

and this provision will include payments of abusa and rent by strangers occupying stool lands.

Again, Field[31] quotes the evidence of an Okyeame that where a citizen sells his farm or cleared land to a stranger, the chief of the town takes one-third, but no portion of this is sent to the Paramount Chief:

> "It is only when uncleared forest is sold by the town that the town sends one-third to the Omanhene."

The Akim Abuakwa Declaration specifies that one-third of the proceeds from the sale by a citizen to a stranger of the former's farm is to be paid to the local stool; whether the paramount stool takes one-third of this or not is not specified.

In ASSIN, the Paramount Stool has its own land, and other stools also have their own land. Before the subordinate

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29. Ibid, p. 57.
30. See p. 99 ante.
31. Ibid, p. 67.

stools began to serve the Paramount Stool, they enjoyed their own lands, being separate and independent. Here, again, then, there appears to be a federated constitution.

In ESSIAM the position is similar: the Omanhene and the Divisional Chiefs each have their own lands; in most cases these have been largely taken up by families and individuals, and there is little unoccupied stool land. The Divisional Chief is expected to inform the Paramount Chief before disposing of any of his land.

In this and other Fante states "stool land" appears to refer principally to two things:-

the area of jurisdiction of the stool;

the stool-family lands.

But there is also reference to the portions of stool-family land earmarked for the ruling chief, which portions are thus attached to the Stool; and there is also reference to any unoccupied portions of land within the area of jurisdiction of the stool.[32]

In MANKESSIM, for instance, I was told that title to the land is not with the Omanhene. The land there is divided up between the different clans and families. There is no unused forest-land left, so that "stool land" in its wide connotation

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32. Cf. Danquah, A.L.C. 215: "In Fanti proper (Borebori Fanti) there are but very few Paramount Stools which can claim absolute right of ultimate ownership in all the lands in their state divisions."

is inapplicable.

In AJUMAKO the Paramount Stool family has its own land; the families of Odikros have their own lands. The Omanhene has no control over any land but his own. The subordinate stools similarly have no control over any land except their own. Individual families also have their own land which they own. In some places there is forest-land which is owned communally by the Oman; and any man may cultivate it without permission. I do not think that there is any appreciable amount of such forest-land left in this State, however.

In ASIKUMA the inhabitants claim to have migrated from Ashanti, and to have conquered the aboriginal inhabitants. The Paramount Chief sent out his subordinate chiefs to fight the aboriginals, conquer them, and take their land, the land being acquired for the benefit of the Paramount Chief. The survivors came indirectly under the Omanhene. Today all the land is controlled by the subordinate chiefs, but the Paramount Stool has an interest in the land. This interest appears to be a jurisdictional one, including:

(1) a right to 1/3 of extra-ordinary gains derived from the land;

(2) a right to approve sales of land by subjects;

(3) as regards timber, it was said that forest-lands are attached to different stools. The Paramount Stool has its own forest-lands, and the subordinate chiefs have their own forests.

The Omanhene is by custom entitled to a share of the price realized from the sale of such timber; he is not, however, the owner of such timber, but only controls its use and disposal.

It is to be noted that it was said that:

> "there is no stool land, apart from stool-family land."

Land for churches, missions, and stranger-farmers, is acquired from the head of a family which owns land. It is possible for a stranger to ask for land from a Chief, who would allow him to farm on unoccupied land. Where land is acquired for a church no payment need be made to the local chief. Where a store is erected on family land, title to the soil remains in the granting family.

In AKWAPIM a divisional chief has his own land but "he owns it for his Paramount Chief".[33] A Wing Chief needs no permission from the Paramount Chief before selling his land. A finder of treasure trove reports it to his Wing Chief, who reports the finding to the Paramount Chief. The find is customarily divided as follows:-

1/3 to the Omanhene;

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33. Information from Akropong (sed quaere). Cf. Danquah, A.L.C. 214-5: "...it is apparent that... there is no recognition of the Paramount Stool of Akuapem's inherent right of ultimate ownership in all the Akuapem lands, although his absolute and indisputable jurisdiction over all the lands of Akuapem and the inhabitants thereof, has never been denied."

1/3 to the Divisional Chief;

1/3 to the finder.[34]

Akwapim is a confederacy of divisions of different racial origins: Larteh, Obosomasi, are Guang;

Adukrom and Awukugua are described as Cherep yong;

Akropong and Amanokrom are Akan, related to the Akims;

Aburi is Akwamu.

At Aburi it was stated that Akwapim is not like Ashanti, where the stools own all the land. In Aburi the land is all divided up between the seven clans who own the town. The Adontenhene[35] had some stool land (quaere stool family land?), but has public-spiritedly given it away for public purposes, e.g., as sites for schools, missions, and for the Botanical Gardens.

Transfers of land by land-owning families are not controlled by the chief; his consent is not necessary, although his signature is sometimes sought as a witness or in confirmation in order to ensure greater security of title (a kind of registration, as it were) for the purchaser. It should be noted that the Akwapim divisions are geographical, thus indicating the federated nature of the constitution.

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34. Cf. the Akim Abuakwa Declaration (already referred to at p.99), where a similar distribution is observed, except where the stool of which the finder is a member does not own the land on which the find is made, in which case the 1/3 share is divided equally (so it is said) between that stool and the stool which owns the land.
35. That is, the chief of the Adonten Division of Akwapim, centred on Aburi.

In SEKONDI land is owned by the Stools, the citizens originally owning not the land, but the things thereon. Before selling land, a citizen must therefore have the Stool's consent. Individuals owning land are found, usually as the result of sale or deed of gift from a stool.[36]

Paramount and subordinate stools each have their own lands, and are entitled to 1/3 of what comes out of the land.

There has been much competition between the Stools and the stool-families in this area, the latter claiming that the so-called "stool lands" were really "stool-family lands". Whatever the truth of the matter, it has now been decided that in Takoradi the stool owns the lands as against the stool-family;[37] and that in Dutch Sekondi the like rule holds.[38]

CAPE COAST:

In Cape Coast any rights which the Stool may possess appear to be in abeyance, and tenure is on the typical Fante model, although with a tendency to absolute ownership, and a corresponding diminution of stool rights, even of a jurisdictional nature. This is explicable by reference to Western influences, and to the existence of a Town Council. Cape Coast and other Fante towns are notable for the claim by the

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36. Personal information given at Sekondi.
37. See: Aginfram v. Broquassie: (1878) Ren. 40; (also spelt "Broguassi" in the report).
38. See: Wurapah v. Commonwealth Trust: (1922) F.Ct, '22, 80; Amissah v. Krabah: (1936) P.C. 2 W.A.C.A. 30.

"companies"[39] to title in certain land, usually that on which they have for long held their meetings, or where their headquarters are situated. Such a claim is not made elsewhere; and even here doubt has been cast on the interest which they possess, if any.[40] They can, of course, own land acquired in a manner similar to that by which individuals may become seised of an absolute interest. The Local Government Ordinance, 1951, includes land or interests in land controlled by a company captain in the definition of "stool land".[41] This may, it is submitted, be inappropriate.

WESTERN PROVINCE:

It seems that in the states of the Western Province (e.g., Wassaw Amenfi) the position is similar to that in Assin, and Akim; but, as I have no personal experience of them, this supposition must await verification.[42]

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39. These "companies" are purely indigenous institutions, into which the asafo or "young men" of a particular state or town are organised. They seem in origin to run counter to the typical Akan military organisation (being "democratic", without chiefly members, etc.). They have assumed most importance in the towns of the coast (.e.g., in Cape Coast, Elmina). In Cape Coast I was informed that membership of a company goes in the male line. At Elmina, companies seem even to have taken some part in judicial work, the Dutch (when Elmina was within their territories) having apparently established a tribunal of the heads of the ten companies in the town.
40. See: Inkoom Company of Cape Coast (No.4) v. Attorney-General: (1910) Ren. 567, where Earnshaw, J., doubted greatly if a company can own land according to native law and custom.
41. S. 2.
42. And see Danquah, A.L.C., 215.

2. It emerges from the above that in some cases paramount stools own the land, the subordinate stools enjoying only a dependent interest in their own lands carved out from this; that in others subordinate stools own their land, but subject to the jurisdictional interest of the superior stool, concretely evidenced by signature on conveyances, rights to a one-third share, etc; and in other, finally, that neither grade of stool truly owns the land, families and individuals owning their own lands, subject to a jurisdictional power of varying importance in the stools controlling them, and the stool-lands so-called are in reality stool-family lands, or are carved out therefrom (sometimes together with pieces of forest-land not yet taken into effective occupation).

A series of propositions may be attempted:

(i) The jurisdictional boundaries of a Stool or state are not coincident with its land-ownership:

> - "the mere fact that certain lands are within the administrative boundaries of a certain division could not raise the presumption that they belonged to the Stool of the Paramount Chief of that division." [43]

(ii) Jurisdiction over persons does not now extend over the

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43. Per the trial judge in Kwasi Safo v. Chief Kofi Yensu: (1941) 7 W.A.C.A. 167, quoted with approval by the appeal court. This case concerned a dispute between Techiman and Offuman in Ashanti, occasioned by the British Goverrmment's placing Offuman under Techiman from the date when Prempeh was exiled until 1935, when the Confederacy, and the previously-existing position, was restored.

boundaries of a state:

- in Odonkor v. Ayeh[44] the question arose of which native tribunal had jurisdiction in land cases, the land in question in this case being Begoro (Akim) land which had been settled by Krobos. Crampton Smyly, C.J., dissented from the judgement of Brandford Griffith, C.J., in Angbo v. Dei,[45] in which the latter judge decided that the land should be deemed to be Krobo land having been settled by Krobos. Crampton Smyly, C.J., said:

> "This is a statement I find very great difficulty in following, if it is to be extended to the case of the purchase of land by members of one tribe from another tribe - it would do away with the territorial limits of the particular jurisdiction of the tribunal and change it into a jurisdiction over the persons of the tribe."

This new principle is consolidated by, for instance, the Native Authority (Colony) Ordinance, 1944,[46] which requires annual rate or tax to be paid now on a residential, and not an allegiance, basis. The idea that tax or levy is due by reason of allegiance, is by no means extinct, as is shown by disputes between states recorded in the files of the administration. The residence requirement does not in any case provide a pat answer where ownership is disputed, e.g., where it is claimed that settlement in the territory of a neighbour-

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44. (1913) D. & F. '11-'16, 50, in the Supreme Court.
45. (1908) S. Ct, 15.6.1908.
46. No. 21 of 1944.

ing state coupled with the allegiance of the settlers produces ownership, or at least jurisdiction, in the settlers' stool.

(iii) Allegiance extends over political boundaries:

this may be of importance when questions of meeting extraordinary stool expenses, etc., are raised. These were formerly met by special stool levies, applicable only to subjects of the stool. It is noticeable, however, that permanently settled strangers are now becoming liable to contribute equally with citizens.

(iv) Allegiance cannot now be bought and sold:

it might have been transferred in the past by the act of the individual, or by a chief transferring his own, or the allegiance of some of his subjects, to requite a debt.

(v) Jurisdiction over persons can now be altered only by change of political boundaries:

Jurisdiction cannot be sold, it can only be ceded. As will be seen when the question of the effect of sales is discussed, it was considered formerly that an outright sale especially to a stool, or to a group of individuals serving the same chief, might also pass jurisdiction.

(vi) Ownership of land does not now confer jurisdiction.

(vii) Absence of ownership does not imply absence of jurisdiction.

3. There are also the complications caused by the dichotomy between the Stool - or the Chief and his elders and councillors - on the one hand, and the Native Authority, even though constituted by the same persons, on the other. As regards this, it must be noted that the stool is a customary entity, whilst the Native Authority is a statutory authority. The Stool and the Native Authority are not the same body, nor interchangeable, even where they are composed of the same persons. The land-owning rights of the stool are not affected by the creation of a Native Authority, even though in some cases the revenue from stool lands (for instance, payments for concessions, for sales of land, for rent from strangers, etc.) are now paid into a Native Authority treasury. The chiefs have generally taken a salary from Native Authority funds in commutation for their previous incomes from customary payments.

Rights attributable to allegiance are still exercised by the Stool, since it would be patently absurd to expect citizens to owe any duty of allegiance to a completely non-customary body. The rights of jurisdiction exercised by a Native Authority consist partly of rights formerly exercised by the Stool, and partly of powers directly conferred on the Native Authority by legislation. The rights of land-control, where now exercised by the Native Authority, are partially attributable to a delegation of powers of management of stool lands to the Native Authority, either by the Stool, or by statute. No doubt,

when the local government reforms are put into effect, the distinction between the customary and the statutory body will become more patent, since they will no longer consist of largely identical personnel. Any juridical difficulties which now exist are to some extent glossed over by the failure to make the distinction in practice at present, but will become more obvious in future.[47] What duties are attributable to allegiance at the present day, what duties to jurisdiction, and what to ownership?

4. Duties attributable to allegiance:

These duties are owed to the Stool, or to the Chief - the Native Authority does not come into the picture.

(i) Certain customary services rendered to the Chief, and (ii) Liability to contribute to extraordinary stool levies, e.g., in defence of the stool lands.

It was formerly the custom that only real subjects of the Stool must contribute, even if outside the confines of the State. Strangers need not contribute to Stool debts. But today it is increasingly evident that those who are permanently-settled strangers are now being rendered liable to contribute to stool levies: this may be done on the practical basis that they are fictionally assimilated to membership of the stool or tribe.

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47. Much of the above will require to be radically revised in the light of the new Local Government Ordinance, 1951, under which "traditional members" constitute only 1/3 of the new Local Authorities. Such revision must await the application of the Ordinance.

(iii) Liability to contribute a portion of certain extraordinary gains:

e.g. a portion of game killed;

the tusk of an elephant killed;

large gold nuggets;

(1/3 of extraordinary gains from the land, as for instance from concessions, sales, snails gathered, especially between stool and superior stool).

But some of these duties may be attributable to land-ownership in the stool: it was stated by one informant that the gift of a portion of snails served "to show the real owner of the land"; and the destination of portions (hind legs) of game killed may vary according as the game was killed by a subject of the stool owning the land or not. If one may take the Asamangkese Arbitration as an authority, it seems that the payment of 1/3 between subordinate and paramount stool of various amounts, including money gained from exploitation of diamond deposits, is attributable to allegiance, and not to ownership.

5. Rights attributable to jurisdiction:

(a) Persons.

(i) Right to exact a levy or tax.

(ii) Right to tax strangers.

The position is complicated because levies were originally extraordinary and irregular, and did not apply to strangers. The right to impose a general rate or tax is of course now

confined to the Native Authority, which is so empowered by statute. The modern rate is payable by all residents, and also by persons owning immovable property within the area of the Native Authority, even though ordinarily resident outside that area.

(iii) Right to political control over the actions of residents, to judge their cases, and execute the judgements. This power of control was definitely attributable to jurisdiction; and the judicial power - now exercised by native courts under the respective ordinances - is not exercisable outside the jurisdictional boundaries of the authority concerned. To seek for a proprietary basis for the exercise of this jurisdiction is fallacious, as was shown in Odonkor v. Ayeh:[48] it must be remarked, however, that there are two points: does the settlement of subjects of a State, S, on land outside S's boundaries give rise to a power in the authority of S to decide personal claims between them, or cases concerning land which they occupy (i.e., is there an extension of jurisdiction?); and does the settlement give rise to proprietary rights in the stool of the settlers, which rights then carry along with them the right to judge cases concerning the land (i.e., an extension of ownership)? The answer to the first question is a decided negative; the answer to the second question is considered later.[49]

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48. See ante at p. 112.
49. See below at pp. 123-5.

(iv) Certain services (e.g., of communal labour) are now owed to the Native Authority under the N.A.C.O. Are these only owed by real subjects of the stool, being a transference of previous customary services? Or are they owed by all, strangers and citizens, being attributable to residence? As to the latter, Warrington says[50] that a stranger paying cocoa-tribute in Ashanti is not liable to perform communal labour for the Chief on whose land he resides, nor does he contribute to levies. But a stranger growing food, (i.e., probably a permanent resident) is not usually called on to contribute to levies, but he is expected to assist in any communal work. This might serve to indicate that the choice is between the duty being attributable to membership of the land-owning stool, or to allegiance owed to the stool calling for the communal service. I feel, however, that in the old days the duty of communal service in the village-context was owed by reason of permanent residence in the village, and was therefore attributable not so much to ownership, or to allegiance, as to territorial jurisdiction over land. The matter is uncertain.

(b) Land.

(v) The right to control occupation.

(vi) The right to control use (e.g., by forbidding certain kinds of use).

In the context of the village, the Odikro may control occupatior

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50. at p. 35.

within the village, for instance, in the matter of where to build houses and so on. He also in certain cases controls the use, by, for instance, permitting the taking of fish, or the damming of a stream, at a certain time of year. These rights are exercised independently of ownership. But where the ownership is with a superior stool, it might be said that the Odikro (commonly called "caretaker for the Stool" in such circumstances) is only exercising powers delegated by the superior stool, powers attributable to the Stool's ownership. Certainly, the most important of the rights in regard to the control of occupation and use are those which concern the admission of strangers to farm or reside in the village or forest. And, quite certainly, an Odikro who does not (through his Stool) own the land in the village concerned, does not on his own initiative admit strangers, but rather refers them to the superior land-owning stool. The admission of strangers thus appears to be a right relative to ownership; and I do not think that a stool with only jurisdictional powers could claim to exercise such rights as flow from ownership of stool lands.

(vi) The right to take land for public purposes, e.g., for sanitary reasons, roads, buildings, etc.
The present powers of a Native Authority in this respect rest on Ordinance; but before that time the Chiefs could undoubtedly regulate these matters (even, perhaps, if not owning the land?). Land required today for public purposes, e.g., for

the building of State amenities, slum-clearance, layouts, etc., is taken and used by the Native Authority (obviously not exercising rights of ownership in itself), but by virtue of the fact that the Stool which it represents is owning the land required. A Stool is not permitted to take land within the beneficial occupation of its subjects without the payment of compensation for the loss by the citizens of their interests in the land. Such might happen if their farms are destroyed so that roads might be made, or buildings erected; or if their houses are demolished for any reason. There are certain questions to which I feel unable to give a definite answer without further information:

(a) Can a stool which owns the land acquire compulsorily stool land in the actual occupation of citizens, or is it necessary for the stool to obtain the consent of the occupiers first?[51]

(b) Can a stool which does not own the land acquire land compulsorily;[52] and must it compensate not only for the citizen's dependent interest, but his absolute interest, where he has one, also?

6. Rights attributable to ownership of land:

(i) The right to dispose of the stool lands, e.g., by sale or lease, etc.

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51. Probably the consent of the occupiers must be obtained first.

52. Almost certainly not.

This is quite certain, since a stool which does not own the land, even if exercising jurisdiction over it, has no interest which it is capable of disposing of at law.

(ii) The power to admit stranger-farmers on abusa, or other systems; and the right to 1/3 share from non-citizens farming the land.

This again is referable to ownership only.

(iii) Power to grant timber and mineral concessions;

It should be noted that if there is an absolute grant of land by a stool, including the right to timber and minerals and timber, the grantee has no liability to pay 1/3 in respect of minerals or timber which he wins or disposes of.

If there is an absolute grant, without the right to timber and minerals, then the grantee is normally on abusa and will pay 1/3 of the proceeds derived from the sale of timber or minerals from the land granted.

The payments of 1/3 between a subordinate stool owning its lands, and a superior stool to which it owes allegiance, are not referable to ownership; but may be referable to allegiance.

(iv) The right to the reversion in the land in which citizens and strangers enjoy an interest (a farm, or a house).

The question of the reversion to land occupied by citizens does not normally arise today, since it would be most unusual

for a citizen to die without leaving any heirs at all.[53] The case might have arisen in the past, when a citizen had been banished, and his lands were forfeit to the chief. The question of the reversion to the land occupied by the stranger, for farms or houses, can arise today. It will be appreciated that there are two interests involved: the stranger's dependent interest in the land, and his absolute interest in his farm or house. When a stranger departs or dies leaving no-one to succeed him, the stool which granted him the interest succeeds to the absolute interest in the farm or house, and the dependent interest in the land is extinguished or merged in the stool's title.

It may happen that the stranger has acquired the absolute interest in the land, by purchase; then presumably the stool succeeds to that absolute interest also, and the land reverts to the category of stool or tribal land, having previously been land alienated in individual ownership.

The most interesting case is that where the stools do not lay claim to the land occupied by individuals or families subject to them (as in the Fante areas), or to the land occupied by strangers claiming title through such subjects. The stool has in such a case at best a jurisdictional interest; but it

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53. The rule is given theoretically by Rattray at Ash. p. 222. He says the land would be taken "by the stool under whom the now extinct clan or family had held it". (Quaere whether he intends "land-owning stool").

seems that if a stranger is absolutely entitled to land within such a state, and dies or departs leaving no heir, then the stool will claim it. The stool in such cases also lays claim to land added to the state, as for instance by alluvion.

Sales of Land: The major problems to do with jurisdiction and ownership have arisen through the sale of land by stools. Similar problems do not arise when strangers have merely occupied land owned by another stool as farmers. If land is sold by a stool to an individual stranger, then, if the sale is outright, the stool forfeits all proprietary rights in the land, including the right to timber and minerals, unless these have been reserved. At the same time, citizens of the stool may forfeit the rights which they customarily enjoy in the land, including the right to take up forest-land for farming, to take forest-products and fish, etc. But a sale by a stool cannot deprive citizens of the enjoyment of farms, etc., which they already possess over the subject-matter, without the consent of those citizens. The stool retains jurisdictional rights over the land, however; and even where the purchaser owes allegiance to a different stool, the land is not taken outside the jurisdiction of the granting stool; nor can an alien purchaser purport to set up an independent state of his own.

The problem is a little more difficult when land is sold to a group (especially an organized group) of strangers. It has been quite customary for a purchaser, and especially a

group of purchasers, to found their own village on large tracts of land which they have bought. In time, the original purchaser or one of them becomes the headman of such a village; such headman may owe allegiance to a stool different from that from
//which he purchased the land. It is such cases as these which have led to the assertion that jurisdiction, together with ownership, have passed by the sale, or by the subsequent course of events. There was formerly a widespread feeling that a sale of land outright by the cutting of guaha or otherwise extinguished all the rights which the vendor-stool had in the subject-matter, including rights of jurisdiction; and that the effect of such a sale was to create - if there was a stool capable of exercising jurisdiction - jurisdictional rights in the stool which the purchasers served. The position was similar to a first occupation by subjects of a stool. This is certainly the cause of difficulty in the Krobo cases.[54]

There has been a gradual recession from the idea that sale of land could extinguish rights of jurisdiction; and today jurisdiction could not thus pass except by a definite cession. If, however, the sale took place some time ago; the land bought was contiguous or near to the tribal land of the purchasers; and jurisdiction was allowed to flow as a consequence of the sale and the allegiance owed by the purchaser

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54. See: Odonkor v. Ayeh: (1913) D. & F. '11-'16, 50.

to the purchasers' stool (as by abandonment of any attempt to exercise jurisdiction); then one may say that the sale has had the effect of transferring jurisdiction.

The transactions by which land was acquired for the State of New Juaben in the last century through a purchase (?) of the land from an Akim chief are an illustration of this. The facts, taken at their face-value, speak for a sale by the chief to Government, and with a subsequent granting of permission to the Juabens to settle there and set up a state of their own (the Government retaining title to the land until they expressly divested themselves of it); but it has also been suggested that the transactions might be represented as a cession of territory from Akim to the Juabens, that the sum paid to the chief of Kukurantumi (the grantor) was a compensation-payment, and not a purchase-price, and that Government merely asserted superior rights (e.g., to take land for public purposes without payment of compensation to the New Juabens) as consideration for their instrumentality in bringing about this cession.

Where land is sold by one stool direct to another, there may or may not have been a cession of jurisdiction as well. In former times, such a transfer would almost inevitably have implied a transfer of jurisdiction as well.[55]

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55. For a further discussion of the effect of sales on jurisdiction and ownership, see SALE, pp.387 et seq.post.

CHAPTER III.

THE INDIVIDUAL AND PROPERTY.

We turn from a consideration of the position, rights and duties of stools in Akan law to the next category of legal persons, namely, individuals. It is proposed here to study the position and rights of citizens in respect of their individual property, the common rights which they may enjoy, and the position of "strangers" in the Akan law of property. It must be emphasized:

(1) that we study the rights of individuals here as against other individuals and political authority (the stools); the rights of an individual in the context of his family are dealt with in the chapter on THE FAMILY (post);

(2) that in their external relations families are in the position of individuals to a certain extent, and the description of a citizen's rights as against another individual, and as against the stool, applies in many principles and details to families also.

A. THE CITIZEN.

What is a citizen? Our first question is naturally this, since so often the antithesis is made between citizens and strangers in regard to rights over land, liability to levies, and so on. In ancient custom it would have been easy to

answer, since there was little movement between states, and warfare gave every subject his place in the military and political machine. At the time when jurisdiction was primarily over persons, allegiance was the test.[1] All those who, owing allegiance to the stool in question, were its subjects or members, were citizens; perhaps one should say more exactly: all those who belonged to families forming the State or community were citizens. Citizenship was therefore a heritable status, which could not normally be otherwise acquired (except in cases of change of allegiance).

With the development of purchase of land, and immigration by strangers, there has come about a greater infiltration of non-citizen elements. These strangers are divisible into two classes - permanent and temporary residents. There is an increasing tendency for the former to become assimilated (except insofar as concerns the mode of their original acquisition of land) to the position of citizens.

The body of citizenry is called in Twi the "oman". One may observe here that this word is applied to every community resident together, from the inhabitants of a village, to subjects of one stool, to all the citizen-body of a state. And secondly, that oman is used as the description of the state

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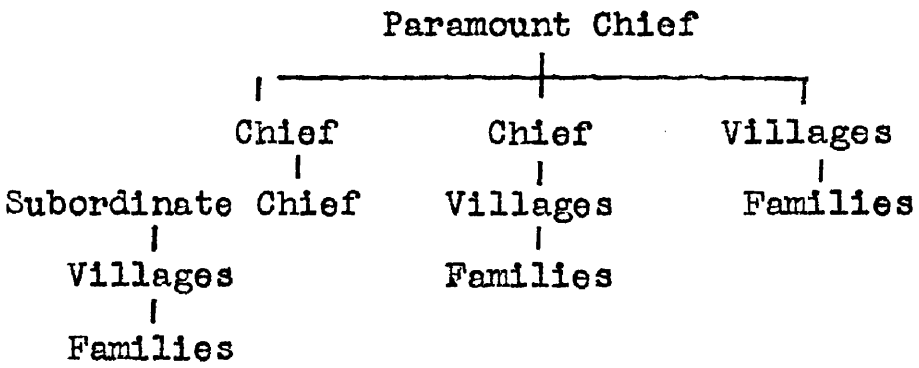
1. "Citizen" in Twi is akoa, or "subject of a stool". The word akoa may mean "slave", but is commonly used of any person who is in a natural state of subjection (by birth) to a superior authority.

itself, which indicates how much in African eyes states are a personal affair, and the existence and meaning of a state are represented by the persons going to make it up.[2]

The citizen in his context - the village: The individual subjects of a state do not exist in a formless mass; they have a hierarchical context of ever-wider communities, a chain of allegiance reaching up to the paramount stool itself. A typical set-up may be:



Certain villages serve the Paramount Chief directly; but the great majority of the state is divided up between the different "Wing" or Senior Divisional Chiefs, who may, besides having villages directly under them, have subordinate chiefs with their own villages.

The villages serving any particular chief may be one solid block, or may be scattered throughout the breadth of the state in question. The difference may be due to different modes of acquisition.

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2. In the following account, "citizen" is to be taken in its widest sense, as a subject of the Paramount Stool of the State (or Division, in Ashanti) concerned, unless otherwise stated.

In the former case the stool lands of the chief have a definite boundary; in the latter case the boundaries of a chief are the boundaries of the various villages which serve him. The boundaries of the state (i.e., all the land under a particular Paramount) are the boundaries of those subordinate to him. There may be segments of land broken off from the main body: these may be owned by the Paramount Stool - or a stool serving it; or the inhabitants may only owe allegiance to it. In such cases, drawing the boundaries of a given state may be a matter of great difficulty.

Depending on the actual area, any given stool may own its own stool lands (whatever its rank), or may only be a "care-taker" of those lands for its political superior. In some cases the paramount stool lays claim to all the land in its state or division; in some the land is owned by its subordinate stools; in others it is claimed that there is a kind of joint ownership.

VILLAGE:

However long the chain of allegiance one comes down in the end to a village, which appears a functioning unit for many of the purposes of the Akan law of property.[3] The origin

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3. Cf. the case of Boadu v. Fosu: (1942) 8 W.A.C.A. 187, where the judgement of the Native Tribunal, reproducing in almost identical terms Sarbah, F.C.L.63-4, is seriously misleading. It was said that the lands in question "are held under the system of village community, whereby all the inhabitants of Brakwa village, divided into clans or families, have each

/over

of villages was given by one set of informants as follows:[4]

The building of huts or houses originates first from hunting, and later from farming in that order. When a subject first finds or found a forest, he should inform his Omanhene. It becomes the property of the family once they start to farm it. The Paramount Stool gives permission for a village, or hamlet, to be built in the first place.

It is possible that many villages have in the past developed in this manner, and that this account represents the change-over from a hunting, to a settled, existence. Many villages in different areas have developed independently, and their origin is lost in antiquity (informants say "they have been there since time immemorial"). Even at the present time in those states with unused forest-land new hamlets or villages continue to grow up.[5] In many cases they develop as offshoots from existing villages (hence the nomenclature: "Hemang I, Hemang II, etc."). If a village grows sufficiently in importance, its headman may become an Odikro. At one village I visited, the Odikro, an old man, said that when he first came the village was very small indeed, with only six houses or so. At present, I estimated it contained about seventy-five

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3. (cont. from previous page) - of them a proportionate share in the said lands, as common property, without any possession or title to distinct portions of the said lands." This is far from an exact description of the legal position.
4. Essumegya.
5. Cf. Ratt. A.L.C. 344.

compounds. It had also become a market-centre for surrounding villages. It was on a main road, with neighbouring villages about four miles in each direction along the road, and at sixteen miles distance into the forest at right angles to the road. This was in an under-populated area of thick forest,[6] and in more settled areas villages are much nearer than this.[7]

(In parenthesis, the word "odikro" needs consideration. Of itself it means no more than "he who eats (owns) the village"; but in usage it seems to be extended to cases where it is not maintained that the Odikro owns the land of the village; he may "own" only the village itself and not the land on which it stands.)[8]

With regard to village boundaries, the following is the gist of some information vouchsafed. The boundaries of a village have never been demarcated on a map; but the Odikro of that village will know his boundaries, and take charge within those boundaries. These boundaries have existed from time immemorial (meaning that no-one remembers who laid them down?). Trees, streams, abandoned huts, dungs-hills, etc., may mark the

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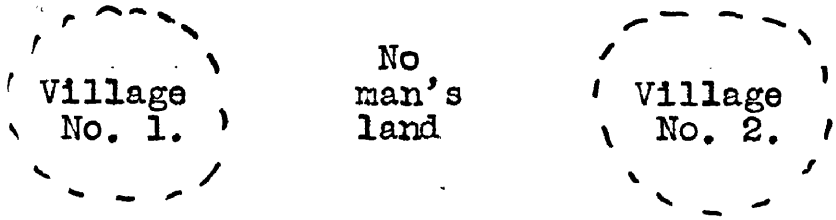
6. Adansi.
7. In the case of New Juaben, it was said that there was no ordered migration. Settlers came in groups from Ashanti Juaben at different times. It was all forest-land at that time (1882). They settled where they wished, and farmed where they pleased on the land, which they found empty.
8. The name compares with the Nyanja (Myasaland) "mwini wa mudzi" (owner of a village).

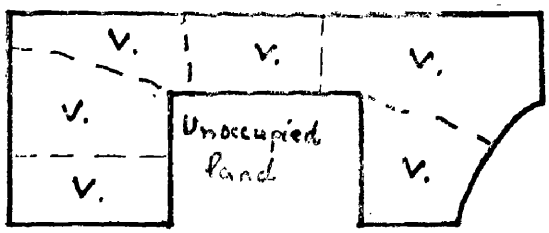
boundaries. Another informant said that each village will know its boundaries roughly even before all the village area has been farmed.

It was said that it is impossible to have village boundaries <u>in vacuo</u>; you must have boundaries with some-one. The following were impossible cases:-

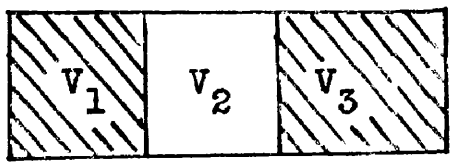
Case 1.



Case 2.



But the following was a possible case:-



where V_1 and V_3 serve the same chief, and V_2 serves a differerent chief. This was given me in a state where there is no unused forest-land left, and where villages serving a chief do not necessarily form a compact and contiguous group.

Another informant put it that there is a village nucleus, surrounded by a portion of virgin forest accessible to the

farmers of that village:

Its boundaries will be in the forest on each side with neighbouring villages. These boundaries often follow natural features. If a new village, V_2, is founded to one side of the original village in the forest, representatives of both villages will meet to fix a boundary between them before all the intervening forest is farmed. This is one of the first acts in the foundation of a village. This probably describes fairly accurately how the forest was gradually brought under occupation in the first place.

The cultivation of farms by the individuals and families making up the village goes on within the village framework as described, the forest on each side being available for new cultivation. As the forext is used up, cultivators must go further afield - in the village already mentioned farmers went up to six miles away. The reasons given were that the land near the village was too dry, and that the nearest land had already been farmed and was now secondary bush.

It should be remarked that there is a sharp differentiation in regard to rights between virgin forest and secondary bush.

The latter is forest-land which has been farmed and then allowed to lie fallow. Such fallow-land (mfuwa) is not part of the forest, available for new cultivation by villagers, since concrete individual rights in favour of individuals and families are created therein (even though it may look remarkably like virgin forest to the inexpert eye).

RIGHTS OF CITIZENS:

1. RIGHT TO FARM.

The primary right of citizens is their right to farm free, which includes both the taking of virgin forest into cultivation, and their continued farming of land howsoever acquired. This farming takes place typically within the context of the village as already described.

(a) Acquisition of interests: A citizen may acquire land for farming in any of the following ways:

by clearing a portion of virgin forest;[9]

by succession from his family, or under will;

by "begging" land from another family or individual;

by outright gift (rare);

by leasing, taking under pledge, or purchasing a farm;

by purchase of the absolute interest in land (where this is permitted).

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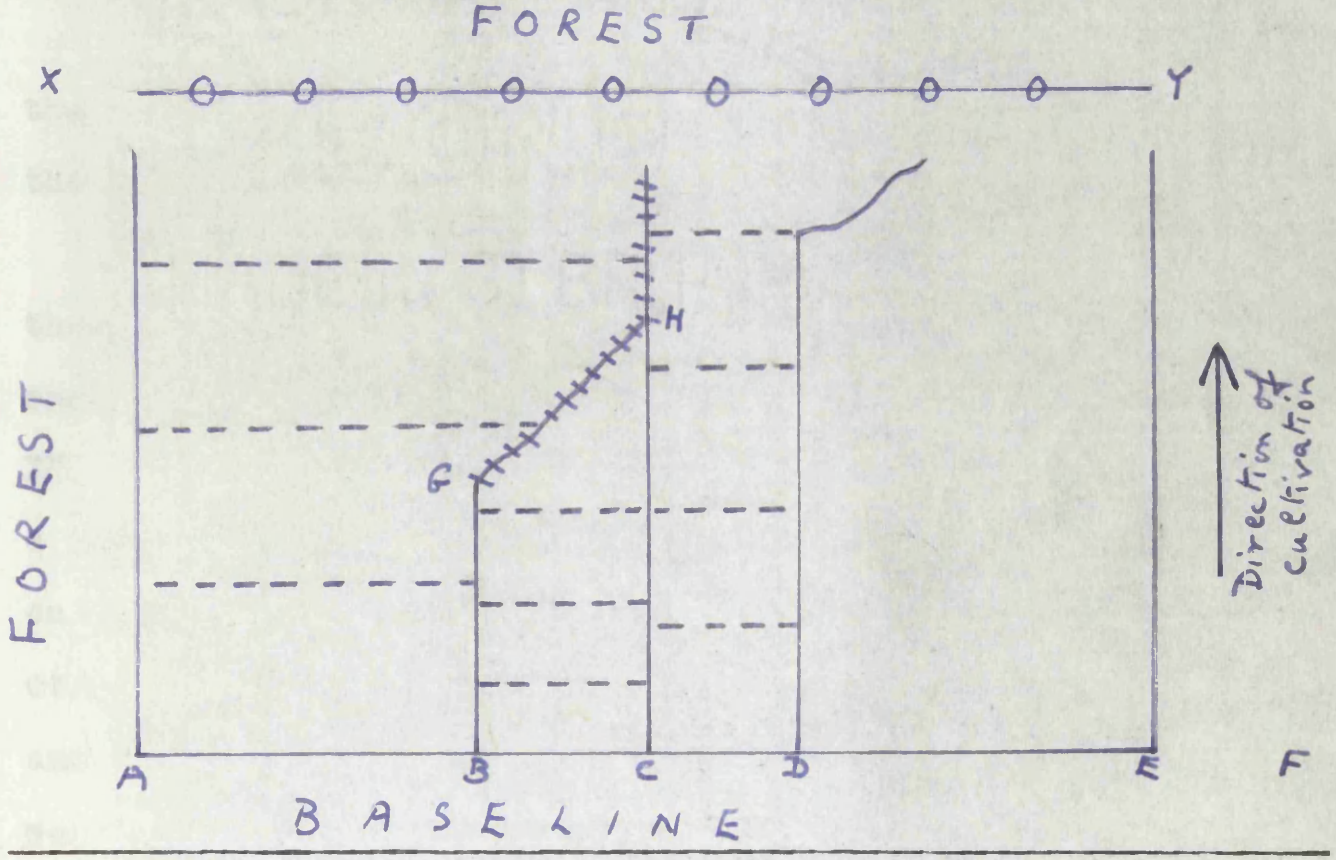
9. Sacred ("fetish") groves, burial grounds (cf. Matson, Digest, 43), and perhaps land intended for building, cannot be taken into occupation in this way.

The norm is that of first acquisition. By exercising his right to take up unoccupied forest land for farming, the citizen concretizes his potential power or right into an individual interest in the land in question. This interest is dependent on the stool's interest in the land itself; but absolute as regards the farm as against the claims of other families and individuals.

Method of cultivation: all cultivation is off a determinate baseline into the virgin forest. The method, and the boundaries that result, was given as follows (a plan being appended for greater clarity):



10. Cf. the maxim given by Rattray, A.L.C. 347, Note: dadie na pere asase (the iron, i.e., the hoe, is the one to lay claim to the land).

The baseline is AE.

A family start cultivation at AB. A member of the family starts individual cultivation at BC. An individual (not a member of that family) might start cultivation at CD. Another family starts at DE.

All the cultivators have started equal. The first stage is to clear the bush, the second to plant cocoa, the third to interplant food crops, which provide shade whilst the cocoa-trees are small. The fourth stage is when the trees grow up, picking starts, and maintenance is restricted to weeding. In the last stage a new farm may be started up, perhaps at EF.

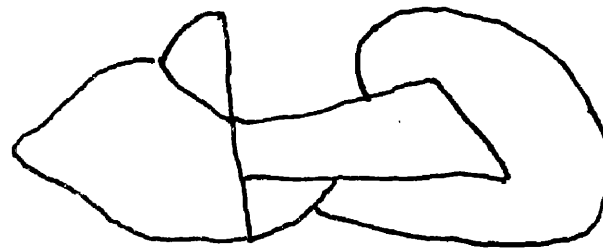
The dotted transverse lines indicate each year's clearing - the cultivators expand their cultivation progressively into the forest.

The portion AB represents several members of a family: they will clear the bush vigorously, and advance considerably each year on a definite frontage. Eventually, they will reach XY. At XY they may find that there are new farms with XY as a base, proceeding in the same direction - so AB must stop cultivation and start elsewhere. Alternatively, there may be other farmers who are starting from a still more distant base, and farming <u>towards</u> XY; in which case XY represents the forward edge of their cultivation. In such a case, some time before the respective cultivations meet, the two parties will have met and agreed on a common boundary (which will be in the

bush between them). Such a boundary might be at ~~0 0 0 0 0 0~~ . When XY is reached, either AB will turn round and farm - with AB as a baseline - in the opposite direction, or go to an entirely new place some distance away. Hence it can happen that a family or individual may finish up with many farms, widely scattered.

BC - a single person - will farm much less vigorously. It is a principle of customary law that each cultivator should stick to his side-boundaries, and not farm across the line of cultivation of a neighbour. Nevertheless, it will naturally happen that AB, farming more vigorously, will encroach on BC; and their right-hand boundary may wander as indicated by ++++++ , so as to cut across BC's front and finish up at H.

Two conclusions emerge: the first is that typically Akan cultivation tends to resemble a grid of long, parallel, strips[11]; the second that in practice farms may become entangled, and the final patchwork may look something like this (drawn for me by a cocoa inspector):



11. It will be appreciated that the rectangular symmetry of our diagram, though necessary for explanation, is an over-simplification.

If the farms are foodstuffs farms only, then as the cultivation advances, the levels of cultivation in the rear will tend to revert to bush, and will in time look like secondary forest. The original cultivator (or his family) will still lay claim to them; and no-one else may go and farm there without his permission. Additionally, a farmer will lay claim to the land in front of him up to the boundary ~~0-0-0-0-0-0-~~ even before he reaches it; so that again permission will be required for farming there.

Permissions and Payments: For farming within the boundaries of his village a citizen needs no permission from his Odikro, or from the stool owning the absolute interest in that land. It appears that portions of virgin forest are not allocated to villagers; nor is the site where they choose to farm notified to the political authority for approval.[12] Citizens will pay no tribute or percentage of their yield over to the stool. At most in some cases there may be a nominal payment before beginning farming.

If there is no virgin land left in his own village, a citizen may go to another village in the same state. All informants agreed that in such a case he should notify the Odikro

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12. So: informants from Ashanti, Adansi, Asikuma, Akim Abuakwa;
Contra: "he notifies the Odikro if he wishes to make a cocoa farm and pays customary rum": Bekwai.
Rattray, A.L.C. 350, quotes an informant as saying: " A Subject had not any right to go and farm, even on unallocated Stool land, without first informing the Stool."

of that village and pay a nominal amount (usually drink) before beginning farming there. He will not pay anything thereafter annually. One informant said that in such a case he should pay rum at the initial stage, and rum thereafter annually, to the Odikro. The reason given was that otherwise the Odikro of the citizen's native village (if neighbouring) might lay claim to the land as part of that of his village. No tribute is payable even if cocoa is planted.

If the new village to which the citizen goes serves a different chief from his own village (but in the same state), similar rules apply; though in some areas it is customary for him to notify this chief first. Again, he makes only a nominal payment, and is thereafter on all fours with a native of that village. This is a recent development in states where the title to land is split up between the wing and other chiefs the state being basically a confederation of such chiefs.[13] The case of Kofi v. Brentuo[14] is somewhat baffling, therefore, as the claim appears to run counter to modern custom. It concerned land in Adansi, particularly the dispute between Adokwai and Abodom. In this case an Adansi sub-stool claimed cocoa-tribute (£19) from the subject of another Adansi sub-stool. Unfortunately, it was ruled that the dispute was over

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13. i.e., some informants said that if cocoa was planted, he might have to pay rates of tribute similar to those paid by a complete stranger. This probably represents the former rule; but it is now questionable.
14. (1944) 10 W.A.C.A. 92.

jurisdiction, and not a land-case, despite the claim for tribute, so that the merits of this claim were not tested in the W.A.C.A.

If all the forest-land in his village-area is used up, the usual remedy of an individual (after turning to his family for aid) is to "beg" spare land (fallow-land) from another family in the village. A farm made on such land belongs to him, even though on another family's land. Usually only a nominal initial payment is made (with sometimes nominal annual payments thereafter). The transaction is thus a species of tenancy, free or for a nominal rental;[15] but although tenant of the land, he is not tenant of the farm. It makes some difference whether the transaction takes place in his own or another village; e.g. in his own village: when the farmer dies, his successor takes the farm automatically, and nothing is charged (as a rule) by the land-owning family; the Odikro need not be notified; in another village: the successor will continue the farm, but may have to make some nominal payment to the "land-owning" family; the Odikro may have to be notified (but probably not compulsory).

Such begging of land is by no means rare, and was reported everywhere as a customary method of acquiring land. Outright gift in such a case was declared to be unusual. In the more commercialized areas it is possible that annual substantial

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15. See: TENANCIES AND LEASES, pp. 451 et seq.

payments (or abusa) might be charged.

A man may also come into possession of farming land by pledge. If land is pledged to him by customary pledge, he enters into possession and takes the fruits of the farm as interest-payments.[16]

An individual may also purchase a farm outright (some informants declared it contrary to custom for an mfuwa or fallow-land to be sold).[16a] The citizen who buys a farm from another citizen holds it thenceforth as though it were a farm made by himself out of virgin forest (subject to the interest of the stool landowner). Such purchases are not normally controlled by the stool. Where outright sale of land is recognised, an individual may buy, not a farm (i.e., a citizen's interest) but the land itself, with or without a farm on it (i.e., he buys the absolute interest in the land). This has been considerably practised in the past (principally by strangers); it applies especially when only part, or none, of the absolute interest in all the land is owned by a stool (viz. in Class II areas - Fante, etc.).

(b) Security of tenure: A citizen who acquires a farm is not liable to be divested by the stool for any reason whatever. His tenure is described as "indefinite" or "perpetual". Formerly, he might have been evicted, or his possessions confiscated, for political offences (where he failed to obey the

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16. See s. v. PLEDGE.
16a. See Akim Abuakwa Declaration, 1932.

order of the chief, or where he was banished). Today, I was assured, there is no such remedy. A citizen who failed to carry out his customary and other obligations is not liable to be evicted. The only remedy is prosecution for the offence of which he is guilty.[17]

His successors continue to hold the land on the same terms as he himself held it (qua the stool: qua his family it is now inherited property - vide SUCCESSION passim). The successor does not, as far as I am aware, make any payment in respect of the farm when he succeeds. He may make a nominal payment of rum to the Odikro or chief concerned, if he farms outside his own village.

Where a farm is made by an individual on land begged from another family, the successor may be expected to report his succession, and make a nominal payment in token thereof. Normally the successor in this case also farms on the same terms as his predecessor.

It is possible that a citizen purporting to dispose of the absolute interest in the land (held by the stool) might thereby forfeit his holding, but I am not aware of instances. A person farming on begged land would probably forfeit his interest by purporting to pass the interest of the "landowner" also; and also in some other cases.[18]

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17. A citizen's farm cannot be taken away from him for any reason whatever - Akim Abuakwa.
18. See TENANCIES, pp. 453-4; 458.

In some cases the land occupied by the farms of citizens may be required for other purposes. If required for public purposes (e.g., roads, housing, etc.) today it may be possible for the land-owning stool to acquire the land compulsorily; though even this seems somewhat doubtful.[19] In the case of Okyere Darkoh v. S.K. Botwe[20] there was a dispute concerned with the acquisition of land inKoforidua Town, New Juaben. The land was situated where Elmina Street now is, and was under farming. The Omanhene's palace was built there in 1916, the cocoa was cut down, and a street made. The land not affected remained for the benefit of the farmer. Apparently, some of the land was in fact transferred:

> "The defendant's family appealed to the late Omanhene, Nana Kwaku Boateng, for land to settle on and the Omanhene instructed the defendant's family to search round if they could discover any land and if they succeed they should report to him so that he could see the person who had foodstuffs and crops on the land and defendant's family would pay compensation to the party."

The Native Court, in their judgement, said:

> "This Court considered the New Juaben tenure of land. When compensation is paid to the person who owns foodstuffs and crops on any land then he or she has no right over the land again, the land automatically reverts

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19. Compensation is paid to citizens who are called on to forfeit their farms. The Omanhene cannot take them without the consent of the owners - New Juaben.
20. Unreported: (1950) New Juaben A Court, 23.9.50.

> to the Stool of New Juaben, and the Omanhene has right to grant it to his subject."[21]

There seems little doubt that when a stool wishes to pass the absolute interest in land to a purchaser, or grant concessions over it, this must be done so as not to affect the rights of citizen-farmers (unless they consent thereto). In the old case of Ayim v. Mensah[22] K.A. planted cocoa on the land of K.E., and worked it for eight years. K.E. sold this land to Mensah (the defendant). After buying the land, M. discovered the farms on it. He agreed with K.A. that K.A. should continue to farm there, and pay 1/- per year token rent. It was agreed that M. had no right to abusa. Crampton Smyly, C.J., enunciated a wide principle of law:

> "...the native custom, as sworn to, is that where a chief sells lands which have been cultivated by natives as cocoa farms, the cultivator is entitled to either continue working his farm, or else be compensated by the purchaser for the trees he has planted, the value of each sound tree being estimated at five shillings."

The facts as cited are insufficient to judge the merits of this dispute; as to the dictum of the learned Chief Justice, a modern statement of the law is the following:

> "Land with farms on it belonging to natives of Akim Abuakwa cannot be sold by a Chief at all, except under special circumstances, and in that case with the express permission

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21. It was said that the decision was confirmed by the Land Court, Accra.
22. (1911) D. & F. '11-'16, 4; in the Supreme Court.

> of the owner of the farm. Once the land is sold the native loses his right to the farm." [23]

(c) Use of land farmed: There is little or no restriction placed by custom on the use to which a citizen may put his land. Where he has "begged" the land from another, or where he is required to notify the relevant Odikro, etc., he should specify the purpose for which he wants the land - foodstuffs, cocoa, building. Where he begs land he may be liable to forfeit his holding if he specifies one use (e.g., foodstuffs) and actually uses it for another (e.g., cocoa).

There is no rule that he must use his land profitably - he may choose to leave it fallow and unworked.[24] This is not a ground for eviction. There is no wide general rule (as perhaps in English law) saying sic utere tuo ut alienum non laedas, though trespass as such is recognised (not in English terms).

Occasionally special uses are prescribed, or, more likely, particular uses forbidden or controlled. Examples are the prohibition on unauthorized new cocoa farms in Ashanti,[25] and provisions in N.A. Forest Reserves, for which the N.A. makes

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23. Information from Akim Abuakwa. See also: Danquah, A.L.C.206.
24. Ratt. A.L.C. 349-50, suggests that the individual must in fact continue to use the land and that his holding is conditional on his rendering all the customary services to his stool. Neither proviso seems to apply now.
25. See Matson, Digest, p. 16; and the terms of the order at p. 41

byelaws. To take an example from Bekwai, the Subin Shelter Belt Forest Reserve was brought into existence as an N.A. reserve, and rules were passed by the Bekwaihene and his Councillors. There were no local contracting parties. The area in question was as follows:

Reserve itself:		9.93 sq. miles
Farms	:	.12 sq. miles
Net area	:	9.81 sq. miles

Rule 4 of the Reserve Rules provides that no cultivator shall, without the permission of the Chief, extend his boundaries beyond the area actually occupied at the time the reserve was made. (These boundaries are delimited in a plan.) It was stated that the usual practice is for an inhabitant who wishes to extend his cultivation to ask the Chief first; in appropriate cases the latter will ask the Forest Officer for permission. It will be observed that it is the Chief who administers (with his councillors) the rules, and draws them up. It will be interesting to see what is the position under the new Local Government Ordinance, 1951, and especially to determine whether delimitation and administration of "N.A." Forest Reserve is a matter for the Native Authority, or for the landowning (?jurisdictional) stool concerned. It appeared that in practice there was little difficulty, the N.A. and the Stool sharing the same (or largely the same) personnel, so that one could not tell in which capacity they acted.[26]

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26. N.A. Forest Reserves are constituted by ordinance.

Forbidding extension of cultivation obviously impedes normal use of farming land by Africans, since an accessory right of the farmer is his right to extend cultivation each year on the same line (as emerges from the description above).

There is one day in each week which is a "forbidden farming day", when no-one is permitted to farm. Although this has a religious significance the native authorities seem ready to enforce it by action. The day varies in different areas. In much of Ashanti it is Thursday.[27]

(d) Ancillary Rights and Miscellaneous: First a few words must be said about the question of boundaries. From the description of the typical method of cultivation it will have emerged that there is a rigid baseline, and theoretically fixed side-lines; but no further boundary, although the farmer's sphere of influence extends in this direction for an indeterminate distance. The baseline may well follow a natural feature, a stream or path; and the forward boundary may eventually be determined in the same manner. Something is said under SALE[28] of the ways in which boundaries may be marked when land is sold; and the same remarks apply mutatis mutandis in other contexts. In one personal investigation of a farm a

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27. See: Matson, Digest, pp. 28-29; Ratt. Ash., pp. 214-5, A.L.C. 314 and 343. But in 1941 the A.C.C. made a Customary Offences Order (v. Matson, Digest, pp. 42-3) the validity of which is uncertain, according to Matson. Rule 20 makes it an offence for any native "to farm on Thursdays".
28. At pp. 365-7 post.

kola tree was pointed out as a boundary-mark; the boundary - quite invisible on the ground - was an imaginary line running between two trees. It was stated that footpaths are also often boundaries, and especially those cut as boundaries when the farm is first made out of the bush.[29] Fencing of farms is very rare.

I was also told that in one state when land is sold outright, sales are made by means of documents if possible, and not by guaha alone; the boundaries of such land are demarcated by N.A. surveyors, and are recorded in the (N.A.) Lands Office.

The first of the ancillary rights which must be noticed is the right to continue cultivation in the same direction. A parallel cultivator should not allow his cultivation to cross over the lines of his neighbour. Nor can someone begin cultivation in a completely different sense immediately in front of the cultivator's farm in progress.[30] Cases in Danquah's book[31] refer to infringements of the right, and it is well established. I found out no fixed limit to which this runs: a suggested criterion was about four years' cultivation in front of the existing line. The right is to exclude others; but the land or the right to cultivate it cannot be

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29. In a case before N. Juaben A Court, a farm's boundaries were marked by "Entome and Castor-oil Trees" at the corners.
30. Cf. Danquah, A.L.C. 206.
31. E.g., C.A.L.-A. 21.

32 & 33
independently sold by the man in front of whose farm it lies.

By being a farmer in that village the individual may acquire the right to share in all the advantages enjoyed by the inhabitants of the village, e.g., common rights.[34]

The rights of a farmer to exclude others from his farm, apart from those attempting to farm there, will be considered below, when the common rights enjoyed by citizens are discussed.[35] There is not a general sense of trespass in the English sense,[36] account being usually taken only of wilful damage, and attempts to usurp the title of the farmer. Claims actually involving title may be brought before a native court in the guise of actions for trespass.

2. RIGHTS TO HOUSE-PLOTS AND HOUSES.

As a matter of principle citizens are entitled to acquire plots for building houses free of all charge; and to build houses thereon without payment to political authority. Once a citizen has acquired such a plot (unless subject to a higher interest in his own family, another family, or individual), he is entitled to it exclusively and rent-free. A citizen is not a tenant from the land-owning stool, although - where he begs a plot from another - he may be in the position of a tenant of that other party.

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32. Cf. Akim Abuakwa Declaration.
33. i.e., sold apart from the farm to which it is appurtenant.
34. Permanent strangers may acquire common rights similarly to citizens. 35. See below, pp. 168-170.
36. In English law trespass to land is actionable per se without any proof of damage: Salmond, Torts, p.199.

(a) Acquisition of a plot: A citizen may acquire a site for a house in any of the following ways:

by prime acquisition on unoccupied land;

by succession from his family;

by making use of an unused family plot;

by "begging" the use of a plot from another family or individual;

by outright gift;

by lease or outright purchase from a family or individual of their dependent (vis-à-vis the stool's) interest;

by outright purchase from a stool, or from a family or individual possessed of the absolute interest.

It was stated that normally families are already in occupation of building plots or sites; and it is to his family that an individual turns first. If he wishes to acquire a building plot for the first time, he should go to the Odikro, who will direct him to a suitable plot (which will in time become a family plot, of course). But various accounts are given. One informant[37] said that a citizen may build freely; but the Odikro approves of the site selected. There were in the village of this informant two small chapels which had been erected by the villagers; it was said that villagers were quite free to erect such buildings on their own initiative and free of charge if they wished. And others said that a citizen

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37. Himself an Odikro.

need consult no-one.

If a citizen has not got a plot (and his family has not got one) then he will beg or buy one from another person or family in the village. Begging sites is frequently done, according to informants, principally in areas where there is no demand for land for sale, or for houses to let. One informant (from Kwahu) said that he begged his site from a person in the town, who put the matter before his abusua-panin and obaapanin. He gave rum (£2 and a bottle of gin) to "stamp" the bargain. No ground-rent was charged; and apart from the initial fee no annual rum was payable. Transactions of this nature, according to some informants, need not be notified to the Odikro, the superior chief, or anyone; though quite often the Odikro is called in to witness the transaction.

In Class II areas generally such arrangements are especially common: e.g., it was stated:[38]

> "If a man wants a plot on which to build a house, he will approach a person owning land in the town. Such land may be given to him, it may be leased to him, or given to him on condition that he gives a sheep annually to the landowner."

It should be stated, naturally, that the plot is required for a house at the time it is begged.[39]

In certain towns the procedure is somewhat different, as there has been some attempt to control occupation and develop-

38. Aburi, Akwapim.
39. See above as to misrepresentation of purpose vitiating acquisition (p. 145).

ment. The case of Koforidua is mentioned elsewhere.[40] Kumasi is also a special case. The town of Bekwai is an example. All citizens of Bekwai Division (in Ashanti) are entitled to receive land for a house rent-free in the town. The town is divided into sections, each of which is under the control of a senior divisional chief. If a citizen wishes to build in the town, he approaches the relevant senior chief for permission to build. The land itself is allocated in plots, and it is not necessary to build over the whole plot at once. A citizen pays no kind of rent for such a plot, whatever kind of structure he puts up, permanent or otherwise. If his old house falls down, he may build a new one without fresh permission. The citizen receives, however, a "lease" expressed for the plot on which the house is to be built. All houses in the town, whether belonging to citizens or strangers, must have a lease of the plot first. The lease ("This Indenture") is made between "The Bekwaihene and Elders of Bekwai of the first part" (called "the lessors") and the "lessee" of the other part. A plot described and delineated on a rough sketch plan annexed is "demised for a term of fifty years". One plot I examined was 50 feet by 55 feet 6 inches. The instrument goes on: "In consideration of the rent hereinafter reserved"; but no rent is payable by a citizen. It provides for determination of the lease by the lessor on five years' notice.

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40. In REGISTRATION, at pp. 757-761.

There are covenants in the lease

(a) to pay the rent reserved;

(b) to fence off the plot within twelve months;

(c) to build a house or store thereon within eighteen months;

(d) to keep in good repair and fenced;

(e) not to carry on a noxious or offensive business;

(f) "not to assign, underlet or part with possession of the premises without consent in writing of the lessors".

Practically all these provisions are inapplicable, not observed, or contrary to customary law. The term of fifty years I was assured to be purely formal, since the lease would be renewed automatically (though there is nothing to this effect in the "lease"). It is certain that the house built on the plot is the citizen's absolute property, which he deals with as he likes (apart from assignment to strangers). A citizen is not a lessee or tenant, nor is his plot "demised" to him.

(b) Building of a house; its use and occupation: However the plot is acquired, any house which the acquirer of the plot (begged, allocated, held on lease, etc.) erects is his own absolute property, in which the holder of a superior interest in the land has no interest whatever. The most that the holder of the superior interest in the land may have is a right of prohibition, or of being consulted, in regard to dealings

with the house (principally alienations).[41]

Where the site has been begged or held on a tenancy from another family or individual, then the house-owner may be restricted in his dealings with the house (though he has a right to exclusive occupation as against the land-owner). Informants did not give exactly corresponding descriptions of the landlord's privileges. One said[42] that the house-owner must have permission if he wishes to sell the house from the land-owner, but not if he wishes merely to let it or part of it. He does not need permission to pledge it, although he should inform the landowner that he has done so. Another[43] said the house-owner cannot pledge or mortgage the house without the consent of the donor or owner of the land. Some informants contested the necessity of informing the landowner at all in the case of any alienation.

Powers stated to be possessed by the land-owner included:

> telling the house-owner to quit and pull down the house;[44]
>
> making the owner sell the house;
>
> converting a nominal tenancy to a tenancy for a money-rent; requiring fresh permission to build up an old house if it has collapsed in ruins.

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41. Some informants said that the relevant chief or odikro must be consulted before a citizen builds a house, even on land belonging to himself or his family.
42. Mankessim.
43. Aburi.
44. Said to be theoretically possible, but I doubt if it is ever done.

The Ashanti Confederacy Native Authority Sanitary Orders, 1944,[45] which apply to all villages within the area of the A.C.N.A., control the use of houses and house-plots. Rule 3 provides that a chief or headman "shall cause a clearing to be made round the village". Rule 4 provides:

> "The Chief shall when called upon by the Native Authority give instructions to demolish any ruined house standing in his village and shall have it levelled and the site cleared of rubbish."

And Rule 6 states:

> "No person shall erect any building or make an addition to any existing building in any village without the permission of the Chief or headman",

and gives minimum requirements which must be met.

(c) Security of tenure: What has been said already with regard to a citizen's farms applies to his house and plot. Generally he has a right of indefinite or perpetual duration, and cannot be divested without his consent and the payment of compensation. It is possible that a land-owning stool has the power to acquire a plot (without a house on it) for public purposes compulsorily, but with payment of compensation.[46]

The rights of an individual on land acquired (other than outright) from another individual or family are conditioned by the nature of the relationship. A free tenancy is of

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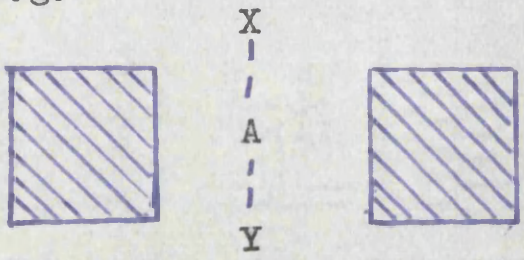
45. Reproduced in Matson, Digest, 37.
46. The Akim Abuakwa Declaration maintained that no compensation is payable. It is doubtful how far this represents the customary law.

indefinite duration; it may have to be made anew if the house is ruined, or the holder dies.

(d) Boundaries: Alleys are commonly left between houses in a town or village. It was stated that this open ground is all owned, e.g.:



The area A between House I and House II is owned by I and II respectively, who will have an unmarked boundary X-----Y. The parties will know their boundaries, however. Encroachment by other parties over these boundaries is trespass (if by building), and may be resisted by legal or other action (.e.g., if I builds a new building overlapping XY). Passers-by use such alleys freely for passing and repassing.

Boundary-fences are more frequent in the towns than for farms; often these fences are for privacy rather than to delimit a boundary; hence they may not be certain evidence of where a boundary lies.

3. DISPOSALS OF INTERESTS BY CITIZENS.

This matter is more fully dealt with elsewhere.[47] Apart

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47. See: SALE, p. 335 ; PLEDGE, p. 421 : TENANCIES, pp. 471 et seq.

from any consents or authorizations required from his family, a citizen's powers (in relation to the stool) are briefly as follows:

(a) Transactions between citizens are not normally controlled in any way by the stool. Exceptionally in certain towns it may be necessary to follow a prescribed form, have the transaction "registered", etc.[48] The local Odikro may be notified, or present as a witness.

(b) Sales to strangers by citizens are practically always controlled by the stools (but not in Class II areas). In some states, the theory is that the citizen, on a sale, "surrenders" his interest, is compensated by the purchase-price paid by the stranger, and a fresh interest in the form of a tenancy is granted by the stool to the stranger.

(c) Grants of lesser interests to strangers are seldom controlled in practice, though they may be subject to such control in theory.

4. SPECIAL LIABILITIES OF CITIZENS.

The special liabilities of citizens are principally:

(a) Duty to pay special levies to the stool.

(b) Duty to render communal services.

(c) Duty to contribute portions of certain exceptional gains to the stool.

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48. See under REGISTRATION, at pp. 755 et seq.

(a) Levies: Levies to pay stool debts are exceptional and irregular. They are payable by all true citizens of the particular stool. Strangers are not assessed, though permanent residents may thereby become liable in some areas.[49] Such levies are distinct from annual levy, rate or tax, and from tribute charged on stranger-farmers.

(b) Communal Services: This is a theoretical duty of decreasing importance. Again, permanently-resident strangers may be liable.

(c) Tolls and Abusa: A citizen is liable to pay 1/3 share or abusa of extraordinary gains coming out of the land. Examples are:

Gold nuggets: large gold nuggets found by an individual must be reported to the Omanhene. The Omanhene in turn used to send it to the Asantehene. Asantehene took his share and returned the value remaining to the Omanhene, who in turn gave a share to the finder.[50] The share of the finder may be 1/3.[51] Treasure-trove is now always reserved for the stool.[52] A large gold nugget (called "Epo") is sent through the subordinate stool to the Paramount Stool. The value of the nugget is divided, 1/3 to Paramount Stool, 1/3 to the stool, 1/3 to the finder. Other rules are given.[53] In other areas it appears

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49. E.G., Akim Abuakwa.
50. Essumegya.
51. Asamang, Adansi,
52. Akim Abuakwa.
53. Akim Abuakwa Declaration.

conditioned by where a nugget is found. If found on family land, it goes to the family.[54] The head of the family takes it all, but the finder may get a share; shares would be sent to the Omanhene and divisional chief by virtue of their paramountcy.[55] There are frequently similar rules for diamonds.

It is possible that where a stool owns the land, the finder gets only 1/3. Where a stool has jurisdictional rights only, 1/3 may be sent to the stool in token of allegiance.

Natural Produce: there is often a tribute on snails collected in the forest. This is a much less valuable right today. Timber on a farmer's land may be subject to a 1/3 payment to the stool if the farmer sells it. Kola trees are not subject to abusa, one informant stated. Rubber collected from natural rubber trees in the forest may be subject to abusa or other share for the stool. The same applies to tolls collected from palm-wine tappers.

Game and Fish: it is customary in many areas to send a portion of large game killed to the chief on whose land the game was killed.[56] One informant stated that one hind-leg was sent to the Omanhene, one fore-leg to the caretaker-chief in charge of the land on which it was killed.[57] Catches of fish by citizens are not normally subject to tolls;[58] though in certain rivers

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54. Ajumako.
55. Essiam: the amount of the shares (or perhaps whether they are sent at all) appears to depend on the head of the family in this case.
56. Cf. Akim Abuakwa Declaration. 57. Bekwai.
58. Akim Abuakwa Declaration, Bekwai, and elsewhere.

and for commercial fishing tolls of up to 1/3 may be charged.[59] Treasure-trove: trinkets, cash, etc. They should be reported to the landowner. One informant (from a Class II area) said that the finder keeps all.

Sales of interests in land: stools may charge abusa when portions of stool land with farms, etc., on them are sold by citizens, such sale being equally an extraordinary gain coming out of the land.

B. COMMON RIGHTS.

We turn now to consider rights which, although enjoyed by individuals, are not exclusively individual, other persons being commonly and equally entitled to exercise them over a subject-matter of indefinite spatial extent.

1. RIGHTS IN FORESTS AND FOREST-PRODUCE.

(a) Timber: Timber in unoccupied forest-land is the property of the landowner (stool), and may not be cut down or sold by individuals without permission of that stool. This does not apply to trees cleared by a farmer when extending cultivation; nor (it was reported) is there needed prior notice before a citizen - in whose farm timber-trees stand - disposes of such trees for cash, though the stool should be notified

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59. Bekwai.

and is entitled to abusa.[60] In Adansi the Wing Chief or the Paramount Stool - the landowner - grants leases and concessions to exploit the timber, mainly by way of sales of a certain number of trees, specified, or to be ascertained later. Timber-leases of the whole area are not used. The conclusion of a timber-agreement imports no restriction on the right of citizens to farm in the forest, to hunt and exercise other customary privileges, except insofar as it is necessary to make roads, etc.

(b) Forest-produce: A citizen is entitled to collect forest-produce of many different kinds. This right in unoccupied forest does not appear to be delimited by reference to membership of the adjacent village. Such collection includes:

(i) Snails: may be freely collected without permission. In abundant years it is customary to send some snails to the stool - "this shows who is the real owner of the land".[61, 62, 63.]

(ii) Firewood; may be collected freely in the forest.[64]

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60. The Paramount Stool is entitled to 1/3 by virtue of its Paramountcy: Ajumako.
61. Bekwai.
62. No share is given to anyone: Asamang, Adansi.
63. In former times a share was sent to the stool, but not today: Essiam.
64. Asikuma.

(iii) Mushrooms: may be collected freely anywhere.[65]

And some of the common rights recognized in forest-reserves by Reserve Settlement Commissioners include:

Posts and poles.
Brushwood.
Esa saplings for fufu poles.
Split and sawn timber and fufu mortars.
Ampei for tie-tie.
Leaves for roofing.
Collection of deadfall trees for brushwood.
Collection of bark of certain trees for medicine.

Common rights in forest-reserves can only be exercised by permission, i.e., if recognized by the Commissioner.

(c) Hunting: A citizen may hunt in the forest anywhere in his state without permission.[66] Inhabitants of one village can freely hunt the land of another village without permission.[67] "Company-hunts" (or battues) were formerly practised; in some areas it was stated that they still took place, in others that they were abolished. In Ashanti they were prohibited in 1936, if without permission, and rules for regulating them published.[68]

(d) Rights of passage: Anyone may freely walk in or through a forest, drive animals through it, etc. Rights of way are saved if timber-agreements are made;[69] and are preserved in Forest Reserves.

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65. Bekwai.
66. Cf. the dictum in Wiapa v. Solomon: (1905) F.Ct. Ren.405: "Subject to the usual toll, the stool lands can freely be hunted over by all the subject of the paramount stool, but in our opinion hunting can confer no right of ownership as between stool and subject."
67. Bekwai, Adansi. 68. Control of Company Hunting (Confederacy Area) Rules, 1936 (Gazette Notice 672/36).
69. Adansi.

2. RIGHTS IN WATER - RIVERS, STREAMS, ETC.

(a) The Ownership of rivers, streams and other bodies of water: Where stools own the land, they naturally lay claim to ownership of such bodies of water, although their use is open to the inhabitants freely. Certain rivers appear to be the property of the landowning stool in a different sense. In Bekwai I was told that citizens fished free of tolls in all rivers except the rivers Fina, Sunyan, Dankran and Ofin. In these last citizens fishing in restricted and defined parts of them, within the boundaries of Bekwai, must pay a customary proportion of their catch to the Omanhene. Citizens fishing there without informing the Omanhene or sending a proportion of their catch to him would be charged in court. Other parts of the same rivers are free fisheries. I did not meet this distinction elsewhere, though it may well exist.

One finds small ponds, and especially wells, in private ownership.[70]

In areas where stools claim only jurisdictional rights, rights in rivers are ill-defined, but appear to attach to the riparian communities.

(b) Rivers as boundaries: It often occurs that a river or stream constitutes the boundary between the lands of two stools, two villages, etc. The ownership of such rivers

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70. In one case from Akwapim a man who fished in a pool without the owner's permission, was fined for fouling the water, and stealing fish.

presents a problem. Three contradictory views emerged:

(i) One stool owns to its near bank; this is the boundary, the other stool claiming to this bank (i.e. including the whole of the river). This appears to be the case with the River Pra, where it is apparently claimed that the Ashanti boundary (rather, that of divisions of Ashanti) extends to the Colony side of the river.

(ii) The boundary between the stools or communities is the mid-line of the stream's bed. Hence things found or won from the bed belong to one side or the other, depending on the part of the river or bed where they are found or won.[71]

(iii) The whole river is the boundary, the river itself, and its bed and the things therein, being jointly in the ownership or control of the communities on either side. This view was strongly maintained by some informants, who emphatically declared that it was not one bank, or the thalweg, of the river that was the boundary. Hence minerals, e.g., diamonds, found in the bed of the river are divided equally between the two landowners or communities, and ferry-tolls are similarly divided. If there is a concession of any kind over the river, it must be made by the two parties jointly.[72]

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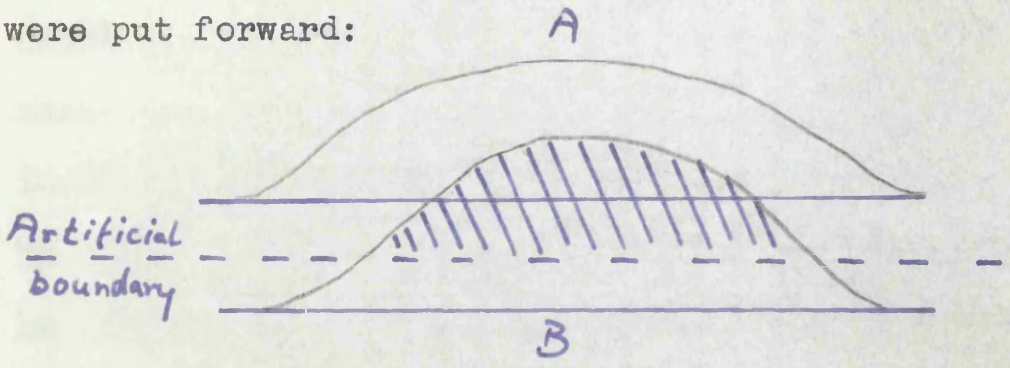
71. Such a boundary has often been laid down in Validated Executive Decisions in Ashanti; (cf. the English and ?Roman doctrine of ad medium filum aquae).
72. E.G. New Juaben. "Anything found in the river would be shared by the towns on each side of it" - Essiam.

If a boundary-river changes course, again various views were put forward:



One view was that the bed of the old course would remain the boundary. It would now cease to be a natural boundary, and would become an artificial boundary. It will be necessary to draw an artificial line as the new boundary, following more or less the centre of the bed, and mark it with ntome trees. B will not acquire the shaded portion by the change of course. If there is a joint concession over the river, the concession would stand, even though parts of the bed will be solely owned by either A or B. But if it is necessary to make a new concession, after the river has changed course, if over the new bed but within the artificial boundary, the landowner in question will be sole grantor.

Another view was that where a stream forms a boundary, the new course will be the boundary, and not the old bed of the stream. This means in our example that B acquires the shaded portion.[73]

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73. I feel doubtful about this view. Sarbah, F.C.L. 58, says: "An inundation effects no change of property in land."

If an island appears in the stream, then this belongs neither to A nor to B, but to the landowning stool. (This makes no provision for cases where the river lies between landowning stools, or between two states). The island will be treated as virgin forest-land without an owner, which can be allocated by the landowning stool. It is uncertain what is the position with regard to accretions (where the whole river is the boundary). The discussion of this point was theoretic only.

(c) Right to draw water for domestic purposes: Any person may draw water from rivers and streams, etc., for drinking, washing, etc. This right is not limited to riparian inhabitants, and no permission or payments are necessary. Persons may freely wash clothes, etc., in rivers and streams. No-one can abstract an abnormal amount, or divert the course of rivers, without permission.

(d) Canoes and ferries: A citizen may put a canoe for his own purposes on a river without permission.[74] Ferries frequently appear to be the perquisite of the landowning stool;[75] and where a river lies between two stools, of the two stools jointly. In such a case permission is needed to operate a

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74. Only with permission, according to Adansi.
75. "Ferries are a state monopoly" - Adansi.
Otoo v. Ellis: (1913) Full Court, Ren. 711; Ayima v. Yamike Kwaku: (1913) Full Court, Ren. 730; were cases concerning ferries.
Acquah v. Gaisie: (1896) Ren. 124.
76. Cf. Asare v. Wusu, Danquah, C.A.L., 4.

ferry, and/or tolls are collected by the representatives of the stool or stools. In the case of one river which forms the boundary between Akwapim and New Juaben, I was told that tolls are divided equally between the states. Where a river is wholly owned by a stool on one side, tolls are collected by that stool only. Rights in rivers of this kind are frequently reserved when land is sold outright.

(e) Right to fish: In general any citizen may fish freely within the rivers of his state, without asking permission, and without paying over any proportion of his catch. He need not be a riparian inhabitant; but no-one of the riparian village can or will object to his fishing there.[77] We have already noted the exception in Bekwai, where certain waters are subject to the Omanhene directly.

There is also communal fishing in certain rivers. At the appropriate time of the year all the inhabitants of a town (men and women) are summoned by the local chief by gong-gong. The stream may be dammed. All the fish caught in this way is divided communally; and it is only in such cases that a proportion of the catch is sent to the stool.[78] According to other information dams and the erection of nets are permissible

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77. According to one informant. According to another, he may have to notify or pay a proportion of his catch to the local Odikro if he is a stranger to that village.
78. Akim Abuakwa.

at certain times of the year; there can be no permanent erection, however.[79] In another state[80] informants distinguished two types of fishing: commercial fishing, and private fishing. The latter is done, it was said, by the women, who dam streams for fish. In such a case no permissions or payments are required, but the local Odikro has the right to prohibit fishing for any reason. The construction of such dams is done only at certain times of the year, and, if water is scarce, the Odikro of a village may forbid damming, so that water may flow to villages lower down the stream. Citizens engaging in commercial fishing on a large scale may be subject to tolls.

(f) Right to dam rivers: Generally, individuals are allowed to dam rivers only for the purposes mentioned above. For any others they will need express permission.

(g) Right to take minerals: Citizens may take clay and sand freely for their own purposes (unlike strangers). If taken in commercial quantities, for e.g., building purposes, a citizen may be charged.

To win diamonds from streams and rivers requires the permission of the stool in whom the land is vested.

3. RIGHTS OF WAY. TRESPASS.

A man may in general walk freely where he wishes. It is unusual to attempt to exclude bypassers from farms and other

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79. Bekwai.
80. Adansi.

land subject to individual interests. Frequently, well-used paths run through individuals' land to the river, market-place, etc. It was stated: "A man can walk over another man's land at will. He can pass to get water without permission. He can shoot on the land of another person without permission. Some farmers could and might stop him going over their land."[81] Fences are rare, and, if made, are principally to exclude animals. There is some limitation to the general rule if a man comes on another's land for a specific purpose: "he cannot collect snails on another's land without permission"[82]; "he cannot collect firewood on another's land without permission".[83] It was said:[84]

> "Any citizen may walk over, hunt over, etc., a farm belonging to another citizen and he needs no permission to do so. (85) A man collecting fallen branches for firewood on some-one else's farm would be stopped by the farmer if he were present." (86)

There is a suspicion that if a man is walking aimlessly over another's land, he has come to steal produce.[87]

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81. Essiam.
82. Essiam.
83. Asikuma; contra Essiam.
84. Bekwai.
85. The informants scoffed at the idea ofasking permission in such cases - there is a general right of way.
86. The idea apparently is to collect the firewood when the farmer is absent!
87. A native method of restraining a trespass is by laying down palm-fronds on the boundary, according to one informant. (See also the Report of the Gold Coast Local Committee of the Society of Comparative Legislation, December, 1904).

Cattle-trespass: sheep and other domestic animals can feed on the land of another without permission; and animals may freely be driven over another's land. If damage is done to the farmer's crops, the owner of the trespassing animals is still liable to pay compensation. I was told the procedure is that if a farmer finds wandering sheep or goats doing damage, he will seize them; then he will find out who is the owner. The owner will tender his apologies through an intermediary, and pay for damage done.

C. THE STRANGER.

WHAT IS A STRANGER?[88]

It is convenient to divide the class of individuals enjoying interests in land into the citizen and the stranger; the citizen being a member of the tribe or state by birth, the stranger being any person foreign to that particular tribe or state who wishes to enjoy an interest in property there. Although it is possible to define "stranger" by reference to groups of various sizes, so that a member of one family is in fact a stranger to another family, (though both serve the same chief), the member of one village is a stranger to another village within the same state, a subject of one stool is a stranger to another stool, though both stools serve the same paramount, yet it is the usual practice to reserve the term to

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88. In Twi ohɔhɔ.

its widest meaning, that is, to a person who is not a subject of the state (or division, in Ashanti) in question.[89] The foreignness of other categories of stranger does have some effect on their legal position, but in writing of the customary law the clearest separation is between citizens and strangers.

Since stranger is the antithesis of citizen, it is definable by reference to the latter term, and it might appear easy to achieve a satisfactory definition of both terms. Reference to the discussion of "citizen" ante (p.126, 127) will show that a reliable distinction is not always easy to achieve. The categories of "stranger" which thus appear can be arranged as follows:-

(a) Non-resident stranger.

(b) Permanently resident stranger.

(c) Quasi-stranger.

Most customary laws today make a distinction between strangers who are resident, and those who are not resident. The resident stranger may become in time assimilated to the position of a naturalized citizen, and he is in general treated more kindly than one whose residence is temporary in nature.[90]

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89. In Ashanti a man from, say, Bekwai Division, is a stranger in, say, Kumasi Division.

90.- "An Assin man who marries an Adansi girl, makes cocoa-farms in Adansi, and is permanently resident there, is not treated in Adansi as so much of a stranger as an Akwapim man, who merely makes a farm there; and the Assin man would not be charged so heavily". - per the Adansihene.

/over

The additional rights that he thus acquires are usually counterbalanced by complementary duties, with regard to such matters as liability to contribute to stool levies, and to contribute communal labour. The effect of the N.A. ordinances, which increasingly make residence and not allegiance the test of liability to annual rate or tax, also assists in the same direction.

I use the term "quasi-strangers" in this connexion to indicate those who, though fellow-members of a larger community (e.g., the state), are not members of the smaller community within the larger, when rights in this smaller community are in issue. Under this head one may collect instances where the inhabitant of village A is treated differently in regard to property-rights from the inhabitant of village B holding land in A; where the subjects of one stool in a given state who apply to another stool, within the same state, for land are treated differently from the latter stool's own subjects, etc. The increasing development of a common citizenship minimises these difficulties; but they are still found, and serve to reveal the way in which citizens' communal rights usually function within the framework of a local community.

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90. (cont. from previous page) -
- A distinction is made in Bekwai between a stranger living permanently in a Bekwai village, and one who is ordinarily resident in another division of Ashanti.
- Again, in Akim Abuakwa, a distinction is made between resident and non-resident strangers, with regard to such matters as rent, contributions, and so on.

See also: Ratt. A.L.C. 351-2.

The concept of "stranger" is largely inapplicable, at least as far as land tenure is concerned, where the stool's rights over land are negligible or non-existent, or where they are largely of a jurisdictional nature, as with the Fante states. Even then, the idea may be of relevance where a stool, by virtue of its paramountcy, claims a right to be consulted before land is permanently alienated by its subjects to a stranger.

"Stranger" is usually taken to refer only to alien Africans, but it in fact includes non-Africans as well, both individuals and corporate bodies. Owing to the operation of the Concessions Ordinance the permanent transfer of land - except in towns - to non-natives is rare; but lesser interests (as for instance by way of demise) have been freely created. The most interesting cases are those concerning alienations to commercial firms and missionary bodies: in regard to the latter, relief from the customary onerous terms upon which strangers hold land has in the past been given by African grantors.

"Strangers" also includes Africans who are not from Akan tribes (e.g., Africans from other parts of the Gold Coast), and even those who are not from the Gold Coast at all (Nigerians, Africans from French territory, etc.). The most frequent instance of possible conflict concerns members of such races as Krobo and Ga, who have settled in Akan states; but

since the conflict will usually be internal only (in questions of succession to the alien acquirer, rights within "companies" of Krobo purchasers, etc.), further consideration of this point is not required in the present context.

RIGHTS AND DUTIES OF STRANGERS.

1. FARMING.

(a) Acquisition of an interest:[91] The most common instance of a stranger acquiring rights in another state concerns farming. One must notice first of all the rights and powers of quasi-strangers, and the conflict that may arise between the citizen's right to take up unoccupied stool land for farming, and the fact that citizens are members of various communities smaller than that of the entire state.

In general, a villager from one village must consult the Odikro of another village on whose lands he wishes to farm.[92] Usually, he will pay customary rum to the Odikro as evidence of the transaction. No tribute is, however, payable.[93]

As regards true strangers, it is the general rule that strangers acquiring any interest in land in which the ultimate title is with the stool must seek the permission of the stool, either before or after.

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91. See Sarbah, F.C.L. 66 et seq.
92. So: Essumegya. "If a person from one village in the State wishes to farm on land in another village in the State, he must inform the Odikro, but need not pay anything therefor."
93. E.G., in Adansi.

The first type of case is that where a stranger wishes to take up unoccupied land for farming purposes. The procedure is amply testified from many different sources:

(i) He first of all sees the Odikro of the village where he wishes to farm.[94]

(ii) The Odikro sends or takes him before the Omanhene.[95]

(iii) The stranger gives customary drink to the Omanhene.[96]

(iv) He is then admitted as a tenant, being sent back with a messenger, who directs him to the part of the forest which he may cultivate.

(v) Arrangements with regard to the type of farming, and the payment of tribute or rent, are concluded before cultivation begins.[97]

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94. If he has no particular area in mind, then he may directly approach the paramount stool.
95. If the Odikro's stool is the landowner, then the matter may go no further, although the arrangement may be notified to higher authority.
    If the Wing or other senior chief is the land-owner, then the stranger is taken before him, and he makes the arrangement with the stranger; but the matter may still be referred for counter-signature or confirmation to the Paramount Chief.
    Sometimes the Odikro passes the stranger to the Paramount Chief only through the relevant divisional chief; this is the more customary procedure, I feel.
96. In some places the matter is thereafter handled by the N.A. Lands Office, or its equivalent, to which the Omanhene will send the applicant.
97. These matters may be settled before the stranger is shown the area he is to farm.

(vi) The stranger clears the ground, and begins paying rent or tribute as agreed.

(vii) In some states, he may be required to accept a written lease.[98]

The second type of case is that where a stranger takes an interest from a citizen family or individual in the state. What, then, is the position with regard to the payment of rent and obtaining permission from the Stool? This case may arise in two different ways: either the stranger takes as tenant from the citizen, or he purchases a citizen's interest in the farm.

Where the former way is adopted, notification to the Stool is generally called for;[99] the rent payable goes in different directions in different areas. In one area, I was told that the rent paid by the stranger would go as to 1/3 to the family or individual "controlling" the land, and 2/3 to the Odikro's treasury;[100] In another, it was stated that the Stool only derives revenue from strangers farming on Stool lands, and receives nothing if family land is let to a stranger for cocoa-farming.[101] In yet another case, it was stated that a stranger wishing to make a cocoa-farm on land controlled by a family must go through the procedure previously described, obtaining permission from the Stool, and paying tribute therefor

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98. E.g., in Adansi.
99. E.g., Essumegya.
100. Essumegya. 101. From an Ashanti informant.

The other way in which a stranger may acquire an interest is by purchase from a citizen. Sales by citizens of their dependent interests in stool lands require the permission of the stool if to strangers, and it is customary to charge 1/3 of the purchase-price paid. This payment, a token of the waiver by the stool of its customary rights, is in theory not compatible with subsequent abusa payments. The stranger in such a case should not become a tenant, any more than the citizen from whom he bought was a tenant. He is absolutely entitled to the farm, though with only a limited interest in the land itself. The one-third is the share which the stool always receives of any extraordinary wealth or sudden windfall (cf. the law relating to gold nuggets).

Sales of this type are usually of cocoa-farms in existence, and there is a reluctance (if not a prohibition) to sell a contingent claim by a citizen to forest-land (e.g., in front of his existing farm), land cleared but not planted, or even fallow land. The sale may be either voluntary or involuntary: the latter is today the more frequent. It may occur, for instance, through the operation of foreclosure on a mortgaged farm, sales under pledge or mortgage, or fi. fa. Where such an involuntary sale takes place, it is a difficult juridical problem to decide what rights the stranger acquires, and how he is to be treated, whether as one entitled to a dependent interest, or as a mere tenant. Where a pledge is not valid

without notification to the Chief, then one can maintain that the notification operates as an estoppel as against the Stool if the pledgee enforces his rights by judicial sale, and a stranger purchases the interest. But this does not solve the problem where no notice to the stool of a pledge is required, or where the pledge is to a citizen (for which notification is not required), but the purchaser at public auction by way of execution is a stranger. There is no case known to me where a purchaser at public auction has been prevented from entering into possession by the stool concerned.

The more reasonable rule, and that more frequently found, is that the stool remains satisfied with its 1/3 of the proceeds of sale, and the stranger need not pay any rent, and there is no tenancy; but he may be required to pay customary drink to the stool before actually entering into possession. The charging of 1/3 on the price appears to be alternative to making a stranger-purchaser pay tribute.[102]

The stranger is advised to approach the stool with regard to entering into possession, to come to agreement about tribute in those states where this is exacted, and to stamp this with drink. In the Colony proper, where the stool is land-owner, payment of 1/3 of the purchase-price appears to be the commoner

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102. In Essumegya the stranger pays tribute on the cocoa produced, but the stool does not exact one-third of the purchase-price. Other evidence from Ashanti indicates that a stranger taking possession by purchase at a public auction should notify the land-owning chief, so that arrangements with regard to tribute may be reached.

practice; in Ashanti, several divisions stated that no 1/3 was charged, but the stranger-purchaser was charged cocoa-tribute. Cases where a dependent interest-holder is authorized to dispose not only of his own interest, but also of the absolute interest (by the authority of the holder of the latter) must, of course, be distinguished; as also must cases where a stranger purchases land outright from a stool, in which case he is never liable to pay thenceforth any rent or tribute with regard to his farming.

The third type of acquisition by a stranger is where he is a squatter on unoccupied stool land. Customarily, he may either be evicted, or henceforth be charged abusa. He cannot acquire absolute title as against the stool.[103] The usual preference is for a demand of abusa, but the election is with the stool, and not with the squatter. If the stool's demand for abusa is refused, then he may be evicted; and the same applies where the stool's title to the land is altogether denied. It is noticeable, however, that squatters who have been there for a long time are usually allowed to stay; and a squatter may acquire by long possession the right to farm there rent- and tribute-free.

(b) Security of tenure: What is the nature of the interest which a stranger acquires (other than by purchase outright of the absolute interest in the land)?

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103. Cf. LONG POSSESSION, p. 723.

African opinion distinguishes as a rule cases where a stranger is a tenant, and where he holds a dependent interest other than one of tenancy. If there is no transfer involved, then the farmer can only be a tenant.

Where the stranger purchases a citizen's interest, and 1/3 of the purchase-price is charged, he is not a tenant living rent-free on a kind of emphyteutic tenure of indefinite duration. He has absolute security of tenure, and cannot be evicted for any cause whatsoever.

Where the stranger approaches the stool, and receives permission from the stool to farm on stool land, he is decidedly a tenant, whether on abusa or otherwise. The only difficulty arises where the stranger is charged cocoa-tribute even though he purchased an interest, and did not receive a tenancy from the stool. This may be explained in two ways: certain African authorities hold that there is no true purchase in such a case - the citizen's interest in his farm is extinguished voluntarily or involuntarily, and he receives compensation therefor. The arrangement between "purchaser" and stool thus starts unfogged by recollections of the previously existing situation - hence quite properly, they say, the arrangement may be called a tenancy of the land (though not, of course, of the farm).

Alternatively, the nature of cocoa-tribute so-termed must

be examined. One has become so accustomed to speaking of an abusa tenancy that other forms of cocoa-tribute ("sheep-money", so much per tree) are considered to be merely a substitution for payment of abusa, that tribute is, in fact, a rent. It could be argued that the tribute is not rent, but rather a tax or levy on strangers who farm on stool lands. At first sight, tribute does have an ambivalent appearance, having analogies both to rent and tax. It is, however, only payable where the stool owns the land, and its payment cannot, therefore, be attributed to jurisdictional rights as such. Other forms of tribute (of game, of snails) appear similarly to be a corollary of ownership; and in cases where stool A is on the land of stool B, the fact that stool A has the jurisdiction, stool B the ownership, yet members of stool A on the land pay tribute to stool B (unless, as is sometimes done, amicable arrangements have been worked out) indicates the proprietary nature of the claim to cocoa-tribute. Strangers coming on this land would pay tribute to stool B.

In general, today, a tenant on abusa receives a tenancy of indefinite duration: the stranger is assured of perpetual rights so long as he continues to pay the annual tribute or rent.[104] Some evidence suggests that he cannot be evicted for any reason whatever, even including non-payment of rent- which,

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104. So, for instance, in Bekwai.

in arrears, must be sued for as a debt.[105] Reference to the chapter on TENANCY will illustrate the usual reasons which may be alleged when it is desired to evict a tenant.

Whilst the stranger himself, if a tenant, thus acquires an interest of indefinite duration, it appears that the question of the transmission of his interest is not so certain. In former times there was a suggestion that a stranger's interest, whether for farming or for building, did not automatically endure beyond the stranger's own lifetime, and that the stool-landlord had a right to refuse entry to the stranger's successor. Whilst this is in general consonant with the principle that strangers may farm on stool lands only with the consent of the stool, the rule has perforce been greatly modified in practice subsequently. The less heavily populated states look on an increase of numbers as an increase of wealth and resources, the development of the country by the influx of strangers is beneficial, and money derived from abusa and rents is a considerable item in the revenue. In order to encourage stranger-farmers and preserve their revenues various states have now modified the former rule. Whereas before the successor to the stranger-farmer had to make a new arrangement with the stool, now, although he should present himself to the stool, so that the transmission of the interest may be ratified with the gift of drink, the position is that the previous arrange-

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105. Sed quaere.

ment is continued, rather than a fresh one reached. It seems that where a stool has orally agreed to accept something less than abusa as a rent (say, "sheep-money") it may revise the rent up to the abusa level when the successor puts in his appearance. How far this isjustifiable in law is uncertain; where arrangements are recorded in writing (with a lease or otherwise) the writing may operate to prevent this.

(c) Payments of tribute and rent: Unless otherwise agreed, a stranger-tenant on stool land pays over 1/3 of the annual produce to the stool if an economic crop (such as cocoa or rubber) is grown.[106] This is the so-called "abusa system". Formerly only food-crops were grown, and even today it is not customary to make any specific charge, except perhaps a nominal one, for use of the land for the growing of foodstuffs only, nor is a portion of the crop taken by the stool. The history is narrated by Warrington[107] in his notes; he says (in regard to Ashanti) that:

> "Before the days of cocoa-farms tribute was collected from all persons farming on a Chief's land who were not his subjects. Tribute was then paid in kind." (108)

As for today:

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106. In one state I was told that resident-strangers pay a flat rate of only 10/- per annum per farm; non-resident strangers pay an economic rent.
107. In his Notes on Ashanti Custom.
108. At p. 34.

> "Cocoa-tribute is similarly collected from all non-subjects of a Stool whether they are Ashantis or strangers. A person paying tribute to the Chief on whose land he lives is not liable to be called upon for communal labour and he is exempt from any levy collected by the Chief to whom he pays tribute.
>
> A non-subject growing food for his own use is not usually called upon to pay tribute but he will be expected to assist in any communal work. His position with regard to a levy is then difficult as he may be called upon by the Chief on whose land he resides and also by the Chief to whom he owes allegiance." (109)

But in general Warrington finds that only strangers who farm for profit are called upon to pay tribute.

There does not seem much to quibble at in his account; but there are certain difficulties to do with estimation of the yield (for cocoa), and the collection of the tribute which must be mentioned. The practice in one state is for the revenue-collectors of the stool to estimate the probable bearing capacity of the cocoa-trees (at so many loads per annum), and then to make 1/3 of this estimated yield the standard abusa rent.[110]

Difficulties of collection and the exorbitant amounts involved, which frighten away prospective tenants, have led to the adoption of other systems of rent: one of these is "sheep-money", expressible in monetary terms. There is no standard rent at so much an acre, but there is an approximate level, varying in accord with certain factors - the size of the farm, the price of cocoa, the acceptability of the stranger

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109. At p. 35.
110. In Adamsi.

(and his intention to be a permanent resident, or only a non-resident exploiter), and so on. Certain stools appear to reserve the right to vary the rent in accordance with the variations of these factors: in one case a farmer paid £2.6.4., the next year £11, the next year £10.[111] If the stranger or his successor behaves ungratefully to the stool, they may be put on a higher rate, or even on abusa.

Certain states do not tax or charge stranger-farmers, or charge them only a nominal rent in order to preserve the stool's title.[112]

Where a community is settled on the lands of a stool which they do not serve, the usual practice is to charge each farmer individually, and not to charge them collectively.[113]

Another method of assessment is the "penny per tree" tax, which is especially popular in Ashanti. The actual charge per tree has fluctuated in accordance with resolutions of the Ashanti Confederacy Council from time to time, sometimes against the general move in prices.[114 & 115] The general rate in

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111. and the Chief said in evidence: "Tribute on cocoa depends upon the fluctuation of the local market. There is no flat or specific (rate) which a foreign farmer has to pay to the owner of a land on which he farms cocoa. As price of cocoa goes high it automatically affects the tribute."
112. E.g., in New Juaben.
113. E.g., in the case of the village of Abutennaa farming on Adankranja stool lands (in Ashanti).
114. See Matson, Digest, p. 17.
115. Rattray, A.L.C. 352, mentions three forms of payment: a proportion of the crops, so much per tree, or a lump sum paid at the time of entry.

Ashanti at the time of investigation was 8 trees for 1d., but this rate is departed from by individual divisions in some cases.

Some states insist on written documents, others encourage the use of documents, and in others no documents are made, the agreement being oral only. The type of rent for which a stranger holds land, and his terms of tenure, are tied up with other matters - such as his duty to contribute to stool levies and to render communal services (which are considered below). In Akim Abuakwa a distinction (which is a common one) is made between resident and non-resident strangers, the former paying a nominal 10/- or so per annum, the latter paying an economic rent (there being no penny per tree system here, nor sheep-money; abusa used formerly to be charged, but the system has now been abandoned in this connexion).

(d) Succession to a stranger: Formerly, the stool was the successor to a stranger-farmer if he had acquired land from the stool.[116] Gradually it was permitted for the successor of the stranger to take over the farm of the deceased; the decision whether to permit this or not was dependent on whether the stranger was a permanent resident or not, and whether he had left potential successors also living within the confines

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116. And Rattray (A.L.C. 353) says: "Any plot of land once abandoned by a stranger (i.e., someone not a /direct/ subject of the Stool) immediately reverted to the Stool."

of the state. These exceptions seem to be greatly weakened today. There are one or two points to make, however. The first is that where the stranger acquired the land by purchase or gift from a family - although the title to the land was ultimately with the stool - then the stool succeeded to the stranger's property, and not that family. This rule cannot be of any application where the stranger was merely a tenant of the family, who would in such a case retain the reversion to the land.[117] It was also suggested in one state that although the site of a house in a village occupied by a deceased stranger reverted to the use of the village (although ultimate title to the land was with the Paramount Stool), the rule was different in the case of farms made out of virgin forest in the neighbourhood of the village: the reversion in the latter case would go to the Paramount Chief direct.

It is also important to note that by virtue of its ultimate title to the land the stool, on claiming such a succession, will succeed also to the stranger's interest in the farm, and this is one of the ways in which stool-property in the narrow sense has been built up.[118]

(e) Rights and powers of a stranger as regards alienations and use: There appear to be no unusual restrictions (apart from those contained in any lease) placed on the use by

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117. And so Ratt. A.L.C. 357, n.1.
118. Cf. STOOL, p. 52.

strangers of farms they have acquired; though as regards alienations they are generally at least to inform the stool, and usually to obtain the permission of the stool in the case of sales outright of their interests. According to one informant, a stool may charge 1/3 of the purchase-price if a stranger disposes of his interest outright. There is often in practice no restriction placed on a stranger's dealings with lesser interests (e.g., on his pledging, etc.).

2. HOUSES.

The normal custom is for a stranger who wants a plot for a house to approach the local Odikro or chief in charge of the land for that village or quarter. The matter may go no further; or in many cases he will be taken before the landowning stool, with whom negotiations will be conducted. As in the grant of permission to farm, drink is customarily offered in such cases to "stamp" the permission granted. Often no rent, or a nominal rental only (say, 2/- to 10/-), is charged. But in the larger towns and in the more civilised areas an economic rent is payable by the stranger. The case of Koforidua is considered below;[119] mention has been made of leases made with citizens for the town of Bekwai;[120] similar leases, but for an economic rent, are granted to strangers. The ground-rent is payable (for the plot only) whether the stranger erects

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119. See REGISTRATION, pp. 757 et seq.
120. Cf. p. 152 ante.

buildings or not, and does not vary according to the type of building put up. This does not apply to commercial firms, who will be charged heavily.[121] Kumasi is also a special case, citizens getting tenancies of plots for a nominal 1/- rent, whilst strangers pay an economic rent.

The rules with regard to dealings with houses are similar to those in force for farms. According to one informant,[122] if a stranger wishes to leave the town and his plot permanently, he need not continue to pay rent if he notifies the Omanhene; but the building will revert to the stool. If the plot is abandoned before it has been built on, then the title to it merges in the stool's interest and is available for re-allocation. In some villages a stranger's house-plot and house may revert to the Odikro, I was told, instead of passing to the Omanhene's stool.[123]

3. LIABILITY OF STRANGERS FOR LEVIES, ETC.

(a) Levies: The former rule is given by Warrington:[124]

> "A levy was only collected for some specific purpose such as the funeral expenses of a Chief, the expense of litigation or war.... When the amount required had been decided upon this was divided amongst the various Asafohin and each was required to raise his quota from amongst his own subjects no matter where they lived."

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121. Similarly in Koforidua.
122. Bekwai.
123. Koforidua.
124. 2nd ed. (Matson) 72.

And further, for today:

> "A person paying tribute to the Chief on whose land he lives is not liable to be called upon for communal labour and he is exempt from any levy collected by the Chief to whom he pays tribute."

That is, special levies are exacted only from persons who owe allegiance to the stool in question. Warrington further says (loc. cit.) that as a general rule strangers who are only growing food-stuffs are not called on to pay levy to the Chief on whose land they are farming; and the same goes for petty traders and craftsmen. Rattray[125] says the same.

Busia[126] considers some of the problems that arise in Ashanti through the application of this rule that special levies are payable on the basis of allegiance, and not of residence.

(b) Annual Rate or Tax: This is now payable on a residential basis:[127] the different relationships of subject and stranger do not therefore matter, except in cases where chiefs attempt to base claims on allegiance owed rather than on residence.

(c) Communal Labour: Warrington (loc. cit.) places liability to perform services of this nature on strangers who

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125. A.L.C. 153, note 2.
126. pp. 128 et seq.
127. Under the Local Government Ordinance, replacing the Native Authority Ordinances.

grow food-stuffs, but not on those who pay cocoa-tribute. It seems likely that the distinction should rather be between permanent settlers (who are liable) and temporary residents (who are not).

CHAPTER IV.

THE FAMILY and ITS POSITION IN THE AKAN LAW OF PROPERTY.

This chapter will deal with the internal relations of the Akan family, types of family property, and so on; where the family as a whole is in an equal position with an individual in external relations (in regard to such matters as the interest of the stool which it serves in the property of the family, the rights of tenant-strangers on family-land, etc.), the rules are analogous to those governing the Individual, and may be found in the chapters on THE STOOL[1] and THE INDIVIDUAL.[2]

Before we can consider what are the rules and customs governing the family and its members in regard to the holding of property it is necessary to say something of the internal organization of the family, to see what is its construction, what is the position of its head, the elders of the family, and the ordinary members.

A. THE FAMILY: ITS ORGANIZATION.

1. NATURE AND BASIS OF THE FAMILY IN AKAN LIFE.

Little need be said of the basis on which the Akan family

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1. See pp. 40 et seq.
2. See pp. 126 et seq.

is built; the reader is referred to the works of Sarbah,[3] Rattray,[4] and Danquah,[5] where the subject is fully treated. It suffices to recall that it is matrilineal, that is, related through the female line, that it is exogamous, and that the relationship binding the members of the family is not presumptive and perhaps fictional,[6] as in the case of the Akan clans.

The family is called in Twi "abusua": since the same word is used to describe the clan, confusion is possible. Confusion is also possible in English, since the word "family" is normally used by us to describe a much more restricted group. A certain amount of caution is also necessary in interpreting the statements of Africans, since some may describe the sections of a family (explained below) as "families".

An Akan family forms part of a clan; but whereas members of the same clan cannot as a rule - unless co-members of one family - trace their relationship to each other, members of the same family should always theoretically be able to demonstrate their relationship. With the multiplication of generations sections of the family tend to "hive off", and the relation may be obscured or forgotten.

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3. In, for instance, his Fanti Customary Laws, pp. 33 et seq.
4. In, for instance, Ash. pp. 21 et seq; A.L.C. 401 et seq.; and 1 et seq.
5. In Akan Laws and Customs, at pp. 193 et seq.
6. Cf. Amissah v. Krabah: (1936) P.C. 2 W.A.C.A. 30, at p. 31: "...a Fanti family consists, subject to immaterial exceptions, of persons lineally descended through females from a common ancestress".

(CLAN: Clans as such appear to be incapable of holding property; descriptions of their so doing are usually attributable to their members sharing the same family. Hence the common statement made by informants that land in towns is divided up between the different clans.[7] But the following facts should be noted:

(1) Membership of a clan may determine allegiance.

(2) According to Warrington, the word abusuatiri is used of the local head of a clan in a town or village.[8]

(3) Each clan in a town has a family-stool serving the chief of the town.[9]

(4) Members of the same clan still tend to associate for farming and residential purposes; and they may share the same burial ground.)

Since relationship is matrilineal, it is impossible for a line to be continued when it comes to a male: hence a man is of a different family from that of his son or father. Such a rule, exact in theory, admits of exceptions, but these are usually of the unspoken kind, where slaves or domestics have been adopted into the family.

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7. "The seven different families (sc. clans) have each their own land in the town of Aburi."
8. Warrington, p. 2. - But: cf. W,'s statement at p. 4: "he is the person elected to a stool by the members of a family group in a particular area or community, who in general exercises no jurisdiction over persons outside that family group."
9. E.g., in Akropong, Akwapim.

Membership of the same family is indicated as a rule by:

(1) Common ancestry, as described above.

(2) Having the same head or abusuapanin.

(3) Having the same principal family house.

(4) Mutual contributions towards funeral expenses of members.

(5) Sharing of the same family burial-ground.[10]

It would be impossible to over-emphasize the importance of the family in Akan life: the most terrible fate for an Akan is to be without a family, which would occur usually in the past only where he was a slave or a prisoner of war. Even slaves were adopted into the family they served as "quasi-members".[11] The family performed all the functions which in England we associate with the Welfare State - care of the aged, the widowed or orphaned; finance for a dozen different enterprises; provision of land for houses and farming; payments in connexion with marriage and death. It would be regrettable if civilisation - and the evolution of a different kind of

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10. Sarbah (F.C.L. 36) gives "the ordinary incidents of a family" as follows:-
"(i) Common clan;
(ii) A common penin [i.e. head];
(iii) Common liability to pay debts;
(iv) Common funeral rites;
(v) Common residence;
(vi) Common burial place."
A family member is called obusuari - Danquah, A.L.C. 194.

11. And were called in Twi "fie-nipa" (literally, "people of the house").

family (the "European" or "Christian" family of husband, wife, and children) were to break up this venerable institution.

2. THE EXTENT OF THE FAMILY.

"Family" is used in speaking of Akan customary law in regard to what the anthropologists would call a "maximal lineage". There is no mathematical limit to the extent of the family, either in numbers of members, or in the degrees to which relationship may be traced, either upwards or downwards; but in my experience (though it is a subject on which they do not like to speak) there were few Africans who traced or could trace their relationship much beyond their great-grandfathers or great-grandmothers, using this term in a classificatory sense. This does not apply to chiefly families, where it is a matter of pride to be able to trace the descent of the family back through many generations.

It must be remembered that an Akan family consists not only of the living, but also of departed ancestors and members yet to be born; and this in a real sense. This is the explanation of the jealous care with which families endeavour to preserve and add to the family possessions.

3. THE ORGANISATION OF THE FAMILY.

(a) Sections, branches, sublineages:

Although the family is a single unit as a term of relationship, for practical purposes one finds that it is split up into

a number of divisions, which are more or less clearly separated. The anthropologist would no doubt term them "sub-lineages", forming part of that maximal lineage which traces its descent to the original female ancestor. Such divisions have occurred as soon as the ancestor bore female children, the descendants of whom would form separate branches of the family. Such a process of division can be continuous and endless. Some of these divisions remain nothing more than figments of the fevered brain of certain sociologists. These sections or branches do, however, play an important part in the control and use of, and succession to, property.

When such divisions occur, the African will refer to them as "sections", "houses",[12] or branches of the family; and their separateness is especially clear where the members of one section are living in a family house by themselves, separate from the houses of other sections; and especially where the different sections are living in different towns; or branches of the family have quarrelled, and there has been separation of property, (or, in the past, cutting of the family-tie).

Each of the sections is under an elder, or "panin", who has immediate control of its members.

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12. The most popular word seems to be "house": an exact translation of the Twi "fie" (or "house"). Confusion of terminology may arise, because, when talking of families and houses, the African may mean:
(i) "Family" - clan in a particular town;
(ii) "House" - family of that clan in that town.
or (i) "Family" - family;
(ii) "House" - section of that family.

(b) The head of the family:

Each family has a supreme head,[13] who is appointed to that position by election; succession to the office is not automatic, although it may be confined to certain lines, and there may be a preferential candidate. It is reported that there is always an "heir" apparent, officially recognized as such; so in many cases the appointment of the head is at least preferential, and practically automatic.[14]

(i) His position: The head of the family is not only the business representative of the family; he is originally the spiritual head of the entire family - so that he has certain religious duties to perform on behalf of the family.[15] Where the family acts as a unit in dealings with the outside world, the head is the natural representative. Within the family, his position is like that of president of a council, the family council in this case; he is no more than primus inter pares; and any head who purports or endeavours to act by himself in an arbitrary manner is sure to find himself in difficulties with the rest of the family. The head of a family may or may not occupy a stool. Some families

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13. Called "abusuapanin" - family elder;
"abusuatiri" - family head.
14. The heir-apparent is termed "abadiakyire".
15. "He is the elected head of the gross family, spiritual and physical representative of the ancestor"; Akim Abuakwa.
See also Sar. F.C.L. 37-8.
For a good description of the position of the abusuapanin, see Danquah, A.L.C. 204-5.

have stools: others have not.[16]

(ii) His appointment: the head of the family is appointed by the family; he does not succeed automatically.[17] When the necessity to appoint a new head occurs, on the death or deposition of the previous head, the family meets together to discuss and elect. Considerable divergencies were shown in the information given by different informants on the question of which persons were competent to take part in the discussion and election.[18] Whilst on the one hand it was said

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16. Evidence, inter alia, from Akim Abuakwa.
17. BUT: "Succession to the head of the family is automatic and the heir apparent must succeed unless there are reasons to disqualify him, such as if he is insane, a spendthrift, or drunkard." - Akropong. Sed quaere.
18. The head is:
    - "appointed by 'senior and responsible' members of the family": (Cape Coast)
    - "appointed by responsible older people": (another informant, Cape Coast)
    - " appointed by members of the family": (Asikuma)
    - "appointed by the senior women of the family": (Aburi, Akwapim)
    - "selected by succession: confirmed by the Obaapanin, supported by the senior members of the family": (Aburi)
    - "selected by succession: confirmed by the Obaapanin supported by the elders of the family": (Akropong)
    - "appointed by Obaapanin in consultation
        (i) with the elders of the family; and then
        (ii) with all the family, who put forward nominations which may be rejected by the Obaapanin as unsuitable. The Obaapanin can herself nominate." (New Juaben)
    - "the head of the family is appointed by the family council, which consists of the Obaapanin supported by the elders of the family. (The elders must be appointed so; elders are not the same as 'senior members', the latter, as such, not being entitled to sit in the family council.)"

    And Sarbah, F.C.L. 38.

that the entire family met together, and all had a voice equally, the proponents of this view weakened when it was shown that this implied that the young members of the family, perhaps still children, would thus be entitled to take part. Another view was that it was the "senior and responsible members" of the family who conduct such business; but in this case no firm test either of seniority or responsibility was given; and the qualification did not seem to depend on the attainment of any particular age, status or condition, such as reaching manhood, being married, being head of a household or section.

One may conclude that, whilst custom varies in different families, in general there are two stages. In the first, in the African equivalent of a "smoke-filled room", (cf. the American method of selecting Presidential candidates) the elders of the family meet together in private, and agree on their nomination, which is then presented to the family as a whole. The Obaapanin, as the authority on family relationships, naturally has a large say in the deliberations. At the second meeting, which is informal, all members of the family, young and old, are entitled to attend and speak if they wish - though the weight attached to what they say will naturally vary according to their status. Women are entitled to take part in family deliberations equally with men.[19]

19. The appointment of the head is gone into at some length, because similar considerations apply in other dealings of the family as a whole; and there are obvious analogies with the election of a chief.

As to the sex of the head, it is customary for him to be a male. One meets instances, both in history and in the reports, of female heads of families, especially on the Coast.[20] Certain informants stated the same thing too as referring to their own families; further investigation usually disclosed that they were speaking of their Obaapanin, and that there was in fact a male head of the family (usually a brother or other close relation of the Obaapanin).

The fact that the head is a male was explained by one expert informant on the ground that "it is merely a natural incidence of the male potestas - ntoro".[21]

I consider, then, that the usual state of affairs is for there to be an Obaapanin, or woman-head of the family; and the natural candidate for the position of male head of the family is one of her brothers from the same mother; failing such brothers, recourse is had to other relatives of the same generation; and only then to members of a later generation.[22 & 23]

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20. And in conveyances. There may be confusion because families have both male and female heads; or the woman is the senior female of one "house".
21. Information from Akim Abuakwa.
22. The Abusuapanin's "successor must be a close relative, say his brother, or his sister's or his aunt's daughter's son, if such is desirable and fit. Otherwise there is nothing to prevent the family appointing a successor from the gross family at large". - Akim Abuakwa.
23. But where a family is divided into sections or "houses", members of each section are equally candidates for appointment (unless there is a private family understanding that appointments should alternate from each house in order; or that one house is the senior).

(iii) General Powers of the head: The powers of the head in regard to property will be fully considered below.[24] Here it is enough to say that the head originates and directs many of the family operations; and controls, the internal discipline of the family, besides sitting to arbitrate on disputes within the family (a power of great importance). Quarrels within the family should be settled within the house; so that it is only when one of the participants feels that he has not got justice that he will take his quarrel into open court.[25]

(iv) Duties of the head: the duties of the head are a corollary of his powers (or vice versa). He is accountable to the family for his actions; and is under a duty to consult the family - particularly in connexion with family property - whenever custom lays down that he should do so. If he misbehaves, he may be deposed, and another appointed in his place. In general, the duty of the head of the family is to preserve the family and its property as far as possible, and to enhance its position and prestige.

(c) Section-heads: elders.

Besides the head of the whole family, one also finds that the branches of the family, if they are of sufficient importance, have heads as well; that is, the latter are heads of

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24. See pp. 218-221.
25. "Matters of importance or difficulty must go before the Abusuapanin; "Rites of Passage" - birth, marriage and death and the funeral obsequies - must be carried out with the knowledge and often the supervision of the Abusuapanin": Akim Abuakwa.

sub-lineages within the family.[26] Their appointment, if they are appointed at all, is more informal; but their position may be of importance.[27] The section-elder will carry to the head of the family the opinions and wishes of his branch of the family.[28] And if the section is occupying a separate house, and has separate lands, then he will have the duty of immediate control of such property.[29]

The usual case is that, where there is a sub-lineage, then the senior member thereof will be its head, and will represent its opinions before the family.

(d) The Obaapanin.

Each family has, as well as a male head, a senior female member, who is termed the "obaapanin", or "old lady"[30] of the family, a position of some importance. Besides supervising the women of the family, she becomes - if the family is a royal one - the Queen Mother,[31] with very definite duties in such things as the election of one of the family as Chief, and advice to the ruler. Hence one is led to conclude that in

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26. Such a head is termed a "panin" or elder.
27. "Families are divided into sections. Each section has a head or panin. ...--elders must be appointed so: the word 'elder' does not equal 'senior member'": Akropong.
28. The elder settles all normal disputes between immediate members of his sub-lineage: Akim Abuakwa.
29. The powers of section-heads over property vary widely, both from district to district, and family to family.
30. She is usually a close relative of the abusuapanin - "often mother or sister of the reigning abusuapanin, or may be his aunt" - Akim Abuakwa.
31. Called in Twi: "ohemaa".

ordinary families the obaapanin will have some say not only in the choice of the abusuapanin, but in the conduct of affairs. Such, in fact, is the case:

(1) She is the "mother" of the family, and looks after it if there is no male head.

(2) She takes a prominent part in the appointment of heads of the family (and also of other successors too?).

(3) Her signature to a document as witness may be essential as proof of family approval, and at least carries great weight.

(4) Her voice has great weight in the conduct of family business generally.

(5) She supervises the women of the family, and settles their disputes.[32]

(6) She takes a close interest in the marriage and divorce of members of the family.[32]

(7) She may settle divorce cases by consent.[32]

(8) She is the authority on the family-pedigree.[32]

(9) She may, according to two decisions, represent the family in the courts;[33] though there is some doubt whether she

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32. Information from, inter alia, Akim Abuakwa.
33. See: Mahmudu v. Zenuah: (1934) 2 W.A.C.A. 172.
Koran v. Bafour Kofi Dokyi: (1941) 7 W.A.C.A. 78: The Court upheld the Native Tribunal which: "after stating that it was satisfied that the plaintiff, an elderly woman of the family, had a direct material interest in the properties belonging to that line of the family, held that according to native custom plaintiff could properly bring the action".

may do so only when there is no male head;[34] or even when there is a male head.[35]

There is a certain amount of confusion, especially in cases originating in the coastal areas (particularly Fante) about whether there are families with only female heads. Personal informants frequently mentioned the female head of their family only (especially in Cape Coast). Further questions always disclosed that there was a male head of the family as well, perhaps brother to the obaapanin.[36]

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34. Tsetsewa v. Acquah: (1941) 7 W.A.C.A. 216, (following Hagan v. Adum: (1939) P.C. 5 W.A.C.A. 35):-
"... the Courts of this country have always recognized the right of the leading female member of the family to sue and be sued in respect of family property in the absence of any male head". (at p. 217)

35. In Mahmudu v. Zenuah (see n.33), the rule that only the head of a family can sue as representative of the family for the recovery of family land was considered. The plaintiff, described as "an elderly woman of the family", was, however, permitted to sue; this decision was based partly on the evidence of a former family-stoolholder that "each member of our family has a legitimate right to dispute for the properties in dispute"; and partly on the grounds that the rule was in this particular case:
a. repugnant to justice, etc., under the Supreme Court Ordinance, s. 19;
b. incompatible with Supreme Court Ordinance, Schedule II, Order 45, rule 25, (1).

36. In Cape Coast, too, it should not be forgotten that there has been a greater tendency for families to fragmentate, and form discrete units of matrilineal sub-lineages, each occupying its own house. Some of the "old ladies" from Cape Coast who appear in the reports are therefore only the old ladies of sections or "houses".

(e) Stools in the family:

There may or may not be stools in the family:

(i) Family Stools: in the simplest instance the head of the family has a stool.[37] But there are complications. Usually the head of the clan in a town will have a stool;[38] and there may be additional stools created for heads of families within that clan, as elders to the chief. According to information, each house of a family - especially a Royal family - may have a stool.[39]

But not every family has a stool. It depends on their status and history. The subject of stools has been fully treated in the leading sociological works;[40] but there does not appear any sufficient guiding principle on why there should be this divergence.

(ii) Town Stools: the distinction between town- and family-stools is explained in the chapter on THE STOOL (q.v.), and also in the writings of many authors of works on Akan customs. A family may hold one or more town stools, the most frequent case being where the family supplies the Chief of a town. Besides the Chief's stool, there may also be other stools in the family for subordinate positions.

(iii) Other Stools: this category is created,

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37. "Every head of a family occupies a stool": Akropong.
38. See, for instance, Akwapim.
39. Evidence from Akwapim.
40. See references given under STOOL, ante p. 17.

because instances were encountered where the incidents of each type of stool occur for one stool. Such a stool one would categorize as a town-stool, since the holder exercises political authority, but it was stated to be still a family-stool, to which the family alone could elect, and from which the family alone could depose. The Queen-Mother's stool, although typically a family stool, also has political power; and the "young-men" may claim the right to depose her. It is to be hoped that this matter will be clarified by further investigation.

(f) The fie-wura.

In the works of Rattray in particular, much is made of the fie-wura, or master of a household.[41] The fie-wura with his household cuts across the family arrangement, since his household includes wives and children, and formerly included slaves, who are none of them members of his family. I consider that the position of fie-wura is probably one of more importance in Ashanti than it is on the Coast; since in the latter, especially in the towns, one is likely to find large family-houses, controlled directly by the head of the family, or section-head. Nevertheless, the position of head of a household is one of importance, increasingly so today when there is a tendency for successful members of a family to acquire or build their own houses. The fie-wura's position is of greater

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41. See especially: Ratt. A.L.C. 1, et seq.

interest to sociologists than to lawyers (since there is much room for study of the conflicting authorities of fie-wura and family over his dependents, a conflict typified by the father-maternal uncle relation).

As regards the property relations of the fie-wura, the matter is adequately covered by consideration of the position of the individual holder of an absolute interest in a self-acquired house; and of the holder of a limited inherited interest in a family-house.

The householder's rights of control over members are of particular importance as the converse of the duty of members (or wives and children) enjoying rights of residence in an inherited house subject to good behaviour.

Where the position of a house-holder is not that of an ordinary individual member of a family, and especially in his relations with his wife and children, and the wives and children of other members, it is discussed in the appropriate portions of this work.[42]

(g) Quasi-members of the family.[43]

By this term are included three main groups of persons:

(i) Wives of members; husbands of members.

(ii) Children of male members.

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42. See, for instance, GIFT, pp. 523 ff.: TENANCIES, pp. 455 ff.
43. Of which the best Twi equivalent is "fiefo" (house-folk).

(iii) Slaves and domestics.[44]

Although one may stoutly maintain the principle that account can only be taken of full members by blood of the family, as a matter of fact these groups of persons, who share the life of the family, or members of it, do acquire definite rights against the family and family-property by virtue of their dependence or relation with members of the family; and it would be unreal to omit consideration of them because of some abstract theory. Their status is recognized in many ways by the family:[45] they enjoy privileges and immunities as compared with total strangers - that is, they are not subject to the same "no-rights", disabilities and liabilities (in Hohfeld's classification). Whilst a total stranger would be prevented from working on family land, or living in a family house, such actions are permitted in certain circumstances for these quasi-dependents. Even if the relationship means no more than that at a family meeting the presence of, say, the husband of a female member of the family is permitted, then the distinction is a real one.

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44. Stool-servants are not domestics, or slaves; they are in a position of dependence on the stool, and their property is subject to special rules.
See GIFT, pp. 528-9.

45. As instances:- husbands take part in their wives' funerals; and wives in their husbands';
children: pay for deceased father's coffin;
may take part in, or at least be present at, appointment of the successor to their father.

Their relationship with the family may have effects outside the family; for instance, if a member of a family marries outside the tribe, the spouse, who would otherwise be liable to pay tribute for occupying the tribal land, will probably go scot-free.

Nor should the rights of former slaves be forgotten. For them the effect of the Slaves Emancipation Ordinance, 1874, and the Re-affirmation of the Abolition of Slavery Ordinance, 1930, has not been entirely beneficial. Whilst on the one hand, it has been maintained that the former right of a slave to succeed to his master's property was based on slavery, and thus cannot be enforced today,[46] on the other it has been endeavoured to waive the customary rider to this rule, that persons of slave-blood must be postponed to persons of the free blood.[47]

Both of these constructions it is submitted, are false. Former slaves, and the descendants of slaves still living with the family which they serve, are now termed "domestics"; and their position is that of adopted but inferior members of the family. They are thus capable of succeeding to family-property (usually only in default of successors of the blood);

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46. But see: Santeng v. Darkwa: (1940) 6 W.A.C.A. 52, (following Bimba v. Mansah: (1891) F.C.L. 137) where the right of the son of a slave-woman to succeed was upheld.
47. By, for example, Hooper, J., in Ambradu v. Mansah: (1947) (Sekondi: Land Appeal No. 1/47).

and in particular they may occupy a tutelary position in relation to the young members of the family, whose interests they may represent in family-councils.[48]

It is admitted by the Africans that such domestics are now theoretically free to leave the family if they wish; most do not choose to do so.

B. FAMILY PROPERTY.

The term "family property", which is so frequently used in reference to African Law, needs clarification. How often do we find it said: "Such-and-such is family property"? From this statement, ill-understood, a whole set of false conclusions may be drawn. The common picture of family property is that it is property within the direct control of the head of the family. On the contrary, more often the use and control of family property is divided up between the members of the family.

And again, one is told that self-acquired property passing on intestacy to the successor thereby becomes family property. What is the true interpretation of such statements?

The fact is that no-one could tell by a rapid examination of the condition and methods of a farmer whether the farm

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48. And they may have a tutelary position in regard to property - servants of a stool are often appointed as caretakers of stool property. (Their status is inherited.)

which he possesses is family property or no; such a distinction only comes in point when he wishes to sell or give away the property; or when he dies. Between an inherited farm and the family house which is commonly met with on the Coast and hinterland, there would seem to be a world of difference. If the term "family property" is divided up in the succeeding sections, it is only so as to make plain the differences in practice between such varying forms of property.

(The presumption that property is family property: According to Sarbah[49] and a multitude of decisions of the Gold Coast courts, the presumption in the past has always been that property is family property. If this was meant to imply that the use of the property was by the family as a unit, such a statement was never true. More recently, it has been accepted that the presumption is not so strong today;[50] it is respectfully submitted that the presumption might with advantage be abandoned altogether.)

(There is no presumption of family ownership of lands in Kumasi.)[51]

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49. In his Fanti Customary Laws.
50. See: Codjoe v. Kwatchey: (1935) 2 W.A.C.A. 371;
Tsetsewa v. Acquah: (1941) 7 W.A.C.A. 216;
Acquah v. Acquah & Tsetsewa: (1941) 7 W.A.C.A. 222.
51. Acc. to Smith, Ag.C.J., in Korkuah v. Yamoah: W.A.C.A. Civil Appeal No.8/49.

1. FAMILY PROPERTY IN THE WIDE SENSE.

The widest sense in which it is possible to use the term "family property" is when not only the ownership, but the use, of the thing owned is common to the whole family. In such a wide sense, we can include only such things as the principal family house[52](especially among the Fantis), and other properties which are perhaps bought (as investments) by the head of the family on behalf of the whole family. This takes the form these days of house-property in the towns; but family-farms are also encountered, which are worked by caretakers.

(a) The derivation of family property:

Before considering the ownership, use and control of family property, it is necessary to indicate briefly what properties are family property, and how they may come to be so considered:-

(i) From ancestress: property acquired or owned by the original ancestress of the family forms the basis of the family property, just as the acquisitions of her daughters form the basis of the property of the sections composing the family.

(ii) Head of family: property acquired by the head of the family acting for the family is family property.

(iii) Act of the family: where the family as a whole has either built a house or made a farm with their own communal efforts.

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52. All families have a principal family house; it is particularly in coastal towns that large houses are found.

(iv) Succession: the family as a whole has acquired title to property through the decease intestate of a member of the family, and their consequent succession to his self-acquired property.[53]

(v) Actions of members: several members of the family have co-operated in the building of a house, or making of a farm (although in such cases either: it may become their joint self-acquired property; or: they vest the immediate interest in their own sub-lineage only).

(vi) Member building or farming on family land: a member who builds a house on a family site, or makes a farm on family fallow-land, may find that the house or farm is a "tied property", i.e., it belongs to the family. Even though during his lifetime he may have the right to deal freely with such a house or farm as though it were his separate property, he may be prohibited from disposing of the property outside the family at will.[54]

(vii) Loans to members: a member who builds a house oracquires a farm through a loan from the family may find that the house or farm is treated as family property.

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53. The family as a whole acquire title; their title is, however, restricted by the dependent interests of the sub-lineage of deceased, and of the successor. See Chapter X, SUCCESSION.
54. But see: Kofi v. Manu: (N. Juaben A. Ct. Suit 57/49); "According to custom, cocoa trees planted on a family fallow land by a member of the family cannot be claimed by a(-nother) member of the same family."

(viii) In addition, a member of the family who pledges his self-acquired property, may have it redeemed by the family (case A), or by a member of his family (case B). In case A, his farm becomes family property: (sed quaere whether if he repays the debt to the family, the property becomes his individual property again?). In case B, the member redeeming will have a right to the use of the property (sed quaere whether he will use it as his self-acquired property - the likelier - or as a member using family property?); (and quaere etiam whether the debtor-member can redeem his property, and either make it his self-acquired property, or use it as if it were property which he had inherited?).[55 & 56]

(b) The ownership of family property in the wide sense.

Such family property is vested in the family as a whole by a single, indivisible, title. It seems almost unnecessary to add that the head of the family does not own the family property, nor has he any larger title, share or interest in the property than other members. No member has a separable interest in the title to family property, nor is his right in the

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55. The manner in which family property comes into existence, and the law and cases concerning this, are more fully examined below, at pp. 248-250, 256-278.
56. It should be noted that for the sake of completeness various derivations of family property have been given above: not all are of the same juristic effect. In some, ownership, control and use vest in the whole family; in others, ownership vests in the family, and use in a limited portion of the family.

property attachable at law.[57] It is incorrect to describe the members of the family as joint tenants, partners, or tenants-in-common of the family property.[58] The subject-matter of the family's title may be sold or otherwise disposed of (as where the family sells a portion of its property, or authorizes a member to do so); but it is impossible for the title itself to be divided.[59] There was a former custom called by Sarbah "cutting Ekar"[60] by which the tie of kinship binding the family could be severed, either between sections or against an individual member; and partition of property between the remaining and the seceding elements was possible: today "cutting ekar" is obsolete; partition of property - if all the family agree - is sometimes allowed to be possible, but rarely occurs.[61]

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57. It was held in Mahmudu v. Zenuah: (1934) 2 W.A.C.A. 172, (vide p. 174) that the head of the family (and a fortiori an ordinary member) has no attachable interest in family property. Where a member's interest is attached and sold by fi.fa., nothing is attached, and the sale is a mullity. Cases like Lawani v. Tadeyo: (1944) 10 W.A.C.A. 37 - which was a NIGERIAN case - cannot be extended to the Gold Coast.
58. Hence Villars v. Bafoe: (1909) Ren. 549, is misleading rather than helpful; see p. 235 post.
59. Hence how can a member's right, if attached, give any right to the transferee?
60. Kahir or kahire - literally a "head-pad"; for fuller descriptions see Sarbah, F.C.L. 33, and Danquah, A.L.C. 193 et seq.
61. In complete distinction from the law in Lagos, where partition of family property is frequently reported.
    In the Gold Coast most partition occurs involuntarily through the gradual separation of branches of the family geographically. In Tawiah v. Addo (New Juaben A Court, No. 272/46) plaintiffs claimed, as immediate sub-lineage of deceased, partition of deceased's property. The Native Court refused, holding: "Customarily, family properties

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(c) Its control.

Family property in the wide sense is controlled by the head of the family, acting as manager and representative on behalf of all the members of the family. To the head of the family falls the duty of regulating the use of the property by the members of the family (in the case of the family house, by allocating rooms, etc; in the case of investment property, by letting out the rooms, collecting of rents, keeping the accounts, etc.).

The control of the family property may be expressly or impliedly delegated, either to a member of the family, or to a "caretaker". The delegate acquires no interest in the property, although he may have claims against the family, or the head, of a personal nature.

(d) Its use.

The use of such family property (e.g., the family house) is open to all the members of the family. No distinction is made between section and section, individual and individual,

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61. (cont. from previous page) -
of such nature could not be divided among the members of the family."
See also Sappor v. Amartey: F.Ct.(1913) D. & F. '11-'16, 53 (a Ga case), where it was said:
"It has been suggested that partition /of family property/ by the Court is unknown in this country..."; but the ChiefJustice went on to say that "subject to any peculiarity of the customary local law unknown to me I think that partition is also a possible form of relief".

except insofar as such individuals are refused permission to use the property, because of disloyalty, indiscipline, or similar reasons. Each member is entitled to a room in the principal family house, if there is room.[62 & 63]

(e) The head of the family and family property:

It has been noted above that it is the duty of the head of the family to control the use of the family property. It is necessary to examine his duties, powers and rights a little more closely.[64]

First, as to his position: he is not a trustee of the property, if this is held to imply that he therefore holds the freehold or absolute interest for the use and benefit of the family, who would thus have only an equitable interest in the property as beneficiaries. Nor is his position that of an English tenant-for-life of property the subject of a strict settlement. These views would be a gross misrepresentation of the customary law, for the whole family owns the property, and whilst the head as manager acts with regard to the property subject to some of the same disabilities as English trustees, we find that his position has not been so clearly defined, and he is left a considerable margin of freedom.

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62. E.g., "where a family possesses several houses, any member of the family may live in any of these houses, provided there is room" - Asikuma.
63. The use of family property is fully considered in a subsequent section: see below at pp. 238-240.
64. It will be appreciated that some of the following remarks apply, mutatis mutandis, to the head's dealings with other family property.

(The head enjoys a similar position in some respects to the manager of Hindu joint-family property; but the analogy should not be pressed too far.) There are also analogies with the English law relating to unincorporated associations, especially as regards the right of individual members to the association's property: the English rules are instructive, but they can be no more than an amusing comparison.

The head is the manager of the family property. In lesser day-to-day affairs he is free from the strict scrutiny of the family.[65] In all major dealings with the property, (for example, if he wishes to sell it), he must consult the family since it is the family which alone can sell, and not he.[66]

The head has the power to undertake repairs to family property,[67] to furnish family houses, to collect rents,[68] and perform other necessary actions in connexion with the property.

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65. Sarbah suggests, undoubtedly correctly, that the head has greater freedom when dealing with movable, than with immovable, family property.
66. So: e.g., in evidence from: Cape Coast, Ashanti, Assin, Akwapim, New Juaben, etc. Cf. SALE, at pp. 317 ff. post. A sale made by the head without the consent of the family is voidable, not void, acc. to Manko v. Bonso: (1936) 3 W.A.C.A. 62.
Dealings with the family property without the consent of the family do not bind the family: cf. Bassey v. Eteta: (1938) 4 W.A.C.A. 153 (Nigerian case).
67. And may use the rents from family property for this purpose.
68. Which are generally paid to the head.

The head may let out rooms in family houses to tenants,[69] or give family farms out on tenancy.[70]

He has no power to pledge the property for debt without the knowledge of the family, since it is his duty, if there is a family debt, to call upon the other members of the family to contribute in order to satisfy it; it is only if they fail to do so that the property would be pledged.[71]

The head is not entitled to any remuneration at all for his services as manager and controller; nor is he allowed to make any personal profit out of the family property.

If the head grossly mismanages the family property, deals with the family property without the family's authorization, wastes or converts the money of the family to his own use, he is liable to be brought before a family meeting and deposed. The family would not take him to court for restitution[72] unless he had refused to heed a previous warning, or had converted a considerable sum.

May the head be sued for an account? it is neither customary nor seemly for families to take their quarrels into open court. One member cannot sue the head for an account, unless the

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69. Only with the consent of the family, acc. to some; (e.g., Akropong).
70. See n. 69.
71. The consent of the family is needed for a pledge (cf. evidence from, e.g., Ajumako, Akwapim, New Juaben); probably even if they fail to contribute when required.
72. So: for example, Akropong, Akwapim.

remainder of the family have consented.[73] In an unreported case, it was held that a member of a family cannot sue the head of his family for an account at all.[74]

Who can sue for the family? The head is the normal person to sue and be sued in respect of family property.[75] But any member may be expressly authorized by the family to defend the family-interest in the courts. The obaapanin has a right to sue for the family, recognized by the courts;[76] and it seems probable that any member may now sue in defence of the family, if the family's interests are in jeopardy (an authority by implication).[77]

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73. Akropong.
74. By Quist, J., in Etuah v. Richardson: (Land Court, Cape Coast, 25.10.48); but this was a case where one section of a family sued the head for apportionment of compensation paid by the Government to the family in respect of family land acquired.
    Following: Sappor v. Amartey: (1913) D. & F. '11-'16,53, Ren. 787; Pappoe v. Kweku: (1924) F.Ct. '23-'25, 158.
75. "The head should inform the family before going to court over family property. As soon as he sees that an action is necessary to defend the title to the property he should call an immediate meeting of the whole family and then inform them, so that they can assist him by raising funds, and take the decision whether action is necessary or possible. If the elders are absent, and it is urgent, the head can inform the people next in rank in the family before taking action." - Akropong.
76. See ante, pp. 204, 205.
77. Mahmudu v. Zenuah (already cited), and oral information. In Busumafie v. Milbah: (1948) Unreported: Land Court, Cape Coast, 18.10.48, coram Quist, J., it was said that "the right of members of a family to sue in protection of the family property is well recognised by the Courts, and cannot be disputed."

Can a man sue in defence of his inherited farm? It is preferable that he should be authorized by the family, or at least inform them of what he is doing. A victorious suitor against such a member may find himself with an empty victory if the family interest has not been put in question by joinder of the family. In Eccuah Abbah v. Smith: (1910) Ren. 21, Earnshaw, J., permitted a person holding a portion of family land to sue in trespass a defendant for removing crops planted on the land by the plaintiff.

When a person sues as representative of the family his personal property is not liable to be taken in execution of any judgement given against the family.[78]

(f) Liability of family property for family and member's debts:

Family property may be seized in execution for a debt of the family. Such family debts include debts contracted by the head (or other representative of the family) when expressly authorized to do so; debts contracted by the head on behalf of the family, and subsequently ratified or accepted by the family; debts contracted by members on their own behalf, and guaranteed at the time or later accepted as a family debt.[79]

Private debts of members: the former rule that the family was unconditionally liable both for the torts and for the debts of

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78. But, acc. to Hammond v. U.A.C.: (1936) 3 W.A.C.A. 60, a head of a family is personally liable for costs awarded against him when he is suing in a representative character.
79. See immediately below, and Chapter on SUCCESSION.

its members is now generally accepted no longer to apply, both by the Africans, in their courts and dealings, and by the Supreme Court.[80]

A family is not now liable to have its property attached for a member's private debt. But an attachment is an obvious nullity in so far as it attempts to seize the family-interest in the property. In so far as it attempts to attach the member's interest in family property, this is also a nullity, since Mahmudu v. Zemuah rightly held that a member of a family has no attachable interest in the family property. A sale of such an attached "interest" is therefore also a nullity; the family need not interplead; and can only lose their right by long acquiescence.[81]

Where there is a document given in connexion with a loan (as there usually is today), then members of the family may sign as witnesses. Such signature may be variously interpreted:

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80. Asiedu v. Ofori: (1932) Suit No. 97/32, coram Deane, C.J.
81. See LONG POSSESSION, esp. at pp. 721-2 ; and cf. Stephens v. Blay: (1910) Ren. 578; but see Basel Mission Factory v. Suapim: (1911) D. & F. '11-'16, 13, coram Crampton Smyly, J., in the Supreme Court:-
"In my opinion where one member of a family holds himself out to the public as the owner of real property, it is essential that the family should have some independent corroboration if they wish to set up some private arrangement between themselves for the purpose of defeating his creditors."

(1) the existence of the debt is witnessed; liability to pay it is restricted to the debtor, his successor, and the property of the deceaseddebtor;

(2) the members have signed as individual sureties: they are alternatively liable with the debtor or his successor;

(3) the family have signed, not merely as witnesses, but as guarantors - they have accepted, on behalf of the family, family liability for the debt. The family are then liable, and family property may be taken in execution if the principal debtor fails to pay. But there must be express words or acts at the time to indicate that the member's debt is accepted as a debt of the family.[82] Only one or two members need have signed as guarantors on behalf of the family, but the transaction should be at least notified to the abusuapanin or obaapanin.

If the family allow a member to hold himself out as owner of family property, "very satisfactory evidence is required to prove that the land or house is not his sole property" - Russell v. Martin.[83]

2. FAMILY PROPERTY WITHIN SUB-LINEAGES.

It is the exception rather than the rule for family property to be not merely owned, but also used and controlled, by

82. Information from, inter alia, New Juaben.
83. (1900) Ren. 193. Cf. Basel Mission Factory v. Suapim above.

the whole family. It is rather the custom for family property to be restricted within sub-lineages, which are divisions of the maximal lineage, the family. This is an aspect of the separation of the family into sections or branches; and is illustrated by the normal process of devolution on intestacy of self-acquired property.[84] When a man dies seised of self-acquired property, it is true that this property then becomes family property, but the right to use and control the property is confined immediately within his own sub-lineage.

Apart from this, we find that where a family is divided into two or more main sections, these sections enjoy a certain amount of autonomy in their dealings with property - the powers they may possess vary widely from the case where the section maintains its sole right to succeed to the property, to the use of the property, to the disposal of the property (perhaps even without the concurrence of the rest of the family), to the case where members of the section in fact use the property, have a prior claim to succeed to the property, and may dispose of interests in the property only with the consent of the whole family.

It therefore appears reasonable to make a distinction between family property in the wide sense, and family property within sections; whilst so doing, it must be emphasized that the root-title to the property is in the family as a whole;

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84. See the Chapter on SUCCESSION, post.

and the distinction is not made in order to whittle down or negative the family-interest in such section-property.

(a) Its derivation:

Section-property is typically derived from the acquisitions of the daughters of the original family ancestress, and their lineages. The subsequent acquisitions of individual members of a family go, on their death intestate, to their immediate (minimal) sub-lineage ascertained matrilineally. In the case of a male member, this means that the immediate interest is acquired by the descendants of his mother in the female line - including his uterine brothers, sisters, and sisters' children. This small sub-lineage is the one within which the use of inherited property is normally confined: one out of its number may be selected as the successor of the deceased. The interest of the sub-lineage is a limited interest, inasmuch as it does not cover the ultimate title (which is with the whole family), and it is a dependent interest, in that it depends on the title of the family of which it is a member. On this interest of the section or sub-lineage depends the limited interest of the individual successor.[85]

(b) Its ownership:

The ownership of section-property is not restricted to the members of that section. Title to it is in the family as

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85. The individual interest in inherited property is examined at 3. below.

a whole. (Such title may be absolute, where the property is capable of absolute ownership free of stool-interests; or itself dependent, where it depends on the absolute interest of a stool.)[86]

The fact that ownership is with the family explains certain features of the customary law, namely, that the family has a say in the appointment of a successor to such property, that the family can oversee the manner in which the property is maintained by the successor, that the authorization of the family is required before there are any major dealings with the property, and so on.

(c) Its control:

The control of section property appears to be divided. It seems fair to say that in minor and day-to-day matters the section, through its head, controls the use of the property. But in any major matter, permanently affecting the interests of the family as a whole - such as sale - the whole family, and more especially the head thereof, must be consulted. Contrariwise, the head of the family must consult the section - through its head - before he attempts to dispose of the property, or to interfere with its use. The other sections, as such, have no say in the use and control of the property.[88]

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86. Cf. THE STOOL AND PROPERTY, p. 41.
87. So, for instance, evidence from Akropong, Mankessim, Akim Abuakwa; "one section cannot sell by itself; but if all three sections concur together, they can sell the land (sc. section's land)" - Essiam.
88. Cf.: "each branch of the stool family has its own land, with which the other branches cannot interfere". - Essiam.

Several factors appear to affect the rules which have to be formulated: (1) The size of the section: where the family as a whole is divided into "primordial" sections, say, two or three in number (as is frequently found), the section has a much larger say in the control of its section-property, and would, for instance, vigorously oppose the appointment of a successor from another section to it.[89]

(2) Physical separation: where the section or sub-lineage is physically separated from the rest of the family - e.g., where it has its own house, or it lives in a different quarter or town - the control of the section over its property is correspondingly enhanced. In many cases it was stated that, if the position was of this kind, then the section itself could initiate such acts of control as pledging and sale, but would refer the matter to the abusuapanin for information or approval.[90]

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89. The appointment of a successor from another section, whilst there remain persons within the section entitled to succeed, is a theoretical possibility only.

90. Many such cases have occurred in New Juaben, where a segment of a family has emigrated, leaving the major portion in Ashanti. An illustration was the case of Fordjuor v. Ayakwa: (1950) Unrep. Nat. Ct A, New Juaben, Suit 75/50), where a segment of the family from Ashanti Juaben settled in New Juaben. Plaintiff was the present head of this segment, as matrilineal descendant of Wiabo, the original immigrant. He maintained that the property of this New Juaben "family" was the property of the section alone; and that he could deal with the property confined within the section in any way he pleased without consultation with defendant, who was the Abesimhene of Old Juaben, and a member of the old extended family.

/over

(3) The nature of the property: where a section is a compact group inhabiting a house, the use of which is primarily confined within their section, the head of the household - in this case probably the section-head - controls the details of use: allocation of rooms, repairs, receipt of rents, etc.; and he may have wider powers of granting interests in the property, as by grant of temporary tenancy, letting of rooms, pledging, etc. Similarly, with farming land, the sub-lineage will apportion out the use of this, and may conclude temporary tenancy agreements, provided members of other sections are not deprived of farming land when required, and provided the title of the family is not permanently affected.

(4) Variances in custom: custom appears to vary, not only as between district and district, but as between family and family. Conditions for a separation of sections' powers are more favourable in Fante and Akwapim areas; and investigation shows that in those districts sections are tending to acquire increased powers over their property. Differences are rarely brought into the limelight of the open court, since disputes will be settled as a rule by arbitration within the family.

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90. (cont. from previous page) -
The contention was upheld by the Native Court, which ruled that plaintiff and his "family" were absolutely entitled to a C.R. grant received in respect of the section-property devastated by swollen shoot, and situate in New Juaben.

The question of whether a section or the whole family should manage certain property was brought to the foreground in two cases from Cape Coast Land Court.

In Appeal Suit 33/1946[91] the issue was whether the head of a branch of the "Twidan family" should manage and control the land in dispute, or the Abusuapanin, "head of the extended family, known as the Twidan family".

Jackson, J., found that:

> "The Tribunal decided that /K.E. (head of the section)/ was the person entitled to manage and control the land as being the Head of that particular branch in whom the land was vested as family property."

But note: (Family property is not vested in any one person, if this is taken to imply vesting as we understand it in English law.) He went on:

> "Customary law is quite clear that if children of a common ancestor acquire land by their own act, each child who acquires land in this manner and who dies intestate sets up ancestral land, and the right to control and manage that land becomes vested from generation to generation in the descendants of the person who first acquired the land, and that this right cannot be traced through any person above the children of that ancestor who first acquired the land."

The second paragraph can be understood only to refer either to the female children of a female ancestor, or else to a patrilineal (i.e., non-Akan) custom such as that of Winneba. In any case, the right in dispute here appears to be one of

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91. Unreported: judgement given 28.6.47.

management and control; presumably, there was agreement that ultimate title was in the family as a whole.

The other case was Paramount Stool of Breman Esiam v. Akyirefi,[92] before Quist, J. The dispute concerned the Paramount Stool Family of Breman Esiam.

It was found that:

> "the Paramount Stool family, known as the Nsona family, consists of three branches, each of which owns land reserved for the use of its members and controlled by such branch, apart from what are regarded as general stool lands attached to the Paramount Stool."

(A candidate for the paramount stool might be chosen from any one of the three branches.)

The defendant-respondent claimed that the land was the property of the section of which he was a member, and

> "alleged the exercise of certain acts of ownership by the heads or principal members of his branch, which establish his section's right to the land."

These included:

(i) A pledge of the land by one member of the section to another.

(ii) Redemption by himself of the land.

(iii) Grant of a tenancy by himself to a member of the Stool family, who paid rent therefor.

(iv) Sale of a portion of the land, without protest from the paramount stool.

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92. (1948) - unreported: Land Ct, C.C., 1.10.48.

These grounds were not adequately considered, the land being adjudged to attach to the paramount stool on the ground that the pledgee under (i) above had ascended the stool, and hence the land became permanently attached to the Paramount Stool. This part of the judgement is considered elsewhere[93] (and, with due respect, dissented from); but one may note that of the grounds alleged, three are transactions within the family, and two within the section, so that they would not, in any case, be strong evidence for absolute separation of ownership.

(d) Its use:

The use of a section or sub-lineage's property is in general restricted to the members of that section. Title is indivisible, but use is divided. The restriction is not an absolute one; it is customary for members of a family desiring land on which to farm, or a room in which to reside, to approach members or sections of the family who have land or room to spare. Refusal to provide this, where it was available, would be taken to a family arbitration.

Apart from this exception, only members of the section are entitled to the use of a family-house belonging to that section (unlike the principal family house, the use of which is in theory open to all members of the family). Family members from other sections asking for room would - if they

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93. See THE STOOL AND PROPERTY, p. 67.

asserted their right to live in the house - be told to try elsewhere. There must not be forgotten the traditional moral duties of hospitality and the offer of a helping hand to family members, and it is unlikely that a member would in fact be refused shelter, except for good reason.

The use of farming land that is section-property is immediately limited to the members of that section, and the use of portions of it is in practice further limited to individuals within that section. A member of the family (even within the section, and thus more strongly if a member of another section) cannot use an individual's or section's land for farming without permission from the individual or section first; but as already noted, an unreasonable refusal to allow the use of spare farming land to such a member would be brought before an arbitration.

3. INHERITED PROPERTY.[94]

The terms "inherited property", "ancestral property", and "family property" are commonly used as if they were interchangeable. As pointed out when dealing with family property in the wide sense, "family property" need not be either ancestral or inherited;[95] hence it appears dangerous to use the term "family property" so loosely as to include the wide interest of the family, the interest of a section, and the

94. See also the Chapter on SUCCESSION, at pp. 578 et seq.
95. At pp. 213, 214.

interest of an individual in inherited property. The term "ancestral" may be used to indicate the nature of the property-right; the term "inherited" to indicate by what means this right has come.

It is therefore proposed that the term "inherited property" should be reserved for describing the interest of an individual taking property by way of intestate succession. The ultimate title to such property is with the family as a whole; one may call this title "family property", and the limited interest of the individual holder "inherited property".

The term "inherited property" includes both self-acquired property of a deceased member passing on intestacy to the successor appointed by the family; and property already ancestral similarly passing by way of succession. Once the chain of devolution as ancestral property has thus commenced, there is no difference whatsoever between the rules affecting each kind of property.[96]

The dependent interest of the sub-lineage in inherited property is itself inherited; it will be seen that all forms of family property, whether in the wide sense, as section-property, or in a narrow sense, are united by the common fact of ownership of the absolute interest[97] by the whole family.

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96. See: Larkai v. Amorkor: (1933) 1 W.A.C.A. 323.
97. Absolute as regards the family; it may be dependent as regards stool interests.

(a) Who owns it:

It is necessary here to make a distinction: the family owns the absolute interest in the property; the individual holder owns a qualified interest, derivative from that absolute interest. From the absolute interest of the family as a whole derives a whole series of qualified interests - through the decreasing sub-lineages - until we arrive at the most concrete and restricted right of the individual holder. This is the true explanation of the Akan law of succession: the right of the successor to succeed, and thereafter to enjoy the property, is derived from his membership of his sub-lineage, and from his sharing of their general interest in the property, which in turn is derived from the family-interest in the property.

In Villars v. Baffoe: (1909) Ren. 549, the Full Court attempted a description of the process: (in referring to the succession to a deceased head of a family):-

> "...the property in and possession of the chattels claimed in this case regarded as "family property" do pass to the "family", i.e., in the first instance to the persons who represent the family on the decease of the head of the family, and later to the properly constituted head of the family when appointed in place of the deceased head".

The Court had no need to invoke English law, but decided, obiter, that a description by English law would mean that

> "the deceased must be held to have been a joint owner of the chattels with the rest

> of the family and not a trustee of the same for the family".

The result would be, as in native customary law, that they would pass "to the rest of the family as surviving joint owners".

It is not clear whether the "head" was a true head of the family, and the subject of discussion "Family property in the wide sense"; or a successor or mediate head, and the property "inherited". The judgement, necessarily inexact insofar as it attempts to describe a purely African phenomenon in English legal terms, does however serve to negative some common assumptions, e.g., that a head is a "trustee" for the family.

The case is misleading if it gives rise to the impression that the property (or ultimate title) in inherited goods passes either to the head, or to a successor.

Nor is it clear from the report (assuming a true head is under discussion), whether the succession is to the family property which he controls, or to his private property.[98]

(b) Who controls it:

Where an individual succeeds to property - inherited property - he enjoys, during his lifetime, a large measure of control over it. If it is a farm, he it is who decides when and where to farm, and what to grow; he makes what arrangements he wishes for carrying out such farming, by the employ-

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98. This may be a Ga case.

ment of labour - that of his wife, children, and strangers (whether as caretakers or labourers), and so on. He can raise money to finance his farming, or because of debt, on the security of his farm; advance sales of his crops do not need the permission of his family; but before he pledges or mortgages his farm it is at least wise to consult his family, and custom strictly lays down in many cases that the pledge or mortgage is not valid unless the family have consented to it first.[99] In practice, the individual holder often fails to obtain family consent, which leads to trouble if the farm is attached for the debt. It is customary for a member of a family to approach the family first, if he is in need of money; if they cannot provide it, then they will more readily permit his giving of his inherited farm as security.

The holder of inherited property lacks the ultimate power of sale: he cannot sell the whole interest in the property - which would include the family-interest therein, without the consent of the family (or rather, without the authorization of the family).

He cannot give away the whole interest in the property unless the family authorizes him to do so - but to this rule there are apparent exceptions. The exceptions are not real, since, for instance, if he gives the farm to a fellow-member of the family, he passes only his own limited interest, and the

99. Members of the family (including the Obaapanin, for instance) should have signed as witnesses.

interest of the family remains unaffected: he can therefore do this on his own initiative.[100]

The holder of an inherited farm is also permitted to grant a temporary interest by way of gift over an inherited farm to his wife - especially if she has assisted him in the farming of the land; and to his children.[101] Such an arrangement does not normally endure after his death, unless the family confirm the grant, which is frequently done in the case of children, less often in the case of wives.

(c) Use of such property:

The use of inherited property is confined to the individual holder in the first place, at least till his death or till he is deposed from his position by the family; it is contrary to custom for others to use the inherited property without his permission. This applies even to fellow-members of the family;[102] similarly, his wife and children receive permission to use the property from the individual. (Such permission is, of course, almost inevitably tacit.) The use of inherited

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100. He should consult the probable successor, who might otherwise object to the arrangement.
101. But as a rule, only over part of the farm: the family would object if he gave away the use of the whole farm in this manner, even as a temporary gift.
102. So: Akwapim. He may go before the family if he unreasonably refuses. And in Abbah v. Smith: (1910) Earn. 21, one member sued another for trespass on the former's inherited farm. It was said, obiter, that even if the head or the family authorized the defendant, such action would be illegal and repugnant. Sed quaere.

property is part of the holder's qualified interest, and the most important part. It is as individual in its effect, as the interest of the family - their absolute interest - is communal.

To the casual eye there is little difference between the use which an individual may make of his self-acquired and inherited property.

There is no absolute duty for the individual to make proper, or any, use of his inherited property; but if he fails to use it, it is likely that the family will suggest either that other members should use it, or else that the property should be put to commercial use - for example, by the letting of rooms in an inherited house.

Fruits: enjoyment of the fruits is part of the usufructuary interest which the holder of inherited property possesses. Such enjoyment is confined to him, and those claiming under him, e.g., his wife. The fruits of his property belong to him absolutely, and he may dispose of them as he pleases.[103] If the property inherited is a house, in which there will probably be living members of his sub-lineage, and dependents both of deceased and himself, then he may be required to devote a portion of the receipts from the property to its maintenance.

Owing to a certain looseness of terminology, one may falsely conclude that an individual may sell his inherited

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103. Cf. Danquah, A.L.C. 205.

farm: this confusion stems from the fact that he is entitled to sell the fruits of the farm as he pleases, e.g., the cocoa-crop, even when still on the tree; and such a sale is loosely called "sale of the farm" by the Africans, when all that is implied is sale of the fruits. (A farmer may dispose of the product either by (1) an advance-sale of the crop, coupled with an advance of part of the cocoa-price; (2) a loan; on the security of the crops. Under (1) the creditor already has right to the crop. His rights are therefore limited to coming on the farm and plucking the cocoa if the farmer refuses to hand over the crop. He acquires no interest in the land. Under (2) the creditor is in theory limited to plucking the crop under order of the Court in satisfaction of the debt, if the farmer fails to repay. But in practice the creditor may sometimes fi.fa. the farm itself; and the farmer's interest in the land, which may be qualified both by the interests of the family and land-owning stool, is taken in execution. Strictly this is illegitimate. One cannot evade this conclusion by holding that the creditor acquires an interest "pour autre vie", since the farmer himself has not got an estate for life. The farmer might also pledge or mortgage the farm, and the theoretical position is as in (2).).

4. SELF-MADE PROPERTY ON FAMILY LAND.

The land-tenure position is complicated where individual members of a family make farms on family land, where they replant inherited farms, or extend the limits of inherited farms. Members also build their own houses on a family site.

Where a farm or house is the product of an individual's own effort or money, then theory lays down that it is his self-acquired property. It has been suggested that such self-made property, if on family land, itself becomes family property, i.e., in the same position as inherited property. This is partially correct. It was difficult to elucidate clear rules for such a position; it seems clear that such property falls between self-acquired property, and inherited property. Whilst on the one hand the maker has exclusive right to such property, and cannot be dispossessed like an ordinary successor, yet he cannot dispose of the property outright without the consent of the family. The family interest in the land thus pervades, as it were, the things placed thereon. (One may compare the restrictions placed by custom on the right of an individual to alienate a house or farm made on land "begged" from another individual or family.)[104]

104. In Kofi v. Manu: (1949) Unreported: New Juaben A Court, Suit No. 57/49, the Native Court affirmed the exclusive right of a member who plants cocoa on family land, as against any other member of the family.

"According to custom, cocoa trees planted on a family fallow land by a member of the family cannot be claimed by a /sc. another/ member of the same family."

/over

Mere replacement of trees in an inherited farm does not destroy its character as inherited.

The right to a farm includes the right to continue cultivation in the direction of cultivation, so that a farmer may rightly object if his neighbour cultivates so as to cross this line. I am uncertain whether such an extension of cultivation of an inherited farm would itself rank as inherited; but I feel that it would probably not, since African terminology separates each year's clearing, and will call each a separate farm.[105]

5. POWERS OF THE FAMILY OVER THE SELF-ACQUIRED PROPERTY.

(a) Of the head:

Formerly the position with regard to a head's self-acquired property was similar to that in regard to a Chief, namely, that all his self-acquired property became on his appointment attached to the Stool and part of the Stool property (in this case, family property).[106] The head was thus incapable of enjoying private property.

Later, he was permitted to enjoy private property in his possession if he declared it as such at the time.

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104. (cont. from previous page) -
And Danquah, A.L.C. 198, says: "...the farm or house on ancestral land becomes automatically ancestral property on the owner's death."

105. Reference should be made to Chapter V, SALE, pp.306, 307, for a further analysis.

106. See STOOL, p. 71; and Danquah, A.L.C. 204-5, 210.

At the present day he may freely own and enjoy his own private property, whether acquired before or after his appointment; and the family have thus lost their special power over the head's private property.

(b) Of a member:

Besides the family's interest in the ownership of family or inherited property, they also have an interest in futuro in a member's self-acquired property, since this will naturally pass, unless left otherwise by will, or disposed of inter vivos by the owner, to the family, and thereunder to the successor, on the death of the member.

It is questionable how far the family can claim to exercise control over the use by the member of his self-acquired property. On the one hand, I was told that they can exercise no control whatsoever; and the individual is free to do what he likes with his own property, e.g., sell,it, pledge it, give it away, without any necessity for asking permission from the family, or even of informing them of the transaction before or after it takes place.[107]

On the other hand, I was also told that no man can deal freely with his self acquired property, but must always tell the family before selling or otherwise disposing of it outright.[108]

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107. Cf. Ratt. A.L.C. 338-9.

108. (See next page).

108. (From previous page)-

To summarise some information received:

SALE:	Family Consent	No consent
Informants from:	Bekwai	Kumasi (notice only)
	Adansi	Ashanti
	Asikuma	Jumapo
	Adukrom	Koforidua
		Aburi
		Akim Abuakwa
PLEDGE:		
	New Juaben	Kumasi (notice only)
	Adansi	Bekwai
		Ashanti (notice only)
		Jumapo
		Akim Abuakwa
		Akropong
GIFTS AND WILLS:		
	Akim Abuakwa	Essumegya (if written)
	Jumapo	Akropong (" ")
	Adukrom	Aburi (" ")
	New Juaben	Akim Abuakwa
	Akwapim	(" ")
	Bekwai	
	Adansi	
(oral)	Essumegya	
	Asamang	
	Cape Coast	
	Ajumako	
	Ashanti	
(oral)	Aburi	

And Danquah, A.L.C. 197-8, says that if a man wished to make a valid conveyance of his self-acquired land, or a "gift or transfer of any particle of his wealth he could only do so with the knowledge of members of his family so that on his death the recipients could enjoy the property conveyed to them without any question from the surviving members of his family",

There was also a middle view, which held that he should inform the family; or at least that it would be a wise precaution.

The view that the family's consent is required probably represents the earlier position, for a time when there was little self-acquired property, and even that had a destined succession attached to it. This may be the position among less sophisticated Africans today. The view that an individual may freely dispose of his self-acquired property represents the growth of individualism, due to the increasing importance of commercial enterprise and individual effort in the creation of wealth. The truth, as usual in such cases, must be considered to lie somewhere between the two views. In some cases, the custom given by expert informants is not borne out by the practice of the native courts or individuals in the area, and the tendency is undoubtedly towards a decrease of the family's control. Whilst, then, it is today probably not essential that the family give their permission before a member disposes of his self-acquired property inter vivos, nor is it mandatory to inform them of the intention to alienate in advance, it is both wisdom and fairness to inform the family, so as to avoid disputes after the death of the member, when the family are otherwise almost certain to contest the dispositions, or indeed that the property was self-acquired.[109] In addition,

109. This was an explanation given by many African informants.

it seems that no member of a family could by custom strip himself of all his property, so that there would be nothing to pass to his successor on his death; and it is certain that the family would today strongly protest if he attempted to do so.

Such a limitation on the power of an individual to alienate all his property, whether recognized by the superior courts or not, deserves, in my opinion, to be recognized (if, indeed, it has not already the force of law).

It will be observed that disposal of self-acquired property by means of an absolute gift or an oral customary will is more strictly controlled. This custom is being eaten away in various ways. Many Africans hold that the use of writing enables the requirement of family consent to be evaded; the view that a samansew does not operate unless the family consent is gradually being overcome by a change in practice, and particularly by a changed attitude on the part of Native Authorities and Native Courts, some of which now hold that the consent of the family is not required, and it is only necessary that there should be independent witnesses and aseda given.[110] Where in any one place the rules regarding gifts inter vivos are laxer than those regarding death-bed dispositions, the requirement of family consent can be evaded by an individual's disposing

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110. Cf. the decisions of the Akim Abuakwa State Council, and of the Ashanti Confederacy Council; and also information given in SUCCESSION, at pp. 611 et seq.

of his property during his lifetime, vesting immediate possession in the donee.

Whilst the family cannot attempt to control the use by a member of his self-acquired property, and he may use it or abandon it, waste it, let it, pledge it, etc., yet there are certain customs which do not appear to have the force of law, but deserve mention. They arise from the strong sense of family obligation; e.g., although a member of the family has no right to reside in the self-acquired house of another member, yet in my experience they have a strong moral claim founded on custom, which is usually met where possible - so that one finds that even educated Africans may have many of their poorer relations living with them free. The reason given by educated informants was that it would cause great dissension with the familyif accommodation were refused when available.

Again, although there is no legal claim upon the earnings of an individual to meet the school-fees of junior family members (except in the case of a child's guardian, father or maternal uncle), yet one regularly finds that members of the family who earn higher wages in a regular job contribute part of those wages to the support of other of their relatives. Members are also conscious of their duty to make contributions to family funds, especially for such purposes as meeting family debts. And similarly, a man with a self-acquired farm will oblige, if possible, members of his family who have no land to farm, and wish to farm on his land.

6. LIABILITY OF MEMBER FOR FAMILY DEBTS.

The old rule regarding the liability of individual members in regard to family debts is put forward in Sarbah,[111] where he says:

> "Not only does the Customary Law render the person or persons who defray the burial expenses of any person prima facie liable and responsible for the debts of the deceased, but, as Bosman states, the members of a family and the head thereof are jointly and severally liable for any family liability. If a member of a family contract debt which benefits the family or commit a wrong for which he is liable to pay damages or give satisfaction, the other members of his family are bound to pay, or such members must be given up by the family to the person making the claim." (112)

This rule is in desuetude: it is obviously now contrary not only to justice and equity, but also to express legislation (Slaves Emancipation Ordinance[113]), by which the position of debt-slaves was abolished.[114]

It was, however, applied in one guise in Hammond v. U.A.C.[115] where the W.A.C.A. held that:[116]

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111. F.C.L., pp.38-9.
112. See also: Sarbah, F.C.L., 96; 115-116; Lokko v. Konklofi: (1907) Ren. 450, at p. 451, on the subject of "panyarring". And see Ratt. A.L.C., 370.
113. Cap. 92 1874; and the Re-affirmation of the Abolition of Slavery Ordinance, No. 6 of 1930.
114. See also: Chapter on PLEDGE - the position of pawns, p.399.
115. (1936) 3 W.A.C.A. 60.
116. At p. 61.

> "where a person sues as head of a family he thereby renders himself personally liable, according to native law and custom, for any costs that may be awarded against him".

Accordingly, in this case, personal attachment of the plaintiff by writ of Ca.Sa. was permissible.[117] Cases where a stool-holder was held not personally liable if he sued in a representative capacity were distinguished, on the ground that stool property is on a different footing from family property.[118]

It is submitted with great respect that the decision cannot stand, as being in conformity neither with present customary law, nor with the trend of decisions in Gold Coast cases.[119]

The present law is, it is submitted, that members of the family are not liable individually or with their private property for debts of the family; and this rule holds equally for

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117. But what can traditional customary law know of liability for costs in the Supreme Court?

118. See: Angwah Bennieh v. Akaba Kangah:) referred to at
Oluyemo v. Ohene Agyemfra IV :) 3 W.A.C.A. 60.

119. E.g., in Lokko v. Konklofi (cited above) Brandford Griffith, C.J., said that family land can only exceptionally be seized in execution, and not for the private debt of a member.
The family and its members now get the best of both worlds, African and English, since their former customary liability no longer applies; and under English (Gold Coast) law they are not liable individually. The learned Chief Justice said in the same case (at p.451):
> "The decisions as to family land, which reach far back, show that the English Courts will not, other than in exceptional cases, permit family property to be seized in execution. In this way, the family reaps the advantage both of the native and English law, without the disabilities of either system."

the head of the family, when suing as representative of the family, and not in his personal capacity, since - as mentioned above - the head ranks only as any other member, albeit one with special managerial functions.

C. THE USE OF FAMILY PROPERTY.

Title to the property being with the family, what rights of use and control do the members exercise over that property?

1. AGRICULTURE.

As regards agricultural property the general rule is that each member is entitled to farm the land farmed by his ancestors unless for good reason. This implies in particular that sub-lineages or sections of the family are entitled to use of the land confined within their sections.

On the other hand, the family as a whole have a right by virtue of their title to the property to control the allocation of family land to members, and their use of it. Certain contests or strains are thus set up, between the individual member and his section or house and between one section and the rest of the family.

(a) Family Farms:

Family farms, where the family owns not only the root-title to the land, but the immediate interest in the farms as well, and where the land is farmed as a co-operative enterprise

of the family, are extremely rare. Farms which pass to the family by purchase, gift, or succession may be worked by a caretaker appointed by the family (who may be either a member or employee); the profits then go direct to the family.

Is a farm made by the joint labour of several members of the family a family farm? Such cases arise where brothers clear and farm one piece of ground, and co-operation is also found between close cousins. The superior courts tend to hold that the effect of this is to vest the title in the family as a whole.[120] The Native Courts, and African informants, take a different view.

Such cases are fairly common, the effort of clearing the forest for the cultivation of cocoa being a sufficient explanation. Usually only close relatives will thus combine, brothers and sisters, first cousins, uncle and nephew; and it was stated to be very rare (if it occurred at all) for distant relations to cultivate in common. There are thus no complications due to membership of different sections within the family.

The general view was that if two brothers jointly cleared and made a farm, the effect would be to make them joint-owners absolutely entitled; during their lifetime the family would have no claim at all.[121] Cases occur in the Native Courts of up

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120. Cf. Tsetsewa v. Acquah: (1941) 7 W.A.C.A. 216.
121. Unless the parties agree at the time that it should be treated as a family property.

to four brothers cultivating in common; the number of persons does not appear to affect the rules, providing the labour is for their individual benefit, and not a joint family effort.[122]

The customary practice is for the farm, whilst it remains undivided, to be held on a joint tenancy (not severable at the will of one party); but if there is any danger of dispute, either in the parties' lifetimes, or as to succession to the farm (as where the parties are not close relatives), the farm is customarily divided physically between the parties, each then being absolutely entitled to his portion as self-acquired

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122. A most striking case was that of Kofi v. Mamu: (1949) Unreported: New Juaben A Court, Suit No. 57/49. In this case Y.K. (deceased) had self-acquired land. He gave the land to his maternal nephews (the two defendants and two others), who were all brothers, to plant cocoa thereon. Y.K. died, his property being inherited by plaintiff. The brothers continued to work their cocoa farm. The two other brothers died, their interest being taken by 1st defendant.

The plaintiff, as successor to Y.K., claimed the property as family property (being stimulated to do so by payment of a cocoa-rehabilitation grant to defendants in respect of the land). The matter was referred to the arbitration of the local chief, the Nifahene, who rejected the claim, and declared the two surviving brothers solely entitled as joint owners.

The Native Court sturdily upheld this decision, declaring that: "the action therefore by the plaintiff bears no substance according to custom". One of the deciding facts was that "the cocoa trees on the land were planted by the defendants", and so the plaintiff "has no right to claim ownership of it".

And in Acquah v. Acquah & Tsetsewa: (1941) 7 W.A.C.A. 222, a man was assisted by his brothers and family-domestics in making and working a farm; but it was held that this did not make the farm family property, and it could be devised by English will.

property. In the case of close relatives, this is not necessary, since the survivor(s) will be potential or preferential successors to the deceased co-tenant, and will succeed semi-automatically to his holding on his death.

A similar result to that achieved by the English law of joint tenancy - the survivor in possession - is thus achieved, though for a different reason.

Where A and B, two brothers, thus cultivate in common, and A dies, B is appointed his successor, both generally, and with reference to A's interest in the joint farm. Attempts to elicit elaborate juristic distinctions from informants met with no success; in theory B holds his own share as self-acquired property, and A's share as inherited property; but the Africans do not look at the matter in this light. It seems certain that:

(1) B cannot be disturbed from his holding, since his labour has gone into the making of the farm;

(2) he probably cannot dispose of the farm without the consent of his family: so the position is intermediate between self-acquired and inherited property.

(b) Individual Farms:

It is much commoner to find farms owned and worked by individual members of the family. The unit of labour in such a case is usually the individual holder himself, together with his family in the European sense - he is customarily assisted

by his wife and children.

If the farm is made by the individual on land not belonging to his family, then the family have practically no control over it during his lifetime (see above, p. 243). Neither his use, control nor disposal of such a farm is controlled by the family (with exceptions already noticed).

If the farm is made by the individual by his own efforts on family fallow-land he has exclusive right to the farm during his lifetime, and the family cannot dispossess him in favour of another member; but (1) he cannot alienate the farm except subject to restrictions similar to those applying to inherited farms; and the family may supervise the use of the land more closely than is the case with self-acquired farms; and (2) where the member is assisted in cultivation by other members of the family, the presumption in favour of its being a family property, i.e., the family having title to the farm, is much stronger than with a farm made on land not belonging to the family.

If the farm is inherited, then the farmer's right against the family is weaker. Africans sometimes describe the successor as a "caretaker" of the inherited farm; but the holder's interest is greater than that of an ordinary caretaker.[123] The statement contains an element of truth in that it reminds us that the holder of inherited property is a sort of "trustee"

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123. Cf. Chapter VIII, CARETAKERS.

towards the property, which he must neither dissipate nor waste. It is unusual for a man to be dispossessed of his inherited farm merely for making insufficient use of it; the main reasons for dispossession are in addition that he is causing permanent damage to the value of the farm, or that whilst he is not using the farm, other members of the family are landless. It is incorrect in one sense to say that the right of the holder of inherited property is not exclusive, since - whilst he is holding it - he has a right to the use of the farm to the exclusion both of other members, and of strangers; but he cannot set himself up as an individual owner.

It is unusual for the holder of an inherited farm to be told what to grow thereon; usually there will already be cocoa planted there, or it may be a foodstuffs farm. In any case, the farmer - unless he is expressly told to the contrary at the time the property is handed over to him - may use the land in any way that he pleases (the exceptions include cases where he is given a cocoa farm specifically to use the proceeds for the maintenance of dependents, paying off of family debts, etc.).

The farmer's wife and children assist him in the cultivation of his inherited property; and they can thus acquire temporary rights in the land, such as the right to interplant foodstuffs, or even to temporary use of an earmarked portion of the farm; but they do not acquire permanent rights without the family's consent. Grant of temporary rights is more readily

made, and more readily accepted by the family, where the farm is for foodstuffs, than where it is cocoa.

Permanent cultivation in an inherited farm - as opposed to the crops picked, or the foodstuffs reaped - belongs to the family. This usually means different types of economic trees, both timber, palm, and cocoa. Hence as a general rule the individual holder has no right to:

cut down timber trees, and pocket the proceeds, without the concurrence of the family;

receive rehabilitation grants for a devastated cocoa farm, and convert them to his own use - in such a case, he is trustee of the money for the family;

(especially in coastal areas) cut down palm trees without the knowledge of the family; etc., etc.

Treasure-trove found on family land by a member must be reported to the head of the family; the family take a portion (not specified) and the finder will be given a portion - apart from the Stool's possible rights in the matter.

2. HOUSES.

(a) What is meant by a family house?

The expression "family house" is so frequently used in the reports and elsewhere that it is as well to have a clear idea of what is meant by the term.

Nothing more should be implied by the phrase than that it

is a house which is family-property, that is, one the absolute title to which is held by the family as a whole. There is therefore no truth in the statement that there can be only one family house, an argument which might be used for holding that another house claimed as family property cannot be such. There is a distinction - perhaps implied in the reports - but certainly encountered in practice - between the "principal family house" and other family houses.[124] Each family may own several houses, the limited interest of use of which may well be vested in a member, sublineage, or section, of the family. Where each section has a family house, each house will prima facie rank equally. But in other cases, especially in the towns and the coastal areas generally,[125] there is a principal family house, clearly distinguishable as such, and other houses - title to which is in the family as a whole - occupied by a sub-lineage of the family (usually descendants of a deceased member who originally enjoyed the house as self-acquired property, and passed the absolute interest to the family, the limited interest to his sub-lineage, on his decease intestate). There is a distinction between the rights enjoyed by members and quasi-

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124. "There is always a principal family house "- Akim Abuakwa. "It is where the head of the family resides, or did reside, even if a hovel; and is called in Twi 'abusuafie' (family house), or 'mpaninfie' (ancestral house)" - id. Where the abusuapanin resides, where ancestral rites are performed, the history of its acquisition, are criteria.
125. Especially in evidence from the Cape Coast area.

members of the family in regard to each type of house: these will be brought out in the course of the discussion.

(b) How does a family-house come into existence?

The reports are full of cases concerning the question of whether a certain house is a family house or not: most are bedevilled by the failure to make the distinction between the acquisition of the absolute interest, and the limited interest; and in certain cases there is a failure to separate title to the land from title to the things thereon. There has also been over-application of the maxim that "the slightest contribution of labour or materials by members of the family makes the house a family house"[126]: this sweeping generalization cannot stand on closer examination.

(i) By succession: This is the primordial mode by which a family house can come into existence. As soon as a man or woman dies intestate, the title to his self-acquired property vests in the family as a whole, whether the property was made or bought or otherwise acquired by the deceased. The limited interest of use devolves to his immediate sub-lineage, and further to an individual member thereof (i.e., the successor appointed to him).

When remote ancestors and ancestresses have thus passed on property, the house may have become a principal family house, especially, of course, where the original acquirer is the

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126. Cf.Redwar, Comments, pp. 79-81.

original female ancestress of the whole family.

(ii) By act of the family as a whole: The family as a whole acts especially through its head - acting on the advice, and with the consent, of the family. If the family thus acting, or the head acting alone on their behalf (the agency may be implied) buy or otherwise acquire, or build, a house, such a house becomes a family house, and is family property in the wide sense.

If the head of the family acts on behalf of the family, it will not matter whether he uses his own or the family's or some other person's money to buy such a house; or whether the house is built by the family's labour or not.[127]

Where certain members of the family act jointly thus to acquire a house, it is a question of fact whether they are acting for the family as a whole. Decision of such a question is aided by looking to the surrounding circumstances: Was the abusuapanin or the obaapanin consulted about the transaction? Was it the declared intention of the members at the time to act for the family? Were the acquiring members authorised so to act? Were there contributions of money, labour or materials from the family? Were the members drawn from one sub-lineage or section of the family? What is the number of members concerned?

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127. The house becomes family-property, but the debt remains a personal one.

One cannot say that the mere question of numbers is decisive of itself; informants tended to hold that joint acquisitions would usually be the self-acquired joint property of the acquirers; but where the number of members concerned is large (six was given as an example in one instance) then there will be a presumption, taken in conjunction with other evidence as above, that the acquisition becomes family property.

It is possible in those families where the sections are clearly defined, and largely autonomous in property matters, for an acquisition, even by a large number of members, to be section-property, and not family property in the wide sense.

(iii) By labour of the family:

Labour of the whole family: If the whole family , or a major portion thereof, contribute labour to the erection of a house, then - unless there is express agreement to the contrary - the house will be a family house.

The mere fact that members of the family contribute labour to the erection of a house is not, however, decisive of the question whether a house is family property or not. There are several possibilities which must be considered.

Joint labour of certain members: This is a more difficult problem of interpretation. The case envisaged is one where a certain, limited, number of members contribute labour to the building of a house. Whatever may have been the presumption in the past, there is now no presumption in favour of the house thus becoming family property. It happens quite often that

two or more members of the same sub-lineage join together to build a house: the normal legal consequence of this, as accepted by the Africans in their customary practice, is that there will arise a joint-tenancy in favour of the actual builders, but rarely an immediate title in the whole family. (The position is the same with the making of joint farms.)

If the court is forced, either by the evidence, or by respect for certain dicta, to hold that the house is family property, it is family property in the sense that during the lifetime of the builders, the members concerned (perhaps together with their immediate sub-lineages) will enjoy the exclusive right to use the property, which cannot be taken from them for any reason.[128] The ultimate title of the family to the property acquires meaning only when the builders have died.

I am aware that the statement of the law above is expressly contradicted by the judgement of the W.A.C.A. in Araba Tsetsewa v. J.D. Acquah & anor,[129] where the Court said:

> "In the present case, Charles, John and Joseph, were brothers, and the Fanti law and custom applicable to joint acquisition of property by more than one member of the family is undoubted, namely that such property becomes family property...
>
> It has never, so far as we are aware, been suggested before this case that where two or more members of a family combine to acquire property, the property so acquired becomes the private joint property of the two or more and not family property."

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128 and one of the joint owners cannot alienate without the consent of the other.

129. (1941) 7 W.A.C.A. 216.

Fawcett v. Odamtten[130] was distinguished. Redwar[131] and Sarbah[132] were cited in favour of this proposition.

It must be noted that Redwar in another place[133] says something rather different:

> "...even the slightest contribution of labour or materials in building a house by members of the deceased person's family gives these relatives a vested joint interest in the house as family property".

This statement is partially correct, being in line with one of the principles of customary law, that contribution of labour gives rise to a certain interest in the product;[134] but the trial judge in Codjoe v. Kwatchey, considering this statement, wished to amend it by substituting "substantial contribution" for "even the slightest contribution". Kingdon, C.J., in the W.A.C.A. re-affirmed the old "rule" in all its rigour, and rejected the trial judge's amendment[135] as a ratio decidendi in the present case. Webber, C.J., another member of the Court, gave judgement on other grounds.

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130. (1929) F. Ct '26-'29, 339.
131. Comments, pp. 79-81.
132. F.C.L., pp. 88, et seq.
133. Comments, p. 35.
134. Cf. the interest which a wife or son acquires by assistance in the clearing of a farm for the husband or parent;
and also a Sekondi case: Aberewa v. Smith (discussed below) - the creation of a citizen's interest by clearing the virgin forest.
135. See: (1935) 2 W.A.C.A. 371, at p. 377-8.

It is also worthwhile to consider in some detail the case of Busumafie v. Milbah,[136] an unreported case decided by Quist,J.

The undisputed facts were that two brothers, K.K. and K.W., jointly built a house on land purchased by them jointly; and that they jointly occupied the house whilst both alive. K.K. died; K.W., before his own decease, purported to dispose of his interest in the property by will as self-acquired property. He then died.

Plaintiffs, representing the family of K.K. and K.W., contended that the house was family property, of which K.W. could not dispose by will.

Defendant, widow of K.W., claimed that the house and land were the individual property of her deceased husband, which he could leave to her by will.

Quist, J., further found as a fact plaintiffs' allegation that K.K. made an open declaration of his intention to hold the property as family property. (That this was considered irrelevant by the Native Court will emerge from consideration of their judgement below; it is hard to understand how the declaration of one of the joint acquirers could affect the issue anyhow.) He also found that the family contributed labour during the erection of the house; (but this does not appear to be a ratio decidendi).

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136. (1948): Unreported: Land Court, C.C., 18.10.48.

The Native Court held:

> "that both brothers had common interest in the property and therefore one cannot alienate it."

It ordered :

> "that plaintiffs' family and the defendant are to own the property jointly by occupying the two apartments (rooms) of K.K. and K.W."

It is perfectly clear that the native court correctly found (ignoring the declaration and contribution of labour in favour of the family) that K.K. and K.W. took an absolute joint-interest in the property in their joint lifetimes.[137] The effect of this - during the joint lifetimes of the tenants - is that one cannot alienate without the other's consent, since the title is indivisible. This is the proper interpretation of the native court's finding above.

On the decease of one joint tenant, the deceased's interest - if he dies intestate - vests in the family, the remaining share in the title continuing to be held as self-acquired property by the surviving joint tenant (in this case K.W.). K.W. may by will dispose of his interest - to his widow in this case: the native court's order (above) was therefore a perfectly logical recognition of this state of affairs.

The claim of plaintiffs that the whole property was family property cannot therefore stand. The claim of defendant that

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137. Conformably with the statement of principle at p. 261 ante.

the property was the self-acquired property of K.W. alone is also not maintainable.

Quist, J., did not, however, take the finding of the native court in this light; he said:

> "This in effect is a finding that the property is family property of which neither of the two brothers can make a valid testamentary disposition..."

It is submitted with respect that the finding of the native court can NOT be taken in this sense: it makes nonsense of the native court's logical order for the division of occupation of the property.

It was against this order that plaintiffs appealed. Once the appeal judge had classified the property as family property, it is obvious that the order of the native court must be rejected. As the learned judge said:

> "It has been urged on behalf of the appellant that the above stated pronouncement is cone trary to well-established native law and custom in regard to family property, for the reason that the defendant-respondent being not regarded as a member of her husband's family by the customary law cannot inherit family property jointly with the members of the family. To this argument I accede..."

Sarbah[138] was quoted in support. This passage deals, however, with the right of a widow or children of deceased to reside in deceased's house; and it is entirely irrelevant to the present case, where the widow's claim is based, not on this

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138. F.C.L. 50.

right, but on the far stronger right of an individual joint title transmitted by one of the original acquirers.

One must therefore reject the apparent misapprehension of the law relating to joint acquisition, the reversal of the native court's findings, and the following dictum:

> "The house in the present case was not built by K.W. alone, and even if so the widow may only reside therein subject to good behaviour"

- a statement which, inter alia, patently fails to cover a case where a deceased devises his self-acquired property by will to his widow.

(It should be noted that native courts are not slow to decree divided ownership of houses, and the Supreme Court not slow to reject such divided ownership or occupation;[139] there is nothing foreign to African ideas in such a separation of ownership and occupation. It is, in fact, a logical course in such cases as the above, and Aberewa v. Smith - considered below.)

Assistance of labour: The argument against the old rule is even stronger where the position is, not that the members of the family concerned have acted jointly in making or acquiring the property, but that there has been assistance given to one member of the family building or acquiring a house by certain other individual members, either with money or labour. (The question of monetary assistance is considered below.)

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139. Cf. Asamoah v. Mprenguo: (1949) (Unreported: W.A.C.A. Civil Appeal No. 72/48), where there was division of ownership of rooms in a house in Kumasi.

If the assistance by labour given to the acquiring member is substantial, then the case is assimilated to the immediately preceding one, and the assisting member(s) may acquire a share in the interest in the property. If the assistance is not substantial, then I believe that the customary-law answer is to raise an equity in favour of the person assisting, which will permit him to enjoy free residence in the house when complete, or at least, to receive preferential treatment. He does not share in the title to the house. If the contribution is negligible (as it was in one reported case), then the contributor receives nothing for his pains. It would be absurd to suggest that if he gave his labour for, say, one afternoon, the result would be to make the house property of the family as a whole, with the contributor immediately acquiring a joint share in the title to the house.

(iv) By an act of a member(s), done on behalf of, or in the name of, the family:

Is it possible for a member of a family who builds or acquires a house to make such a house family property, if at the time of his acquisition, he declares that he acquires it as family property?

There is evidence in the cases against such a proposition, one judge holding it absurd that anyone could merely by a declaration to that effect convert what would otherwise be self-acquired property into family property. There is, however,

evidence the other way;[140] and in particular, if a member, at the time that he acquires a house, declares that he does so in the name of the family,[141] or makes a subsequent declaration that he intends to hold the house as family property, the effect in customary law would be that that house would thenceforward be family property.

A self-acquired house can also become family property by tacit acquiescence, as where the owner has permitted members of the family - otherwise not entitled to residence - to reside there for many years,[142] where he has consulted or obtained the

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140. See Akempon v. Enyan: (1912) Ren. 629, which is, however, a misleading case; the account of the judgement in Brandford Griffiths's Digest is also misleading. It was not the alleged declaration at the time the brothers Hockman bought the land as family property that the Full Court found significant; it was the presumption of the Court that the brothers must have purchased the land with family moneys held on a joint account.
In any case, the house was in issue, and this was assuredly a family house, as it was built by the family, as far as one can gather, and was certainly occupied by them.

141. As was alleged to have been done by one of two joint-acquirers in Busumafie v. Milbah (discussed at p. 263 ante); but it does not appear from the report that this fact was one of the rationes decidendi.
An agreement to this effect was alleged in Codjoe v. Kwatchey: (1935) 2 W.A.C.A. 371; its effect was not tested, since the agreement was held not to have been proved.
See also Halm v. Hughes: (1869) F.C.L. 165, where it was held that a person who has not inherited cannot constitute his house a family house.

142. But in Codjoe v. Kwatchey (already cited), at p. 375, Webber, C.J., approved a dictum of Deane, C.J., in Okai v. Asare: (Unreported: Suit No. 11/35), in which he said: "...self-acquired land is not turned into family land by the owner of the land being kind enough to allow some of his family to live on the land and enjoy the use of it." (This was a Ga case; even though Sarbah and Redwar appear to have been profusely cited, it is not binding for Akan cases.)

permission of the family for dealings with the house, where he has permitted the assumption that the property is family property to continue for a lapse of years without demur. This follows from rules of estoppel, laches, etc.

A family is not liable for the debts of its individual members.[143] Where a member has incurred a debt, and his property is liable to attachment in satisfaction therefor, if the family accepts the debt to preserve the property, thenceforth the property concerned may rank as family property.

(v) By contribution of money: on the principle of conversion - considered below - there is a presumption that anything bought with family funds is family-property. (It is important to emphasize that this is a rebuttable presumption.) The two commonest cases are those where

(a) a member receives a loan from family funds in order to build a house: or

(b) a member receives contributions of money from members individually.

(a) Family loan: formerly a house built with the aid of such a loan would almost always have been a family property, in which the builder enjoyed only an exclusive right of use for his own life. Today it is not so.

A member short of money may apply to the head of his family for a loan: it is a question of construction whether

143. Cf. Ashon v. Snyper: (1869) F.C.L. 136;
Lokko v. Konklofi: (1907) Ren. 450 at p. 451.

this is interpreted as "Here is the money; go and build your house"; or - "Here is the money; you may build a house to live in; but I am giving you somewhere to live, and not a house outright". If the latter construction applies, the house isfamily property. But today the likelier situation is the former, in which the house belongs to the member absolutely, and the loan is treated as a debt owed by him to the family. The debt is usually impliedly secured on the house, in that the member may not dispose of the house - without family consent - until he has repaid the loan; and further, the loan of money appears to raise equities in favour of the lender, which in this case (where the family is lender) would mean that the borrower would have to reciprocate by giving accommodation to other members of the family if necessary.[144]

(b) Contributions from other members individually: Just as Redwar and Sarbah's dicta, and the principles on which judges have acted, do not correctly represent the present customary law in regard to joint acquisitions by members, and contributions by other members of materials and labour, so also in the case of money contributions made by other members of a family to a member who wishes to build his own house.

Such money may be given for either of two purposes: either

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144. It has to be remembered that it is very frequently the case that contributions of labour, materials, money, etc., raise equities in favour of the donor or lender, which are not shares in the title, but rather claims to preferential treatment.

to purchase a building plot, when the family has no land to spare; or to finance the building of the house, when a plot is available.

Even if the contribution of money by individual members for the purchase of a site is held to create a family interest in that site (which is doubtful), it has been decided that the mere fact that a family site is used does not of itself make the house a family house.[145, 146]

The general rule today is, as with contributions of labour, against a presumption of family ownership, and for immediate individual ownership. As before, if the contributions are substantial, the contributors acquire a joint-interest in the house. No informant could give a minimum number of contributors, which if exceeded would make the house family-property.

The case of Aberewa v. Smith[147] will serve as a general illustration of the law relating to contributions. This case was interesting from many aspects, since it involved a conflict between the customary successor and the widow of deceased, and involved questions of contribution of money by the family and by the widow; and contributions of labour by the widow. The case was complicated by the parties having been married under the Marriage Ordinance.

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145. Santeng v. Darkwa: (1940) 6 W.A.C.A. 52, at p. 54.
146. The law was not clarified by Laryea v. U.T.C.: (1931) D.Ct. '29-'31, 122.
147. Ahanta Conf. A Ct: 14.11.47 - at Sekondi. Land Ct, Sek., Land Appeal Suit No. 11/47, coram Hooper, J.

The case came to the Native Court A on appeal from Sekondi Native Court B. Plaintiff-respondent Aberewa was the successor of one Aidoo, deceased. Defendant-appellant Smith was the widow of Aidoo.

The A Court found as facts:

(1) S. was married to Aidoo under the Marriage Ordinance.

(2) Aidoo built a house on land he acquired from one Ansah.

(3) S. assisted her husband to acquire this land.

(4) The family of Aidoo assisted him by the loan of £120 for the building of the house.

(5) S. claimed she also assisted Aidoo financially.

(6) - per Court: "This Court is convinced that Respondent helped the late Aidoo in putting up the building and the Appellant also assisted in one way or the other if even she did not advance money towards the building."

The Court ruled:

(7) "There is no sufficient evidence to disprove the late Aidoo's ownership of the house in dispute."

(8) Respondent admitted in court that - "The house is the sole property of Mr. Aidoo."

(9) The family had an interest in the house "according to the custom of this State."

(10) The appellant had an interest in the house "according to the nature of the marriage."

The Court ordered:

(11) "That the Respondent is entitled to the possession of the house and the Appellant is also entitled to occupation of the house."

(12) "The number of rooms in the disputed house is to be divided into three parts: one-third for the Respondent, one-third for the Appellant and the remaining one-third for the children of the late Aidoo."

(13) "That in case the Appellant marries to any person other than the successor (Respt,) or dies, her share of the house reverts to the Plaintiff-Respondent."

(14) "That in case all the children of the late Aidoo die their share of the house also reverts to the Plaintiff-Respondent."

(15) "Appellant is to account for all house rents collected and to be divided into three parts:" (and distributed in acc. with the division of occupation above.)

The B Court had found that the property was family property. When the case came before Hooper, J., he confessed himself unable to understand how the B Court could have so found.

The judgement of the A Court makes clear that in modern custom aid, financial and otherwise, as found as (3), (4) (5) and (6) above, is not enough to make the property other than the individual property of the builder or acquirer. That this aid is of some legal import is shown, however, by the Native Court's order, which endeavoured, in an equitable manner, to recognize the claims which this aid implied on behalf of the family, the successor, and the widow respectively.

This judgement was appealed against by Smith, who asked the Land Court to delete points (13) and (14) from the Native Court's order, which should otherwise stand. Hooper, J., rejected respondent's claim that the house was family property:

"I can find no conclusive evidence that
the house was in any way family property."

The learned judge confessed himself baffled as to how the A Court could find the family loan of £120 as proved, and yet hold that the house was the self-acquired property of Aidoo. He did, however, reject the evidence of the loan's ever having been made; and on the absence of this evidence, and the clear admission of respondent (see point (8) above) that the house was the sole property of Aidoo, held that the house was the self-acquired property of Aidoo.

The further point was raised of the effect of the Marriage Ordinance, s. 48: under this the widow is entitled to two-third's of her deceased husband's self-acquired property. The point was accepted, the judgement of the Native Court set aside and the appellant was awarded two-thirds of the property, the remaining one-third going to those entitled thereto under native law and custom.

How this order was operated in practice (i.e., whether there was a physical division, as the Native Court had attempted to decree, of the house; and which were the parties entitled to one-third under native law and custom) is left unanswered by the report.[148] Owing to the intrusion of marriage under the Ordinance, the testing of the Native Court's order never, unfortunately, occurred.

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148. The problem does not arise today, owing to the amendment to s. 48, by which the properties are held on trust for sale, and only the proceeds are divided. SUCCESSION, p. 635.

Codjoe v. Kwatchey[149] is another case where contributions of money from the family were alleged. It must be emphasized that this was a Ga case, and is therefore suspect authority for any proposition concerning Akan law. In this case it was originally alleged that deceased had bought the house in dispute with moneys provided for that purpose by the family. The family later shifted their ground, and alleged that it was bought with the proceeds from trading with a sum of £100 given as loan by the family to deceased for trading in cocoa. Counsel endeavoured to put forward the proposition that

> "if property is bought with proceeds resulting from the use of the money actually given /sc. by the family/ and it is agreed that it is bought as family property then it is family property." (150)

This proposition was unfortunately not tested, since the Court were not satisfied as to the existence of any agreement designating the property family property. As a proposition of Akan customary law it is in any case far too wide, since there is today no idea that a lender is entitled to follow his money - and the increase from his money - into whatever property it is used to purchase. There is a law of conversion (which will (be considered presently) but it does not cover cases like this.

(vi) By replacement: where a family-house is merely repaired, it remains family property. Even where the repairs

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149. (1935) 2 W.A.C.A. 371.
150. At p. 375.

are very substantial, and even where a new house is substituted for an old one (the old one having perhaps fallen down) the character of family-house attaches to the replacement.[151] Similarly with a house bought expressly to replace another, which was a family house.[152] It does not matter by whom the replacement is made; but a rule similar to that applying to farms operates in certain cases - a member redeeming family-property from a pledge with his own money acquires a right to use, but not to dispose of, the property, until the family repays him the money - in that a member replacing a family house with his own money acquires a right of use over the property.

(vii) By conversion: The principle of conversion operates in African law also, in that money realized from family-property (by its sale or otherwise) has itself the same character imprinted on it; so that if subsequently it is used in the purchase of property, that property itself becomes family property.[153] So, for example, if money paid by way of Cocoa Rehabilitation Grant in respect of a devastated cocoa farm the property of the family is used to purchase a house, that house becomes family-property.

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151. See: Barnes v. Mayan: (1871) F.C.L. 180;
Halmond v. Daniel: (1871) F.C.L. 182.
152. Cf. Quabina Mansah v. Hamilton: (1878) Ren. 43.
153. See: Tsetsewa v. Acquah: (1941) 7. W.A.C.A. 216;
and Sarbah, F.C.L. 59.

(viii) By use of family land: So far consideration of family houses has extended only to the houses themselves and the rules are not altered where the house stands or is built on a site belonging to a stranger to the family. One has to consider the instance where a family-site is used. Whilst agreeing with the dictum in Santeng v. Darkwa[154] that the use of a family site does not by itself make a house a family house, one must concede that (a) a special character is lent by the use of such a site to a house built thereon by one of the family. The position is analogous to a self-made farm on a family fallow land. The builder cannot dispose of the house outright during his lifetime, although during his lifetime he will enjoy an exclusive right to the house. And (b), taken together with other evidence, use of a family-site may serve to prove that a house is a family house.

A somewhat similar principle operates in regard to the use of family materials, as where the materials from a derelict family house are used by a member to build a new house. It is a question of law whether the materials so used form such a

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154. (1940) 6 W.A.C.A. 52, at p. 54. The trial judge had held that "the house described as a store seems to have been built on the site of the ruins of a family house, and is therefore family property."
Strother-Stewart, J., in the W.A.C.A., said (at p. 54):
"I cannot agree with this reasoning. No custom was proved that when a house is built on the site of the ruins of a family house it becomes family property, and I know of no such custom."

substantial part of the new house as to stamp it with a family character; but it is incorrect to hold that the slightest use of family-materials serves to make a house a family house.[155] The dictum in Santeng v. Darkwa,[156] that "if it had been proved that a single brick from the ruins of the former family house had been used by the deceased in building the store, the store would be family property" - is, it is submitted with respect, too wide.

(c) Rights of residence in a family-house:

(i) Individual member: An individual member of a family has in general a right to reside in a principal family house - or, if a house is section-property within his section - in a section's house. This is only a right to be accommodated if possible, and not a vested interest entitling to take possession of a room without prior permission.

Customarily, with the enjoyment of so-called family houses being divided up between sub-lineages of the family, the member of one sub-lineage neither does in fact, nor claims to be able to, reside in a house other than that of his own sub-lineage. There is a variation in custom as between the town and village, and between different areas. The large family house in Cape Coast and other towns may contain more than 100 residents, (many of these are not members of the family,

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155. See: Codjoe v. Kwatchey, ante; the remarks of Webber, C.J., at p. 376.
156. (1940) 6 W.A.C.A. 52, at p. 55.

but dependents and affines).

Where a self-acquired house passes by inheritance to the minimal sub-lineage of deceased, and more particularly to the successor, then the successor may prevent other members of the family from living in that house without his prior permission, (exclusive of those close relatives already residing there, whom he cannot eject).

A member of a family has at least a moral right to ask for accommodation, but this is subject to there being room available.

Once he is in occupation, however, he has - although still without an interest in the house - a right to continue living there, provided he observes certain rules. He must conform to the directions of the person managing the house, whether the family-head or another; so that wilful insubordination, lack of co-operation, and trouble-making, may be grounds for his ejectment, or for refusal of accommodation. He also has to take whatever room or rooms is/are offered to him. He must not deny the title of the family to the property as a whole, or assert a title over the portion which he occupies. He must be willing to make the necessary contributions, both to the maintenance of the house, subventions to the family, and assistance for dependent members, where required. If he has been disowned by the family, then he has no right to occupation (but this rule is stated to be inoperative today, with the abolition

of "cutting ekal"). He must not attempt to deal with his right of residence, which is not, as such, transmissible or transferable.[157]

The usual remedy today for any failure to observe these rules is a warning, and - if this fails - consideration of the matter before a family arbitration.

There seems to be a distinction made between permanent residents, and what may be called visiting members of the family. Occupation given to the latter is purely on a temporary basis.

(ii) Dependents: The wife, children and servants of a member have a right to accommodation during the lifetime of the member, which right is dependent on the right of that member. Domestics of the family as a whole are entitled to accommodation as members of the family, so long as they continue to render their customary services. There appears to be a principle of "one member, one room"; this principle extends to the member's dependents, so that one finds that the room is occupied by the member, his wife, and minor children. If the member is a female, then she occupies it together with her children.

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157. Brandford Griffith, C.J., referred in Lokko v. Konklofi: (1907) Ren. 450, at p. 452, to the difficulties which would flow from making the right of a member in his family-house attachable in execution. It would mean admitting a stranger in to share occupation with the family.

At the death of the member, then his wife is sent back to her own people if she refuses to marry the successor. Exceptionally, however, she may be allowed to continue to reside in her late husband's house, though remaining a widow: but this right is subject to good behaviour; and is in no circumstances transmissible.

Children of a deceased male member have a right to live in their father's house;[158] this right appears in practice to be stronger than as it is commonly stated (that it is subject to good behaviour). Children are rarely if ever ejected for any reason, and it is doubtful how far custom would permit their ejectment. Cases were given where the children's children similarly resided in the grandparent's house; but in these cases the residence is by leave and licence only.

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158. Cf. Richardson v. Fynn: (1909) Earn. 13: the children of a deceased member have a right "to continue living in the house their father occupied, if that house is part of the family house belonging to the family of which their father was a member. They can only be ousted for misconduct." (At p. 14).

P A R T II

THE INSTITUTIONS OF AKAN LAW.

CHAPTER V.

SALE.

I. WHAT MAY BE SOLD.

A. ABSOLUTE INTEREST.

Although it is common to speak of "the sale of land", properly speaking it is not land which is the subject of sale, but rather interests in land. We consider first the sale of an absolute interest, taking care to use this term in a sense which has meaning in Akan law. By "absolute interest" in any property is meant here the closest approach to ownership of which the native law is capable; which implies that when this interest is disposed of, there remains nothing more in the hands of the vendor. Whether or not the bundle of rights which a vendor can transfer to a purchaser is as extensive in African as in English Law will become apparent as we proceed. It is most important to stress at this point that the use of the term "absolute" does not necessarily mean that the holder of such an interest has a completely free and unfettered right over the thing owned, as wide or wider than an English fee simple, or as wide as "dominium" in Roman Law. The use of "absolute" serves to distinguish the manner in which an interest is held from that where the interest held is itself dependent upon some superior interest or title. The customary law

is not static, and through the influence of English legal ideas, English methods of conveyancing, and English legal terms, changes have occurred, and still occur, in African concepts of rights and ownership. And the influence also of new economic concepts

The interests which may exist in property are divisible into three main heads, according as they are enjoyed in the land itself, things in or on the land, and movables entirely separated from the soil; and the sale of such interests must be similarly divided. Besides categorizing from the nature of the subject-matter, it is also possible to classify according to the size of the interest of which any legal person is seised; and these two classifications I have endeavoured to wed together so as to ensure a thorough treatment of the subject.

1. ABSOLUTE INTERESTS IN LAND.

It is necessary to deal first of all with the sale of an absolute interest in the land or soil itself. It is a commonplace to the student of African customary law that the sale of land itself was not formerly recognised, since the soil was the property of no man, but might be variously attributed to the possession or care of an Earth-god or goddess, to the spirits of the ancestors, or of the tribe, past and present.[1] However

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1. As was recognised by Hayes Redwar, J., in the case of Abessibro v. Ama: (1893) F.L.R. 78, where he said: "According to the contemplation of ancient native customary law (as embodied in numerous decisions in

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this may have been in the past, there can be no doubt that at the present day in the Gold Coast (and for some time past) the land itself has been the subject of sale. This development may be said to have originated on the Coast, where the infiltration of European ideas, and the disruption and corruption of native custom, proceeded the earliest. Whilst on the one hand stools tended to become increasingly impoverished by the expense of lawsuits, and ostentatious display in warfare and ceremonial, on the other there appeared other stools, groups and individuals with the wealth to buy and develop land for their own purposes. Chief among these were the rising middle classes - lawyers, public servants and the like; and, besides them, the European commercial interests, which had discovered in the forests and mines of the Gold Coast a source of wealth. We may add to this as persuasive factors the progressive desiccation of the country through cutting down the rain-forest and over-cultivation, and the introduction of cacao as a staple crop. This last, since it remained for many years in the ground, and placed little burden on the cultivator by way of maintenance,

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1. (cont. from previous page) -
this Court...), there is no such thing in the interior as an absolute transfer of land as between natives, whether by sale or gift, and the only thing that passes is the usufruct, or licence to use the land in certain ways..."

And the court in Impatasie Concessions Inquiries 164 and 169: (1902) F.L.R. 134, at p. 136, referred to "sale by native custom, which was extremely rare."

The reader is also referred to Danquah, A.L.C., pp. 212 et seq.; and to Sarbah, F.C.L. 85-95.

allowed the common farmer continually to extend his farms, thus leading to a land-shortage; it also, of course, encouraged farmers from less fortunate areas to invade the interior in search of land for cocoa-farming.[2]

If we observe dealings in land at the present day, we find that there are three groups of persons enabled to sell, of which the earliest is the stool. Since, however, some stools in the Colony have recklessly disposed of their stool lands to any purchaser, it follows that we find individuals and families in possession of land, that is to say, of an absolute interest therein. But it would be an incorrect presentation of the historical picture to maintain that none of the land of which such families are seised could have had any other derivation than from stool lands: here is a perfect illustration of the difficulties of generalisation. In those parts of the Colony furthest away from the Coast, and showing the greatest affinity with the Ashanti peoples, families and individuals have (or had) no absolute interest in the land which they occupy; whilst in states near to or bordering the coast, it seems

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2. F.G. Crowther, the then S.N.A., commented on these points in his evidence before the Belfield Commission, (pp. 55 et seq.). Note for instance:
"7. When the European capitalist made his appearance the Chiefs began to take more interest in their stool lands than before. They recognised that the possession of these lands by the tribes was likely to be a source of pecuniary benefit to themselves..."
"9. Some stools are in a very precarious financial condition owing to the existence of stool debts..."

truer to say that formerly the stools had no interest in land comparable with that enjoyed, for instance, in Ashanti today. The land here was originally in the hands of the families, and stool-families took their turn with the other families in the state.[3] Since the time when the tribal lands, if any, were almost no-man's-land, and there was certainly no elaborate theory of stool ownership in trust for the tribe (a rarefied concept which one may attribute in part to the efforts of writers on the subject, and in part to rationalisation of the claims asserted by stools to land) certain states have endeavoured to develop the idea of stool-ownership where it formerly was not found, usually at great profit to themselves.

(a) Sales by stools.

Here one is dealing with the sale by stools of the absolute interest in stool lands; so that first a word of warning about terminology is necessary. The term "stool land" can be and often is used - to the perplexity of the reader - in at least three different senses.[4] It may be used to mean the reserve of tribal lands (the primeval forest), which any citizen has the right to clear and cultivate. It may (for instance, in Ashanti) mean all the lands which are subject to a certain stool. It may also be used to mean "stool-family lands": these are the farms, etc., in the possession of the

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3. Cf. Chapter II, pp. 105 et seq.
4. Cf. Chapter I, p. 29.

stool-family; with regard to them, their use and disposal, the stool-family is in no better and no worse position than any other family. It may also be used of farms acquired by the stool and thenceforward attached thereto, whether through gift by a subject, exploitation, or purchase by the stool. These again are of a different nature from the stool-lands proper.

The term "stool lands" may properly be used to describe the forest or tribal lands, in which no limited interests have been created, since it illustrates in those states which do not recognise the power of a family or individual citizen to acquire any interest larger than usufruct - whether perpetual or not - that the ultimate reversion to all the land in the state remains vested in the stool in trust for the people of the stool. It may also be used to indicate all the land subject to a stool, but in this case it must be emphasised that the right of the stool may be only one of jurisdiction, and not of ownership.[5]

Even in those cases where the stool is recognised as in some sense/"owner" of the stool lands, it is still hardly correct to describe it as owner, since the stool is properly an agent, manager, or trustee, for the tribe; but analogies with English law are highly dangerous, since, of course, it is not

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5. For a discussion of the interests which a stool enjoys in different types of land, and the distinction between jurisdiction and ownership, see the Chapters on THE STOOL, esp. at pp. 28 et seq.; and JURISDICTION AND OWNERSHIP.

the case that the legal estate is vested in the stool, and the beneficial interest with the members of the tribe. The interest, if any, is vested in a sense in the members of the tribe as a whole. What is more, the former essence of this interest was its inalienability, thus indicating its complete distinction from any English type of interest.

Although in former times tribal lands could not be permanently and absolutely alienated, there is no doubt that they have in the recent past - and also the present - been frequently disposed of for cash. The strict legal theory said that this could not be done; the facts say that it has been done. To attempt to restore the pristine condition of the customary law, and to declare invalid all those sales of stool, or tribal, lands which have taken place, would produce an absurd situation, and great hardship as well as disappointment to purchasers who have taken bona fide. The law relating to the disposal of tribal lands has thus changed in practice,[6] and the only solution for the analyst of the law is to describe those changes, and leave the decision whether such sales should be permitted in the future, and, if so, on what terms, to the legislator and the judge.

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6. "The sale of land was formerly unnecessary and was unknown, but is now recognized by custom and if Sale is effected with the consent of the Head Chief and his Elders the freehold title to land passes": (1934). Warr. 36.

A contrary movement is now observable: in Ashanti, for instance, it is not now possible for a stool to sell its complete interest in stool lands; this reversal has been brought about through a declaration of the Ashanti Confederacy Council,[7] which, although it lacks the force of enacted law through a technicality, is of at least great persuasive weight - so that one cannot doubt that this principle of inalienability will be (and is so at present) upheld in the Ashanti courts. Again, the Wassaw Confederacy in the Colony has proposed to ban henceforth the sale of stool lands within the Confederacy;[8] and other states, such as Akim Abuakwa, are restricting the alienation of stool lands either by granting land only on lease, or else by denying the wider character of the rights which are conveyed by a so-called sale.

It will be appreciated that in the subsequent discussion we are concerned primarily with the disposal by or by the agency of the stool of the root-title to stool land, both unoccupied and occupied (or encumbered by the interests of citizens and others). The sale of stool property in the narrow sense is a somewhat different matter.

Who may sell stool lands: Where stool lands are vendible, it is in accordance with the theory of ownership that the

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7. Cf. Matson, Digest, pp. 18-19 (especially paras. 81, 82).
8. According to a report of a meeting of the Confederacy Council in the Daily Graphic newspaper for 26 April 1951, p. 4.

owners thereof should alone be capable of alienating them. The owners of tribal land are, as has been shown, the members of the tribe - dead, living, and to be born; as a body they are an impracticable party. So in present-day practice the stool is considered to have a mandate from the tribe to manage the tribal lands, a management which includes a right of disposal. The stool, that is to say, the Chief, his Elders and Councillors - is the granting party for the disposal of stool lands. (For the disposal of stool-family lands, it may be worthwhile to remark that these lie within the control of the stool-family; any portions of the stool-family's land which have been temporarily allocated to the stool-holder remain part of their property, and may not be alienated without the consent of the family.) Properties donated to the stool - frequently these will be given to the stool-holder for the time being, but with the intention of benefiting the stool and not the individual - remain within the control of the stool, and may not be disposed of by the chief acting individually.

Where a stool possessing land serves another stool, the subordinate stool may be the landowner, and the superior stool have a purely political right over the land; or the superior stool may have merely portioned out the use or control of the land among its subjects. Whilst in the former case the subordinate stool is owner of its lands, yet in certain areas it is still necessary for the sub-stool to have the consent of, or

at least inform, its paramount stool before alienating land.[9] This necessity the student should not confuse with the latter case, where the subordinate stool, if it wishes to alienate its land, must receive permission to do what is in fact impossible, i.e., to sell what it has not got - the full title.[10, 11]

(b) Sales by families: Where the interest of a family in its family lands is not recognised to be subject to any other interest of a proprietary nature vested in a stool, that family may now, by custom, dispose of its interest absolutely. Such absolute sale by a family of its family lands or a portion thereof must be distinguished from that of a family disposing of its limited interest in land, held subject to the superior

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9. "The local stool and the Okyenhene execute the conveyance jointly; if the stool has already executed the document, then the Okyenhene must sign as confirming party": Akim Abuakwa.
10. I propose to consider the position of parties to a sale more fully in a subsequent section: the reader is therefore referred to "II.Who may sell", at pp. 313 et seq.
11. It should be noted that the Local Government Ordinance, 1951, s. 75, regulates the disposal of stool lands:
    "(1) Any disposal of any interest or right in land which involves the payment of any valuable consideration or which could, by reason of its being to a person not entitled by customary law to the free use of land, involve the payment of any such consideration, which is made -
        (a) by a Stool .....
    shall be subject to the concurrence of the Urban or Local Council, as the case may be, for the area concerned, and shall be of no effect unless and until such concurrence has been obtained and certified in writing ..."

title of a stool, for this interest is one of usufruct only. The latter case (which occurs wherever the stool makes an overriding claim to the land itself, as in Ashanti, Akim, etc.) is of altogether a different nature, though in practice one might observe little distinction, and even language may give no hint of the distinction.

Sales by a family of its absolute interest in land are most frequently met with in such areas as Fanteland, Akwapim, etc; but they may also occur in those states which, while insisting on the ground-title of the stools to land, yet permit outright alienation to individuals.

(c) Sales by individuals: An individual may be seised of a similar interest to a family, and may dispose of it in a like manner. Viewed from outside, both family and individual have the character of a single legal person, each holding a similar interest. From this head must be excluded the sale by an individual of a farm which he has made out of virgin forest, in a state where no absolute title to land is conferred on a citizen in such circumstances. But in other states, where virgin forest remains (but this is diminishing or has already vanished) and a citizen can, by exercising his right to cultivate, acquire a farm there which is his individual property during his lifetime, a right to sell such a farm will be recognised; although, if the stool is strong, it may lay claim to the forest as tribal land, and then not permit a citizen to create anything more therein than a limited interest of usufruct.

2. ABSOLUTE INTERESTS IN THINGS IN OR ON LAND.

So far the right of the stool, family or individual to sell their absolute interests in the land itself has been the subject of enquiry. The dichotomy which exists in the customary land-tenure between the ownership of the soil itself, and ownership of the things which are thereon, is no doubt familiar to all students of Akan Law. Thus a citizen may own absolutely the farm which he has made, but, if it is on stool land, then it is the stool which owns the absolute interest in the soil itself.

At the present time almost anything which is found in or on the land may be the subject of sale by the person entitled. The stool, where the land is stool land, will usually have the prerogative of disposing of the timber, minerals, and other natural forms of wealth, within the soil.

(a) Sale of timber.

The timber-trees themselves may be the subject of sale:[12] this procedure is adopted by some stools as a more convenient way of exploiting the forest, since it involves the grant of no right in the soil itself (as would occur if a timber-lease were granted). The method is especially useful where the purchaser is a small contractor, to draw up a lease or timber-agreement for whom would be a waste of time. It is largely the stools

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12. See: Sar. F.C.L. 92, et seq.

who sell timber in this fashion, since even when an individual has acquired a usufructuary right over the land on which the trees stand, the timber trees themselves, being part of the resources of the tribe, cannot be disposed of by the cultivator for cash (although he is permitted to cut them down or use them for his own purposes in the normal course of farming).[13]

Sale of timber trees may be either of specified trees marked by the purchaser, and approved by the grantor, or of trees unspecified at the time of agreement, and to be selected by the purchaser to the number and kind laid down in the agreement. Even when the land itself has been sold to a purchaser, stools may sell timber trees standing on it later separately to another purchaser, since it is now common form to reserve timber and mining rights to the stool when a conveyance of land of this nature is made.

(b) Sale of other trees and crops.

Kola and rubber trees in their natural state were, and perhaps still today sometimes are, the perquisite of the land-owning stool,[14] and could not be sold without the consent of the stool. Their position in custom is similar to timber trees. As regards natural rubber, licences to collect on payment of

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13. Though some information indicates that where there are timber-trees standing in an individual's cocoa-farm, he may cut them down and sell them; he should give 1/3 of the purchase-price to the land-owning stool, however. (This is probably either a local variation, or a recent development, in custom.)
14. Not today in Adansi and some other states at least.

abusa seem to be the more common method of exploitation.[15]

Palm trees were formerly the most valuable adjunct of farming land, at least on the coast. Both palms self-sown and plantations of trees were to be found. Palm-trees, although they have declined as a source of transferable wealth, belong in the coastal fringe (where they are mainly found) to the owner of the soil, and may be bought and sold independently of the land on which they stand.[16]

The introduction of cocoa has meant the creation of a continuing and valuable right in the trees and their produce. It is possible to sell the trees themselves without selling the land; but normally an African sells his farm, which means that he also passes his limited interest in the soil. Advance sales of the crop are fairly frequent; as is raising money on the security of the crop, whereupon the creditor has a lien on the crop in the case of default. The absolute ownership of the crop from cacao-trees is generally recognised when the crop has been severed; but it equally applies whilst the crop is still on the tree.[17]

(c) Sale of houses and other buildings.

By far the most valuable (after cocoa-farms) of the things united to the soil are houses and other buildings. It is

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15. See: Sar. F.C.L. 92.
16. Cf. Sar. F.C.L. 92.
17. It is hoped that the distinction between sale of the crop whilst on the tree, and sale of the tree itself, is patent to the reader.

generally admitted that a citizen is absolute owner of his house, and a limited owner of the plot upon which it stands.[18] Whilst in theory it is possible to pass the house without the limited interest, yet in practice this is not done. Where the sale is to a stranger, then the stranger may take a lease or tenancy of the plot from the stool, the citizen's limited interest in the plot merging in the stool's title. But it may happen that, whilst the absolute interest in the land is held by the stool, the limited interest dependent upon this in the plot is held by a family, who allow a stranger to them to build a house thereon, using the plot on a kind of permissive and free tenancy. Often in such circumstances the right of the house-owner to sell the house is fettered: if the plot is not purchased, but leased by the house-builder, then he may often be required to request the permission of the land-owner and/or the person with the immediate interest in the site, before he sells the house: otherwise, he might compromise the title of the latter.[19]

Portions of a house are capable of separate ownership, and it is possible in such cases to sell a portion only.

The Ahenfie or palace - which is either a house built or

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18. Where a stool owns the absolute interest in the land. Cf. Chapter III,(pp. 150 et seq.).
19. E.g., in Akwapim the tenancy is granted out of the absolute interest of a family: the latter's permission is required. In New Juaben, permission from the stool is required.

purchased by the stool-family, and dedicated to the service of the stool, or else is constructed out of stool funds - falls in a class by itself. It is an appurtenance of the stool, and is inalienable, unless the oman consent.

(d) Rivers, pools, etc.

Rivers, pools, and other bodies of water may be sold. Ownership of such bodies of water may lie with the stool - representing the tribe - or with the riparian inhabitants on one or both sides. In modern conveyances, such bodies of water are often reserved to the granting stool when the land including them is sold. Rivers and lakes which are sacred are, in the nature of things, incapable of sale, for obvious religious reasons.

(e) Sale of gold, diamonds and other mineral wealth.

In theory it is possible to sell such deposits in situ. The usual form, however, is to grant a mining lease or concession, where the exploiter is a large European concern - the effect is then similar to the grant of a profit à prendre (a licence to come on the land and mine, and a grant of the minerals so won). In the case of small-scale mining or washing operations, such as individual Africans engage in, an informal agreement, similar in scope to that made with small timber-contractors, is made.

(f) Fetish-groves and other sacred places.

These are obviously not saleable. It seems that where

their ownership is vested in a family, they are inherited as other property by the fetish-priest (or at least the control of them is so inherited). One may also note here that as a matter of custom clan or family burial-grounds and cemeteries are not sold (or indeed ever disposed of if it can possibly be avoided).

3. ABSOLUTE INTEREST IN MOVABLES

(a) Large chattels.

It will be noticed that movables are divided here into three categories. It is inevitable that large chattels, though movable, should assimilate some of the law relating to immovable property, since they represent considerable capital. (In a sense, houses are movables in customary law.) One may note a similar attitude in English Law; it seems that "covenants running with a ship" may be recognised on the analogy of leaseholds;[20] and it is absurd to have one law for persons injured on dangerous premises, and another for those injured in or on dangerous chattels.[21]

This division of chattels into large and small does not affect the question of their vendibility, but goes rather to the question of who may sell, and when. Under the head of large chattels might be collected such ancient objects as fishing canoes; and such modern ones as lorries and taxis.

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20. Cf. Lord Strathcone S.S. Co. v. Dominion Coal Co.: (1926) A.C. 108. (P.C.)
21. Cf. Duncan v. Cammell Laird: (1943) 171 L.T. 186.

(b) Small chattels: It is unusual to find a chain of interests operating over a chattel. English law similarly provides a simple formula for chattels as compared with real property. Any transaction affecting less than the whole or absolute interest in the chattel concerns bailment, loan, etc., rather than sale. Little need therefore be said here about the requirements for the passing of the whole property in chattels.

(c) Chattels of special significance: Under this title are to be collected special objects such as male property, so called, which was formerly the expression of the warlike tradition of the man - his spear, his gun, etc. Again, under the heading of woman's property are found those things passed down from mother to daughter, to which the latter may have a preferential claim. These chattels are of greater significance when we consider the law of succession than in the law of the sale, the contra-suasions to their alienation being moral and customary rather than legal.

Of a slightly different nature are those chattels which are attached to a stool - the stool regalia, etc., and the stools themselves, which are obviously not capable of being sold, as this would be an affront to the dignity of the stool and the memory of the ancestors.[22] And in fact legislation has

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22. But I was informed by one African that in Ashanti before the restoration of the Confederacy there had occurred an instance where a stool, which was in debt, had all its

/over

been passed to prevent the disposal of such regalia by stools.[23]

B. LIMITED INTERESTS.

It is now necessary to consider the sale of limited interests in property. The term "limited interest" is a wide one, and can imply either of two things: that the interest is limited by the nature of the subject-matter of the right, or that it is limited in legal extent, i.e., it is not the widest legal bundle of rights in the subject-matter, being either part of or subject to a larger interest (perhaps itself limited) in the hands of another. It is true that in certain cases it is difficult to say whether the interest is limited "in nature" (as I have chosen to describe it for the sake of brevity) or in legal extent; but this is of little consequence, so long as the facts of the case are correctly presented.

The limited (because derived) interest of a family in the stool land which they cultivate would seem to be of a different kind from the fishing and other rights which may be possessed by a family as members of a larger community, or which may have been the subject of grant by the land-owning stool.

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22. (cont. from previous page) - property taken in execution of the suit of its creditor, including its blackened stools, etc. I have not been able to verify this information.
23. Stool Property Protection Ordinance, 1940, for Ashanti; Native Authority (Colony) Ordinance, 1944, S. 27A, for the Colony.

LAND:

1. SALE OF INTERESTS LIMITED BY THE NATURE OF THE SUBJECT-MATTER.

(a) Timber-rights:

Rights in timber may be of various kinds: there is the ownership (or control) by the stool of timber on stool-lands; there is the interest of citizens in timber-products, which they may customarily use for their own purposes - tie-tie, fufu poles, fencing, roofing, etc.; there is the interest of a farmer in timber-trees which happen to stand in his farm, etc.

The only person entitled to sell rights in timber when the timber itself stands in the forest is the stool:[24] there is a distinction between the sale of timber-rights, or their grant, and the sale of the trees themselves. In the former case, commonly a timber-lease is given which implies the grant of an interest in land - hence the popular African expression - "sale of land for timber-purposes". Such a sale would imply the right and power to control the use in the future as well as in the present of trees standing thereon, and also of trees not yet in existence. Sale of the trees themselves involves the grant of no interest in land, although, to make the sale effective, it is necessary for the grantor to couple his grant with a licence to the grantee to come on the land and take the timber.

But such a sale is a possibility rather than an actuality, since either a lease is usually given, or else individual trees

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24. Or other holder of the absolute interest in the land.

are sold by licence.

The communal rights and privileges of citizens in trees and forests cannot be the subject of sale by the citizens themselves acting individually.[25] A citizen who has right to take poles or firewood could not assign this right to a stranger. It is possible for the whole body of citizens to grant such rights to strangers - sometimes not exclusively, but implied in, for instance, the grant of permission to farm to strangers. The stool which the citizens serve will be the effective party to such a grant; but it will be appreciated that the grant of such communal rights is a mere accessory to the grant of farming-rights to a stranger, and cannot be severally granted. Where the land is sold outright to a stranger by the stool, is one to presume that these "communal" rights are also exclusively granted to the purchaser? To hold so would be inequitable in the extreme, if, for instance, a village on or adjacent to the parcel of land so sold had been accustomed to get its firewood, building materials, and so on, from the adjacent forest. In one or two cases where a stool has sold land to an individual, the purchaser has maintained that he has thenceforth the right to exclude citizens from their former customary privileges: but the proposition is doubtful. It is possible, however to presume that some of such rights have passed by such an outright sale, at least so as to restrict the right of citizens to come

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25. For a description of these rights see Chapter III, pp. 160 et seq.

on the land sold for various customary purposes (more especially so as to restrict them from developing new farms, as they may do by pure custom). But there is a distinction between the citizens concerned exercising rights they already possess, and their extending the scope of their rights. Certain purchasers of land from a stool have gone so far as to maintain that thenceforth they are in the position of an independent chief, and they have endeavoured to set up new states.

(b) Sale of Fishing and Ferry Rights.

Fishing and ferry rights are another example of limited interests in one aspect of the land's wealth; in this case the wealth of the water which it bears on its surface. Rights to operate ferries, including the power to exclude unlicensed persons from operating ferries, are commonly the perquisite of the land-owning stool,[26] although it is possible to find areas where such a stool monopoly is not recognized.[27] One finds that where two states have common boundary at a river, ferries over that river may be in the joint disposal of the communities on either side. Ferry- and other water-rights are today often reserved when land is sold by a stool to an individual stranger; but, apart from this, it is possible to make such rights the subject of a sale, although the more common practice is to lease them, or at least give individuals licence to operate them.

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26. "A ferry is always State or Stool-owned" - Akim Abuakwa.
27. See Chapter III, pp. 166-7.

The right to fish in rivers and lakes - not the subject of private ownership - is one of the communal rights of the citizens, similar to their communal forest rights.[28] In certain cases rivers - which will all be owned (where the stool has an absolute title to the land) by the stool, seem to fall into two categories: free rivers, in which citizens may fish free and without permission; and restricted rivers, where fishing is only by permission of the stool, to whom a proportion of the catch must be paid. The stool can sell the right to fish, provided it does not conflict with the communal rights of the citizens; but in general the practice is merely to grant a licence to fish, either commercially, or for personal consumption, in return for a proportion of the catch, or its worth. Thus one finds a fishing syndicate operating on the River Pra, composed of immigrant Nigerians.

(c) Sale of Mining Rights.

Mining rights are also often reserved today when land is sold; again, either a lease, or special licence to take out minerals, is the usual form of exploitation. The case differs from that of timber-rights in two respects only: first, that citizens have as a rule no rights in mineral deposits; and secondly, that disturbance of the top-soil is involved in the winning of the minerals, which may conflict with the rights of others to farm in the area.

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28. See: Chapter III, pp. 167-8.

2. SALE OF RIGHTS LIMITED IN INTEREST.

If one assumes that there are persons who enjoy an absolute interest in the land, then other persons occupying or interested in the same land can have only limited interest in the land, and derived therefrom. The juridical basis of the family's interest in the stool land which they cultivate, and of a member's interest in family land which he holds, is discussed elsewhere.[29]

(d) Sale of family interest in the usufruct of land vis-a-vis the stool:

Land belonging to a family may take the form of land under present cultivation, fallow-land and land adjacent to their farmed land. The interest of a family in land under present cultivation may be disposed of at the same time as a farm is sold; and to make such a sale effective should normally be included in the sale. The interest of a family in its farm is not limited but absolute; but since, to engender the right in the farm, it is necessary to have a right in the land (and this latter right is limited), the absolute right in the farm is in a sense dependent on the stool's absolute interest in the land. Hence the common restrictions on alienation of farms, especially to strangers. Fallow-lands held by a family may also be the subject of sale, for the family retain an interest in them.[30]

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29. See: THE STOOL, pp. 41-4 ; and THE FAMILY, pp. 233-8.
30. The Akim Abuakwa Declaration denies power to a person to sell an mfuwa, or fallow-land; but other evidence acquired orally tends to show that a citizen may sell an mfuwa.

The family also possess an interest in land adjacent to their farms, which is reserved to their use for future cultivation. It is doubtful whether they can dispose of their right in this adjacent land separately; though commonly it may be included when the family sell the farm to which it is adjacent.

When an individual has a self-acquired farm (subject to the rights of the stool) his position is comparable to that of the family above, and similar considerations apply in regard to sales by him.[31]

What has been said above with regard to the sale of farms applies mutatis mutandis to the sale of houses and house-plots: the distinction between the limited interest in the plot, and the absolute interest in the house, is clearer in this case than in that of a farm.

(e) Member's interest in the usufruct vis-à-vis the family:

(i) Self-made farm on family land: The various rights of a member of a family in a farm which he has made himself on family land can be analysed as follows:

(1) That of part-owner of the family-interest in the land itself.

(2) That of owner of an absolute interest in the product of the farm.

(3) That of owner of a limited or derivative interest vis-à-vis the family in the soil.

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31. See: Ratt. A.L.C. 356.

(4) That of owner of a limited interest in the area of new farming, and the area of potential farming, both as regards the family and strangers to the family.

The derivative interest of the member arises by virtue of the fact that the farm-land has been allocated to him by the family; and his new interest in the farm is created by his effort in making new farms on and adjacent to the fallow-land, and by extending the area of potential farming attached to the farms in question. Although so complicated in appearance, in practice little distinction is made between the various rights, but it appears to be recognized that the labour of the member in making farms on what was fallow-land implies that he should remain solely entitled to the product during his lifetime. The title of the family to the land usually restricts him from alienating the new interest in the farm which he has created for himself without the consent of the family: so that, as regards alienation, the member is usually in a similar position to the holder of an inherited farm.[32]

(ii) Inherited farm on family-land: When permanent crops were not yet in cultivation in the Gold Coast, little distinction would be made between this case and the last, since the farmer would have had to make a new foodstuffs farm each year in either instance. But with the coming of cocoa a real

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32. I am not sure whether the Africans themselves make the distinction between farms on the fallow-land, and farms newly made adjacent to the fallow-land.

distinction can be made: a cocoa-farm is a continuing asset, and may represent not the occupier's, but some other person's, effort. The difference from the last case is that the member in question does not have the last right, in that he has not created a new farm by his own effort. In general, inherited farms may be sold only with the authorization, or by the action, of the family.

(f) The wife's or child's interest in the land of husband or father:

A wife may assist her husband during his life to make farms, part of which may be presented to her in recognition of her services.[33] Whether she may sell her interest or not depends on the nature of the gift, Such gifts are, without more, temporary only, and do not extend beyond the lifetime of her husband, unless her husband's family consent. A wife may have a right to use her late husband's farm for her sustenance whilst she remains a widow, but such a right is of course inalienable.

Children also receive gifts from their father, perhaps in return for their assistance on the farms.[33] Again, a gift of usufruct may be alienable or not by the children, depending on whether the gift is outright or not. The interest of a son so acquired commonly continues beyond the death of his father, but is not, as far as I know, alienable.

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33. See: GIFT, pp. 523-5.

(g) Sale of a subordinate stool's limited interest where the superior stool owns:

The case is that where a stool enjoys its own stool lands and has a recognizable interest therein;[34] but, since it serves a superior stool, the interest of the junior stool is derivative from, and dependent on, the interest of its superior (which might itself be derivative). (The case is different where a stool recognizes the political paramountcy of another stool, but owns its own land.)

Where the subordinate stool owns such a limited interest, it is possible for it to dispose of its interest for cash, but only with the consent of its overlord to the sale.[35]

(h) Sale by overlord where the sub-stool owns:

In such a case, the right of the overlord is commonly one of paramountcy, or jurisdiction, and, since this is a political, and not a proprietary, right, it cannot be the subject of sale. The overlord cannot sell the interest in the stool-lands of its subordinate, since title to such lands is not vested in it. At the most, one finds a claim that the overlord should be a party to a sale by the subordinate stool of part of the latter's

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34. See Chapter II, pp. 86 et seq.
35. As agrees Ratt. A.L.C. p. 356 (but subject to the proviso that the alienee must also be a subject of the Head-Stool); and this might be put forward as the position in Akim Abuakwa, although it appears that subordinate stools enjoy at least a joint interest with the Paramount Stool in their stool lands (vide the Declaration); and probably something more.

lands; or else that it should be a confirming party; or finally, that it has no say in the matter.

For a discussion of the juridical position, the reader is referred to the Chapter on JURISDICTION AND OWNERSHIP, pages 96 et seq.ante.

THINGS IN OR ON LAND:

The limited interest in things in or on land will commonly be a derivative interest: such is the interest of a member of a family in the house belonging to his family, the interest of a successor in a house which he inherits, the interest of the wife and children of members in the house of the husband and father, etc. A family or individual have an absolute, rather than a derivative or dependent, interest in a house belonging to them, even though the land on which it is built belongs to a stool.

Where a stool possesses stool land, but has derived its title from its superior stool (which continues to own the land) the interest of the subordinate stool in certain of the things in or on the land is derivative and limited. And one can similarly construct chains of dependent ownership.

The interest of a member of a family in a family-house is not vendible, since the title is not divisible. Still less can he dispose of his right of residence in a family house, although there is a suggestion in a case from Lagos, Nigeria,

that such a right is attachable or transmissible there.[36] A fortiori, the rights of a wife or children in the house of their husband/father are not vendible.

The interest of a successor in a house or farm, title to which is with the family, is neither vendible nor attachable. Where cases of sale of such inherited property take place, then one must suppose authorization, either express or implied, by the family. But in such a case it is not merely the limited interest of the holder which is transferred, but also the title to the property.

Where a man has built a house on a family plot, his position when he wishes to sell is similar to that of the farmer making a farm on family land: he may sell only with the permission of the family.

MOVABLES:

It is much more difficult to find limited interests in movables, since with movables in any system of law possession rapidly becomes equated with ownership. The interest, if any, of a chief in stool ornaments and regalia is not vendible or assignable.[37] It is really incorrect to describe a chief as having any interest in such property at all, since it belongs

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36. Cf. Odejoke v. J. Holt: (1942) 8 W.A.C.A. 152. In Lokko v. Konklofi: (1907) Ren. 450, at p. 452, Brandford Griffith, C.J., pointed out obiter the difficulty of accepting such a view in the Gold Coast.
37. One must also include the State motor-car nowadays.

to the stool and cannot - as stool property - be disposed of except by the stool. Besides juristic obstacles, there is also a strong prejudice against disposing of such property, even by the person rightfully entitled to do so (the stool). Legislation reinforces this prejudice, since the Stool Property (Ashanti) Protection Ordinance,[38] for Ashanti, and the amendment to the Native Authority (Colony) Ordinance,[39] for the Colony, forbid or impede the pledging or disposal of such property.

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38. No. 22 of 1940: see especially s. 3.
39. No. 22 of 1944, amended by No. 13 of 1947; new section 27A. But see APPENDIX post.

II. WHO MAY SELL.

A. THE STOOL AS VENDOR.

The stool is fully empowered to sell stool property which is subject to its ownership or care, even though, as we have seen, stool lands were not formerly the subject of sale;[40] and, of course, a stool cannot even now sell stool property where its right to do so is no longer recognized, as in Ashanti.[41] But before considering the powers of the stool more fully, it is necessary to draw the reader's attention to the distinction between town and family stools:[42] the distinction is important in this field of property, because just as with the election of a person to a family stool it is the family who perform not only the selection but the appointment, so with the property attached to a family stool. But with the town stool, the control and disposal of property attached to the stool is the

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40. Subject to S. 75 of the Local Government Ordinance, 1951, which requires the concurrence of a Local Council before a disposal of stool land is valid.
41. But sales of land by stools in Ashanti appear to have been fairly frequent in pre-war, and especially pre-1935, Ashanti, as the paper by Mrs. I. Matson on "Land Disputes in Adansi" bears out. In one case, pending whilst I was in the Gold Coast, it was alleged that one of the Wing Chiefs of Adansi had sold part of his unused stool lands to some strangers from Akwapim; the present contest concerned not so much the alienability of the land as such, but rather whether the proper parties had joined in the conveyance. See also: Ratt. A.L.C. 363.
42. The distinction is considered more fully in the Chapter on THE STOOL, especially at pp. 17-21.

concern of the occupant, and the elders and councillors (as representing the Oman), and not the stool-family. It was sometimes put to me that stool property is not under the control of the chief, but of the elders, whose duty it is to safeguard the interests of the tribe in the tribal possessions. Where the chief is of strong character the impression may be given that it is the chief who deals with the stool property, and the elders give only their formal concurrence. But it would be more accurate to describe the position as the exact opposite: it is the elders who have the power, and the chief - as so often in Africa - has the position but not the power which goes with it.

The chief by himself cannot sell stool-property, and such a disposition is prima facie of no effect.[43] The case reported by Danquah from Akim Abuakwa[44] appears to involve a different principle. In this case the sale by the stool-occupant of a farm which had formerly been the property of a previous de-stooled chief, but which had been declared on his destoolment to be stool property, was held illegal, and the sale annulled. The sale was made by the chief (an Odikro) alone; but the operative factor was that the sale injured the "equitable

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43. But, to take an instance from Mrs. Matson's paper, Kobina Foli, former Adansihene, appears to have frequently engaged in dealings with the stool lands and property in a semi-individual capacity.
44. Case A. 62: Cases in Akan Law, pp. 108-9.

title" of the ex-chief to the property. But in another case[45] concerning sales of stool land by the Ohene of Begoro the native court had this to say:

> "Owing to the very reckless way in which lands at Begoro were disposed of at the time Ohene (now Ex-Ohene) K.T. was chief of Begoro, ... the Oman of Begoro, i.e., the Elders, Councillors, Stool heirs, and the Asafo Company with the concurrence of the Ohene, laid down a rule strongly forbidding the sale of the lands without proper authority from the Oman, and with a view to giving due effect to this rule the Oman vested all necessary powers connected with all dealings with the land in the present Ohene, who was then Mr. Thompson, and from that time any sale of land which Mr. T. did not approve of was deemed revocable."

This case is most interesting as illustrating the reiteration of the principle that authority for the stool-occupant to deal with the stool lands flows by reason of a mandate from the people (or oman) of the stool; the remedy actually put into effect went beyond that normally required by custom, since the elders and councillors of the stool are expected to watch the interests of the people. Although the elders, councillors, etc., of the stool have such powers in regard to alienation, yet the elders by themselves cannot sell stool-property: if a chief is obdurate and refuses, then no doubt the remedy is to destool him.

Although, when stool property is the subject of dealings, it is customary to call the council together for a meeting at

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45. Case A. 37: op. cit., pp. 59 et seq.

which the decision is taken, anddespite the fact that many conveyances recite that the "chief of so-and-so (conveys) with the consent of his Elders and Councillors, whose consent and concurrence is necessary according to native custom", or some such words, yet it appears unnecessary for all the elders to join actively in the conveyance; and usually only a representative selection of their signatures (if a deed is in question) is taken. The recital is not conclusive, but it establishes a presumption. It is possible for the stool to delegate some or all of its powers of management of stool property; and it may authorize, for instance, an agent to conduct all dealings with its lands, including that of sale. Persons appointed caretakers for the stool cannot sell unless expressly authorized. The question of parties to a sale is more fully considered below.[46]

It should not be forgotten that where a subordinate stool is vendor, then the consent or confirmation of its superior stool may be required;[47] and that when a Paramount Stool disposes of land within its dominions outright, this may be a matter for the State Council, and not merely for the smaller body of

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46. At p. 333 et seq.
47. Cf. Ratt. A.L.C. 356: where a sub-stool sold, it could do so only "with the consent of the Head Stool and of his (the sub-Stool's) councillors, and in the latter case the alienation could only be to someone who was a subject of the Head Stool."

councillors round the Paramount Chief.[48]

B. THE FAMILY AS VENDOR.

The family may sell family property which it owns or controls, whatever the nature or size of their interest; and today they operate in this regard as freely as any individual.[49] The right or power is subject, where necessary, to notice to or permission from the stool, primarily where a stool is the owner of the absolute title in the land concerned. This limitation cannot apply where no stool enjoys the absolute interest in the land.[50] Consents and permissions from stools and others are examined below.[51]

It is necessary to examine the general statement that "the family may sell family property", in order to find out what is meant in this context by "family" and "family property". The

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48. Cf. Ratt, ibid: "The Head Stool /which actually owned the land/ could /dispose of the land/ only with the full consent and approval of the heads (Chief and Queen-Mother) and councillors of the Stool."
49. Sarbah, F.C.L. 79, seems to make this right subject to the sale's being necessary or justifiable (because of family debts, etc.) or beneficial. Today, at any rate, the power is unqualified.
50. But an unreported judgement of Jackson, J., goes in a contrary sense, for he declares that: "sales of family land were by ancient custom wholly unknown, and that at the highest it was an alienation of the user of the land". This is, with respect, too wide.
51. See: pp. 334-338.

extent and basis of the family are considered in the Chapter on THE FAMILY;[52] as also the various categories of family property. But certain points must be raised, especially here.

The first is the position of the head of the family in relation to the sale or other alienation of family property. What are his powers in relation to sale? The head, as such, is entrusted with the general management of the family property in the wide sense, and will at least initiate dealings with it. How far do his powers of management go? Can he sell the family-property of his own motion, and without the knowledge of the family? He cannot do this;[53] the usual answer received from informants is that the head of the family may sell only with the consent of the family first obtained.[54] But this answer is not entirely accurate, since the head is not owner of the family-property: it is the family which own it.

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52. See ante at pp. 192-196.
53. Sar. F.C.L. 79: "Neither the head of the family acting alone nor the senior members of a family acting alone can make any valid alienation or give title to any family property whatsoever." And "...although an alienation may be necessary for some family purpose, or for the discharge of a family obligation, nevertheless, unless confirmed by the senior or principal members of the family, such alienation is revocable."
Information from Akwapim, Akropong: "The head of the family must always have the consent of the family before selling. Even if the sale is a forced one, he must have the consent of the whole family (and not merely of one or two members)."
54. Cf., e.g., "the head of the family may sell with the consent of all the members of the family": Assin Apimanim.

For greater convenience they have delegated their powers of day-to-day management to the head; but when the head apparently sells with the consent of the family, it is not the head who is the vendor, but the family. Perhaps the head alone will appear in a conveyance as a party: even so he is acting in his representative, and not his personal, capacity -if he appears in his own right he cannot sell.

There is a suggestion by Hayes Redwar, J. in the case of Abba Gaisiwa v. Kwa Akraba[55] (reported by Sarbah) that there is an exception to the general rule that the consent of the family (more correctly, their authorization) is necessary before the head may sell family property. The learned justice said:

> "I am satisfied of the existence of the native custom of the head of the family being entitled to sell family land without the concurrence of the members of the family, when the head of the family has asked the members to contribute to the expense of litigation in defence of the family land and they have refused to contribute."

Three of the referees in the case gave it as their opinion that the family should have been notified of the intention to sell the property before selling. Sarbah,[56] appears to support this statement; but information from Akwapim, quoted ante (at p. 318, n. 53) tends to disprove it. It will be noted

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55. (1896) F.L.R. 94.
56. F.C.L. 78; but note the apparent contradiction with the passage cited above.
I did not meet any such custom as alleged in the course of my investigations.

that Sarbah talks of the question of "confirmation" of the sale by members of the family post hoc: this raises a somewhat different point involving questions of "equity" and "estoppel", as those terms have been used in, for instance, dealing with cases involving long possession or laches.

What is meant by the phrase: "with the consent of the family"? The practice of different families in the Gold Coast varies, since each family tends to evolve its own conventions for its family life; but one may say in general that the likeliest variations are:

(i) a family meeting is called, and the decision taken to sell (this is the most formal);[57]

(ii) the head consults the senior members of the family, formally or informally.[58]

When the first alternative is adopted, the family meet in the same way as they would for the election of a new head. It will be noted that some information says that all the family must agree, and other that only the senior members need be consulted.[59]

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57. So it was said that the head of the family "convenes a meeting": Manso; and see Sar. F.C.L. 91.
58. The head consults "other responsible members of the family (i.e., the senior persons in each section). If they agree, the house will be sold": Mankessim.
"The head of the family consults near relatives on a sale": Cape Coast.
"...with the consent of or notice to all the principal members of the family": Sar. F.C.L. 90.
59. "'Senior and responsible' members of the family are consulted for important family dealings, e.g...sale of family property": Cape Coast.
"If it was desired to sell the (family) land, it would be necessary to ask the senior members of the family": Essiam.

The custom varies. It usually depends on circumstances within the family, and personal facts: such considerations as the absence of a member in a distant place, the age, position and worth of a member, will all be taken into account if after the sale one of the family objects that he was never informed about the proposed sale.[60]

Must all the family (i.e., those who have been consulted, informed, or are present at the meeting) agree to the sale? Again, either the custom or the information varies. In some places it was stated that the decision must be unanimous.[61] Elsewhere a majority decision is taken; or one or two dissentients, if of little position in the family, will be ignored.[62]

As has been shown in the chapter on THE FAMILY,[63] property may be reserved within sections or sub-lineages of a family, and its use reserved to them alone. It seems to be a general

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60. "Before a sale, the more distant relatives are consulted. Absent members are asked for their comments, though their absence does not vitiate the decision of the present members": Cape Coast.
"The greater part of" the family should be consulted, according to Sar. F.C.L. 90.
And in Awortchie v. Eshon, F.C.L. 171, it is said that "as many members as could be got should represent the family".

61. E.g., "A majority is not enough: there must be unanimity": Asikuma.

62. E.g., "If one member of the family is not present, or disagrees, the head will still have a right to sell": Manso. And: "If the majority agree, the house is sold":Cape Coast.

63. See p. 225 ante.

rule that where this is the case that section may engage in less important dealings with the property, but for major operations - such as sale - the formal consent of the whole family is necessary, although the initiative comes from the section. It was strongly denied that one section can by itself sell "section property".[64] The only exception given was where there was a split between two houses of a family, and they thenceforth go their own ways. In such a case, two new families are set up, and the former section acquires complete powers of alienation over its own property.[65]

What may happen in some cases is that the section elder informs the head of the family that he wishes to dispose of some of the section property; the head then informs the elders of the other sections of the family. Once approval has been given, the section goes ahead with the sale, in somewhat an analogous manner to the individual holder of inherited property authorized by the family to alienate it.

Can the family - if they agree together - sell family property without the consent or the co-operation of the head of the family? Sarbah denies the possibility;[66] and, although I am

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64. "One section cannot sell by itself": Essiam; and similar information from Akwapim.
65. Information from, inter alia, New Juaben.
And cf. the case of Fordjuor v. Ayakwa: (1950) (Unreported) New Juaben A Court, Suit No. 75/50, cited under THE FAMILY (at p. 228 (90) ante).
66. F.C.L. 79.

not aware of actual instances, from my own experience it appears that the more usual course in such circumstances would be for the family to attempt to persuade the head to fall in with their wishes; if the persuasion fails, then he might perhaps be deposed, and a more amenable head appointed.

C. THE INDIVIDUAL AS VENDOR.

The power of the individual to sell can be considered from two angles, according as one views him as a member of a family, or as a subject of a stool. The restrictions on the power of a citizen to sell are naturally similar to those which exist in the case of a family vis-à-vis the stool: both are considered in detail below.[67] It is sufficient to remark here that in general, when a citizen alienates his interest, he passes only a limited interest if the absolute interest is vested in a stool.[68]

Further restrictions also exist for the individual dealing with "his" property, since his family also have rights and privileges in this regard. It is a fairly recent novelty to find an individual either possessing anything vendible, or having

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67. At pp. 335-6.
68. "A sale by a private individual ... is a sale only of the agricultural rights possessed by the individual and does not affect the ownership of the land.": Warrington, 37; (i.e., unless authorized to sell the absolute interest by the land-owning stool). But this does not apply where a private individual is himself owner of the absolute interest.

the power to sell it, since in former times - when the family was the unit of land-holding and enterprise more than it is today - he had nothing much that a purchaser would care to take. One finds at the present day that an individual may wish to dispose of three different kinds of property:

(1) property self acquired;

(2) property created by himself but on land belonging to his family; and lastly

(3) inherited or ancestral property.

Let us consider the disposal of these three in turn.

1. SELF-ACQUIRED PROPERTY.

Typical instances of this are a farm made by an individual on land which he has either cleared from virgin forest, bought, begged, or been given by a land-owner other than his family; and houses built or bought by an individual and standing on land not belonging to his family; finally, chattels of various kinds acquired by the individual's own efforts or cash.

During the life of the individual such property is his own, the fruits of which he may freely dispose of as he pleases. There are certain restrictions on alienation (e.g. by gift) sometimes found, but these seldom if ever apply to the sale of the property. The reason is that on the death of the owner self-acquired property not otherwise disposed of becomes - as to title - family property. Hence the family stand to lose

their rights *in futuro* by a voluntary transfer of the property to another during the lifetime of the acquirer. But if the property passes only for money, then theoretically the family is not the loser thereby. Whether notice to the family is required or not,[69] it is often a wise precaution to give them notice, or obtain them or their signatures in witness of the transaction, since this will prevent the family or the successor from disputing the validity of the sale on the decease of the vendor.[70] As a further precaution against litigation the Nifahene of New Juaben has introduced a local rule that all pledges and sales made by citizens in his Division are to be taken before the Chief for countersignature by him. The Chief satisfies himself that the owner is entitled to sell: he does this by enquiry from the head of the transferor's family. Members of the transferor's family are called also to sign the document (if any) of transfer as ancillary witnesses. This prevents the family coming later and proving, or attempting to prove, that the property sold was really family property. This modest attempt at control and quasi-registration is worthy of notice and perhaps of emulation.

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69. Cf. Ratt. A.L.C. 338, who maintains that no consent or notice is *theoretically required*.
70. The kindred of the vendor will be informed that they may be witnesses of the transaction: Ratt. A.L.C. 356, note 1; "If the property is self-acquired, he (the vendor) need not inform the family first, although he usually does so": Bekwai. Sometimes the individual will send a bottle of rum to the head of his family after the sale, and out of the proceeds of the sale.

It must be stressed that even if the individual is required or expected to consult the family before selling, or give notice to them before or after, it is he alone who has the power to make title; the family have no such powers, as they have no present interest in the property. At most, then, the individual's power of sale is fettered; but the power remains. In the more sophisticated districts individuals commonly sell today without consulting their families first; and even in other districts this seems to be the more usual practice today.[71]

I have to thank Professor Vesey-FitsGerald for drawing my attention to a parallel in the Hindu Law of India. The Mitakshara lays down that the consent of the sons is required before a father may dispose of his self-acquired immovables or slaves. In practice, however, the British courts departed from this strict requirement, and allowed a more liberal power of alienation of all self-acquired property.[72]

2. A FARM OR HOUSE MADE BY AN INDIVIDUAL ON FAMILY LAND.

The case envisaged here is that of the member of a family who makes a farm or builds a house on family land. In the case of a farm, the land is a "farmstead" or land formerly farmed

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71. Opinion in Ashanti seemed to be equally divided between the view that notice is required, either before or after, and the view that no notice is required. Lack of notice can always be cured after the event, and it does not avoid the sale.
72. Col. Mit. I.1.27; ibid. 28.

and now lying fallow. In this the family still retain an interest. The case is even stronger in those areas where an absolute interest in land is recognized in favour of the family.

In the case of a house, the individual has built on a plot owned by the family - either never previously built on, or on which a family house once stood.

It can easily be seen that the interest of an individual in such a farm or house is not on all fours with his interest in self-acquired property. The family already have a vested interest in the land in the former case, whilst, if the individual sells his self-acquired farm, he can sell not only the crops and the right to work the land in the future, but also the limited (or absolute) interest in the soil itself, free of family interests. There are thus competing interests in the case we now consider: there is the interest of the family in the soil; and the individual's interest in the farm. No-one would deny to an individual the right to enjoy the fruits of his own labour; so that one would say in theory that the individual's powers of alienation would not be so limited in the case of a self-made farm as with an inherited farm, which may consist of cocoa-trees planted by his predecessor and represent no effort of labour on the part of the present holder. This being the case, the individual should be free to dispose of his self-made farm, provided it is in a way which safeguards the family interest in the soil. The reconciliation between these

different rights in practice leads to a certain confusion in the statements of customary law received. Some informants said that the holder could sell his farm only with the consent of the family;[73] others said that he was required to give prior notice to the family.[74] None said that he could sell without consulting the family at all.

Perhaps the answer is that in all cases he cannot sell the farm without notice to the family, since this avoids his compromising their interest in the land unbeknown to them. Where, in addition, he seeks to pass all the interest in farm and land, so as to divest both himself and the family of their interests, the family must grant him permission to do so first. But the custom does not appear to have settled down yet in all areas.

3. INHERITED PROPERTY.

This is property which has passed to the successor by inheritance, even though it was self-acquired by the de cujus.

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73. E.g., in information from Bekwai, Mankessim and elsewhere.
74. "He must inform members of his family": Adansi;
"He must consult his family": other information from Adansi;
"He cannot sell...without informing the family first": Bekwai;
"If a member of a family has made a cocoa farm, he may sell it, but the head of the family must sign any document. The money is paid to the member, who accounts to the head of the family, who takes a dash, usually 1/3": Asikuma.
And other informants from Ashanti favoured notice.

With regard to inherited property the individual, acting alone, has no power of sale. There was uniformity of information from all areas on this point.[75] To sell the holder requires at least the permission of the family. In appearance it may be that it is not the family, but the individual, who sells when he has received such permission. He may be an apparent vendor, but it is the family who genuinely sell, since they are jointly owners of the property. Truer it would be to say that the individual must be authorized to sell by the family.

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75. Mr. Justice Jackson said, for instance, in the unreported case of Appreku v. Kwakyi: (1950) Land Court, Kumasi, 6/3/50, that:

> "It is well accepted principle of customary law that family lands cannot be sold by one of its members other than with the express consent of the head of the family and its principal members; and by sale I mean the sale of the user of the land as a heritable estate."

III. FORM OF SALE.

All sales must be concluded in prescribed form, although some elasticity is permitted, particularly as between the alienation of different interests, and between land and movables. The general programme for the parties, after making sure that the interest to be sold is one capable of being sold, and that the party selling is the proper party to sell (and is also capable of making a contract), is to satisfy other preliminaries which may be required - such as the consent of some persons to be obtained, and notice to be given to others. There must be agreement about the price; the subject-matter of the interests sold must be ascertained or ascertainable. Next come the conveyance itself, which in the case of a sale of land involves delimitation of the land sold by tracing its boundaries, the customary observances for sealing the bargain, the evidence of the sale, and the payment of the price or part thereof. Then come the notification - if any - which may or must be made to any parties, and the payment of any part of the price still due; with, finally, payment to third parties entitled to a part of the purchase price. Rattray, in Ashanti,[76] suggests that the essential parts of "the formula of sale" were:

> "1. The competency of the contracting parties, i.e., the participation of all members of the family.

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76. At p. 236.

2. The witnessing by the proper persons in authority.

3. The viewing of the land and fixing of the boundaries.

4. The valuable consideration.

5. The payment of the tramma."[77]

Most of the points he puts forward will emerge in the course of this section. In the special case of sales of land, the procedure was described to me as follows:[78]

(1) If the vendor is a stool, the preliminaries are indicated by payment of a "knocking fee" (opon akyibo de) to the vendor. The purpose of this is to open negotiations, and predispose the vendor in the purchaser's favour. The knocking fee is paid by the purchaser in person, or by persons deputed as messengers where there is a group of prospective purchasers. The "fee" is in the form of "drink", although money is some-

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77. In Mensah v. Carthy: (1949) (Unreported) Land Court, Sekondi, Land Appeal No. 15/48,) Mr. Justice Ragnar Hyne said (although the point was, he found, obiter):
"Learned Counsel for the appellant has pointed out that to constitute a valid sale of land in the Gold Coast [sc. by customary law] there must be
1. Competent contracting parties. (Compare this with Rattray above).
2. Mutual assent of such parties.
3. The marking out or inspection of the land and its boundaries, and, if necessary, the planting of boundary-trees, and fixing of boundary marks.
4. Valuable consideration, that is, gold, money, or chattel, paid, given, or promised.
5. The payment of trama (earnest money) to the vendor or his representative, in the presence of some of the members of his family and witnesses."

78. Information largely from Akwapim.

times offered today in lieu. If the purchaser is favourably received, then a time is arranged for making the purchase.

(2) At the appointed day and time the purchaser returns, and accompanied by the vendor, proceeds to the land in order to inspect it. If the land is found to be good, fertile, forest-land, the sale will proceed.

(3) The vendor and purchaser will then agree as to the price to be paid: their agreement will be determined by the area of the land, its condition, and so on; and the price will be quoted at so much "per rope".

(4) Boundaries are then cut and measured.[79] For this purpose labourers are employed, the purchaser finding them and bargaining for their remuneration. The purchaser pays the labourers;[80] but when the purchase-price is paid a portion is deducted to represent the vendor's share in the cost of the labourers' wages, which are a joint expense between vendor and purchaser.

Before the labourers enter on the land to cut the boundaries, the vendor pours libation to invoke supernatural blessing on the transaction with drink provided by the purchaser.

The labourers proceed to cut the boundary-lines as indicated by the vendor and his representatives. They will be

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79. See: Sar. F.C.L. 86, who makes it compulsory.
80. According to Danquah (A.L.C. 216-7) the boundary-cutters are usually remunerated by 5% of the price.

followed by the vendor, purchaser, witnesses, and representatives of the vendor and purchaser, who measure the lines cut accurately in terms of "ropes".[81]

The boundary usually runs from large tree to large tree, which will be marked by the boundary-cutters to indicate the line.

(5) Once the boundary has been cut and measured, the parties sit down and the price is paid. Commonly only a portion will be paid at the time, but this does not affect the validity of the subsequent proceedings.

(6) Then follow the customary observances (the cutting of guaha described below)[82] and then the corners of the land may planted with "ntome" or boundary-trees.

(7) Frequently thereafter today a written conveyance is made and signed.

A. CONSENTS AND AUTHORIZATIONS.

It is a frequent requirement of the customary law that the consent or authorization of certain persons must be obtained before a sale of property takes place. The term "consent" is used here for the permission which a party requires, who has power to sell, but cannot exercise this power unless some other party signifies his consent. The term "authorization" is used

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81. Here given as 24 fathoms.
82. See: pp. 354, 355 post.

to cover cases where a party selling has no power to sell that particular interest (although he may have power to dispose of a lesser one), but has to be clothed with authority given him by some other party to sell that interest (or the larger interest). In the former case the vendor already has that which he wishes to sell; in the latter case he has not.

1. CONSENTS.

These divide into two main classes, according as they concern property-relations between family and member, or between stool and subject.

A member does not usually require the permission of the family before selling his self-acquired property.[83] He may need the consent of the family before selling property self-made or self-acquired on land belonging to the family.[84] He does require authorization before selling his interest in inherited family property.[85]

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83. Cf. the dictum in Sampah & ors v. Yarboyoe: (1946) (unrep. New Juaben A Ct, Suit 216/46), where the native court considered the validity of a sale of self-acquired property:
"As to the contention that no member of the family witnessed the sale, a building or property made by a member of a family is regarded as private property in his lifetime, only the privacy of ownership dies with him after his death...There is nothing in record that the family interest is in the properties in dispute."
84. See the discussion ante, pp. 326 et seq.
85. Cf. the dictum of Morgan, J. at F.L.R. 136, which covers also the case of a stool's interest:
"To render /sale/ valid, the consent of the family as regards dealings with family land, and that of the community as to dealings with land attached to a village or town stool, would be required, such consent being given through the head of the family, or the chief of his village or town stool."

A family (or individual) selling its interest in immovable property may require the consent of the stool which owns the land before disposing of the property. In the areas where the absolute interest in land is commonly owned by a stool or stools, the stricter observance of the customary law is that the consent of the stool is required before a citizen sells his limited interest in farm or house to a stranger[86] (this ensures that the stranger pays rent or tribute to the stool, and also preserves the title of the stool in the land itself). It was sometimes stated that even when selling to another citizen a family or individual requires the consent of the stool:[87] this - if true - is probably the exception, since in most cases no more than notice to the stool is required, and in some areas no notice or permission is required at all. In those areas where the family or individual holds the absolute interest in the property, he or they require no permission or notice at all.

86., Cf., for instance, the statement from Akim Abuakwa that "where a native of Akim Abuakwa sells his farm or house to a stranger the local Chief must sign with the vendor. The Okyenhene must be informed of any such sale." The local Chief must give his permission before such a sale.

87, Rattray, A.L.C. 356, seems to suggest that alienation was only possible when the person to whom the holder of the limited interest wished to convey that interest was a subject of the Chief who owned the land; the footnote adds: "the custom being now for the Chief (who must of course be informed) to take 1/3 (abusa) of the valuable consideration paid for the transfer, the vendor taking 2/3." But there appears to be a confusion here.

In any case, the rule only applies to immovable property and does not apply in the sale of chattels, or to the sale of crops (except to the sale of the right to tap palm-wine in some cases).

What consents, if any, are needed where a sub-stool sells land? As to this point, there is a certain amount of variation of information from place to place, and from one informant to another. Part of the explanation lies in the differences from state to state in who is the owner of the land, the paramount or the subordinate stool. But even in those cases where it is apparently the subordinate stool which owns its stool lands (the Paramount Stool having a jurisdictional interest only), yet today the tendency is for the Paramount Stool to join in the conveyance, at least as a "confirming party". In theory, a subordinate stool owning its own land does not need the consent of the Paramount Stool before it sells any of that land. Where the subordinate stool owns only the "usufruct" (i.e., a dependent interest), then obviously such a stool is not by itself a competent contracting party, and the consent

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88. Rattray, A.L.C. 358, considers the special case of Ashanti as it was; where a Birempon of the Asantehene wishes to sell any part of his lands then "the King of Ashanti had first to be informed of the contemplated sale". But today of course the matter does not arise, since outright sales by stools are no longer permitted in Ashanti; it could not arise in Rattray's time, since the Confederacy was then in a state of dissolution.
Cf. also C. Hayford, G.C.N.I., 45.

(or rather the authorization) of the paramount stool will be essential.

Let us consider some of the generalised statements which have been made about this question of consent, and also later some of the exceptions which emerge. In Sintim v. Apeatu,[89] which was a case which concerned Akim Kotoku, it was laid down that the consent of the superior stool is necessary when an inferior stool sells its lands. But examination of the facts discloses that the vendor here was an Odikro who served a Divisional Chief: the question was whether the consent of this Chief was required (the answer was that it was); the consent of the Paramount Stool to the transaction was not mentioned, or apparently needed. Rattray[90] says that a sub-stool which possesses the usufruct of the land can only sell "with the consent of the Head Stool and of his (the sub-stool's) councillors". But in Ashanti generally, of course, title to land within a division is with the Paramount Chief. Some other opinions were given from the Colony that permission of the Paramount Chief is needed;[91] but these perhaps are concerned with jurisdictional questions. Although Danquah[92] gives it as an absolute rule that it is necessary to acquire "the sanction and

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89. (1934) 2 W.A.C.A. 197.
90. A.L.C. 356.
91. "Before the sale of land, the Omanhene must approve": - Asikuma.
"If a Divisional chief wishes to sell his land, he should inform the Omanhene first": Essiam.
92. A.L.C. 214.

approval of the Paramount Chief" to a sale, and traces this to the fact that "there is not an acre of tribal or stool land in Akan land over which a Paramount Stool has not inherent right of ultimate ownership", yet he admits exceptions for Akwapim and the Fante states; and even for Akim Abuakwa admits immediately afterwards[93] that where a sub-stool owns its land "our constitution as it stands at present recognises the Paramount Stool's acquiescence as indispensable in so far as its right of paramountcy is concerned".

Casely Hayford,[94] writing principally of the Fante states, says that:

> "To him /the Paramount Chief or King/, indeed, belongs the power of ratifying and confirming what the subject grants, though he may not himself grant that which is given. Such ratification is not even absolutely essential to make the transaction valid, though as being evidence of good faith, such ratification or confirmation is resorted to, and is, indeed, becoming quite common in modern grants." (95, 96)

2. AUTHORIZATIONS.

Again these may be split up as between the family and stool.

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93. A.L.C. 215.
94. G.C.N.I. 45.
95. The reader should also refer to the chapter on THE STOOL, especially at pp. 27 et seq.
96. "Any disposal of any interest or right in land" for a valuable consideration by a stool now requires the "concurrence" of the Local Council - Local Govt. Ordinance, s. 75 (1).

The head of the family must be authorized to sell family property by the family; this is frequently but inaccurately described as "obtaining the consent of the family". Sections may be authorized by the family to sell property the use of which is restricted within that section. Members of the family may be authorized to sell inherited property. This will especially occur where a member wishes to raise money, and has only inherited property which he holds on which to raise the money. If he sells this property (or even charges it), then he must be authorized by the family first to do so. In some cases it appears that a member may satisfy this requirement by informing the head and one or two other responsible members, perhaps including the potential successor.

A stool serving a superior stool may be authorized by the latter to sell not only its own limited interest, but all the interest in the property. Wherever such a sale by the subordinate stool has the effect of extinguishing not only its own, but the superior stool's, interest in the property, then that is a case of authorization. This happens of course only where the stool serving a paramount stool enjoys nothing more than a derivative interest in its lands. In such cases the superior stool may sign as a "consenting party", or as one of the grantors; but the effect is the same. A citizen or family serving a land-owning stool may in theory be authorized to sell not only his or their limited interest, but all the interest in the land which they occupy.

B. NOTICE TO INTERESTED PARTIES.

Even where authorization - permitting a person to sell a larger interest than he possesses; or consent - to permit a person to sell that which he owns, is not required by the customary law, it may still be necessary to give notice to other parties who are interested in the subject-matter of sale. Such notice may be required before or after the sale.

1. NOTICE WITHIN THE FAMILY.

According to the custom of different areas, notice by a member to his family may or may not be required before he deals with his self-acquired property.[97] In any case, it does no harm to give notice to the family, so as to stifle subsequent argument. Such a result can equally be achieved by making some members of the family witnesses to the sale. The question of notice will particularly arise in the case of sales by public auction under order of the court of a member's farms in satisfaction of his own debt. It is noteworthy that there is a tendency today to take the advertisement of the attachment and sale as notice to the family, who are liable to forfeit not only the member's limited interest in an inherited or self-made farm, but also the family interest in the land. Normally at least consent would be required if an individual endeavoured to sell by himself; but in this case there is the tendency to

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97. Notice required; Ratt. A.L.C. p. 356, note 1.

replace the requirement of consent with that of notice (and constructive notice, at that).[98]

Is subsequent notice as good as prior notice? Where the aim of notice is to pacify the family, probably yes.[99] Otherwise the answer is in the negative, although in actual cases instances of subsequent notice or consent being accepted are found.

2. NOTICE OUTSIDE THE FAMILY.

Where a villager sells a farm or a house within the area of his village, he may be required to inform the Odikro of the village, even where the Odikro does not occupy the position of land-owner. Again, even when it is not required, it is a wise precaution, since the Odikro supervises and looks after the village and village-affairs. Variations which are observable in regard to the method to be adopted by a citizen who wishes to make a farm out of the virgin forest, or build a house in the village (either he need inform no-one before doing these things, or he may be required to notify the Odikro of his choice, or lastly he may be shown by the Odikro a place to

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98. But in one case in New Juaben, a sale by auction was reversed after many years for lack of consent,; and information from Akim Abuakwa stresses the stricter view.
99. "Such family disputes usually end in getting the aggrieved member who has not been consulted prior to the sale to express his concurrence in the transaction after some amount of pacification money has been paid him by the vendor." - Ratt. A.L.C. 356.

farm or a site for his house) are observable also in the requirements for alienation - at least as between citizens (perhaps even only between co-villagers).

Must a vendor give notice to neighbouring farmers or householders? In theory probably not. But in practice, since a person who sells his farm or plot will be required to trace out the boundaries of his holding, he should inform his neighbours that he is doing so, and get their co-operation. From the point of view of the purchaser, such a procedure will prevent many of those arguments which later arise, since allegations of encroachment will be freely made.[100]

The requirement that the stool should be notified of any sale of a house or farm on its land is traceable to either of two principles: where it is a landowner, then this is part of the wider principle that a landowner should be notified before lesser concurrent interests in or connected with the same subject-matter are disposed of; where it is not a landowner, then a jurisdictional principle is involved. There is a certain amount of conflict as to whether the consent of a landowner (a family or individual) is required before a person may sell a house, for instance, which he has built with permission on

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100. Cf. Sarbah, F.C.L. 93: "The owners of land adjacent to and abutting upon land under inspection are invited to be present, so that disputes as to boundary marks may be averted in the future."

the land.[101] But it may be given as a rule that notice at least should be given to the landowner; otherwise the action of the house-owner in selling the house may jeopardise the title of the landowner to the land (contrary to one of the implied terms of the tenancy), as the transferee may later deny the landlord's title. Where the stool is a landowner, then - as already noted - sales of limited interests by citizens to strangers require the consent of the stool; sales between citizens need no more than notice,[102] and often not even that.

Those with concurrent interests in the same subject-matter, apart from the case of landowners and sale of farms, etc., may require the giving of notice. A stool cannot alienate land occupied by a subject without that subject's consent;[103] but - a lesser case - if citizens have farms on land granted for mining or timber purposes, then notice should be given to them collectively of the transaction.

No notice need as a rule be given by individuals or families disposing of their land or interests therein in those

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101. The house, of course, belongs to the builder: an informant from Mankessim maintained that the consent of the land-owner would be necessary in the case of a sale, but not in the case of a mortgage.
102. "If a citizen sells, he should inform the Chief on whose land the farm or house is situated": an Ashanti informant. - If a citizen of Akim Abuakwa sells his farm or house to another citizen, then the local Chief should be informed.
103. Quarm v. Yankah II: (1930) 1 W.A.C.A. 80.

areas where they hold the absolute interest.[104]

Where notice needs to be given, in many cases it is equally acceptable either before or after the sale takes place.

The form in which notice is given varies: where property has been attached in execution, notice of an intended sale is usually given by displaying a copy of the order or auction-notice on the property, as warning to all those adversely affected to come in with their claims within the time allowed. But in general notice may be given orally or in writing of an informal nature. Making affected parties witnesses to the transaction gives them effective notice. The fact that all customary transactions are (or were) made publicly usually ensures that notice is correctly given; hence secret dealings, such as are permitted by the increase in the use of written instruments, run counter to the former spirit of the law, and may infringe its letter as well.

C. THE PURCHASE-PRICE.

(1) When agreement has been reached about the property to be sold, and about the price payable therefor, the sale is made effective by conveyance or delivery. The purchase-price is not necessarily payable either in a lump sum or before conveyance of the property takes place. Usually at least a portion

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104. E.g., in Akwapim; and also "there is no need for an ordinary family to inform their chief before selling their land": Essiam; and in other Fante states.

is paid on account to the vendor (though often after the actual conveyance has taken place). Payments either by way of "earnest" or as tokens to witnesses should not be confused with such part-payments, even though these also may be calculated as a portion of the purchase-price. What is paid and when is determined by the agreement of the parties; but, unless the contract expressly provides otherwise, the validity of the sale is not affected by the question of whether the price has been paid in full or not.[105] The payment of "tramma" is often looked upon as the payment of "earnest" or part-payment, serving a comparable function to such payments in the English law of sale of goods.[106] But its significance is disputed, and one does not get much help by describing it as earnest-money. As Danquah points out in Akan Laws and Customs at p. 217, earnest is given in English and Roman law to indicate the serious nature of the negotiations preceding a sale, and is given before the sale takes place. Tramma is paid after the sale, and is evidentiary: it may or may not be calculated as a portion of the purchase-price. (More is said on this topic below, at pages 358-361.)

As is the case with all requirements for fulfilling obligations - whether to pay money or perform some service - in Akan custom, the purchaser may "beg" for time to pay the

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105. Cf. Danquah, A.L.C. 217; and evidence from Akwapim and elsewhere.
106. Cf. Sale of Goods Act, 1893, s. 4.

purchase-price; or to pay the amount outstanding after the sale has taken place - such a request is not usually refused.

(2) Abusa: or the one-third share: It is frequently stated that one-third of the purchase-price is payable to certain third parties in the event of a sale: when is such a payment exacted? The application of abusa is not limited to the case of sales, since (apart from tenancies) it is frequently stated that all unusual profits derived from the land - gold-nuggets, treasure-trove, sale, etc., are subject to abusa if they are not such as derive from the use of the land for ordinary cultivation. In the specific case of sale, the logic of demanding such a payment when the holder of a limited interest sells to another is evident when the one-third share represents the capitalisation of the holder of the absolute interest's rights in the same land, rights which are compromised or destroyed by the sale. When a citizen sells his limited interest in a farm to a stranger from outside, it is reasonable that one-third should go to the stool (the holder of the absolute interest), since the stranger is acquiring something to which he is otherwise not entitled, and is - by his acquisition - barring the rights of the citizens (whom the stool represents) to take up the land for farming in accordance with their right to land for free cultivation. It is difficult to see why the one-third share should also be exacted (or declared to be exigible) in cases where the interests of the stool are prejudiced

only partially or not at all, as is the case when one citizen sells his limited interest to another; in such cases the stool's interest remains unaffected, and charging abusa becomes a profits-tax on internal dealings.

Where a stool does not hold the absolute interest in the land, abusa is not paid on the purchase-price to the stool.

Where stools hold the absolute interest, then if a citizen sells his limited interest to another citizen, in general the modern information is that no abusa is payable.[107] But on this point Rattray, writing in regard to Ashanti, said[108] that (in the case of a sale from citizen to citizen) "the custom /is/ now for the Chief...to take one-third (abusa) of the valuable consideration paid for the transfer, the vendor taking two-thirds". The Akim Abuakwa Declaration[109] laid it down that:

> "A tribal member may sell his farm on Stool land to another tribal member without permission of the Stool or of the Paramount Stool, and no Stool is entitled to any share of the purchase money thereof."

This declaration harmonizes on this point with the actual practice as observed.

Where a stool holds the absolute interest and a citizen sells his interest in, for example, a farm to a stranger, then

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107. Or so it was stated in Ashanti: Adansi, Essumegya, Bekwai, etc.
108. A.L.C. 356, note 1.
109. 1932, para. 26.

the custom is that abusa is payable on the purchase-price received. But not only do the proportions vary, but the legal position thereby produced also varies. Warrington[110] says that:

> "The custom with regard to the proceeds of such sale is different in each Division. In the Juaben Division the Stool receives 1/2 of the purchase money; in Kumasi and Bekwai the Stool receives 1/3; and in Kokofu 1/4."

But this description for Ashanti between the wars refers to the case of sales to individual strangers to which the Divisional Chief and his Elders have consented, authorizing the passing of their absolute interest to the overlord of the purchaser, the limited interest of the citizen passing to the stranger himself. In modern sales to strangers by individual citizens only the citizen's limited interest passes, and the stool of the purchaser does not acquire the absolute interest of the vendor's stool. Hence, although it may be given as a principle that the stool is today entitled to charge abusa on the proceeds of such a sale,[111] yet in practice other methods of acquiring revenue from such transactions are adopted; for Akim Abuakwa, for instance, it was stated that:

> "Often a Chief may forgo this share of one-third if the farm is really established and not a mere pretence to dispose of the land with a new cultivation and little crops on it."

And in many parts of Ashanti today payment of abusa on the

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110. At p. 37.
111. Cf. the Declaration for Akim Abuakwa, para. 24: "one-third of all moneys received from such sale shall be paid to the Stool of which he [the vendor] is a member".

purchase-price to the stool is taken as alternative to charging the stranger-farmer abusa on his yields from the land (as cocoa-tribute), or as rent; and the latter seems to be the more usual practice.[112] Again, in New Juaben the theory of such a sale to a stranger is that the citizen surrenders his interest to the stool, and receives compensation therefor from the Stool (the passing on of what the stranger pays by way of consideration); the Stool then grants a fresh interest to the stranger in exchange for an annual rent.

Is a stranger who acquires a farm or house-plot, either by transfer from a citizen, or by grant from the stool, to be charged anything if he later disposes of his interest? In theory, whether the transferee is another citizen or stranger, the answer should be in the negative (since the stool has either received payment in commutation of its interest, or has never barred that interest). But there are contrary opinions, some of which root in the former custom, no longer prevalent, by which a stranger wishing to depart, and to transfer his interests for cash first, could only surrender them to the stool, unless the stool permitted otherwise.[113]

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112. Adansi: the landowning stool is entitled to 1/3 of the proceeds of the sale;
Essumegya: the stranger pays tribute thenceforward for cocoa, but it is not done for the Stool to take any share of the purchase-price;
Bekwai: in the case of houses, the Stool takes no share, but charges the stranger a rent for the plot.

113. It was stated that in Essumegya that if a stranger sold his interest, then the Treasury would receive one-third of the purchase-price.

When a subordinate stool (owning its lands) sells its land, abusa may not be payable to its overlord. In other cases it is stated that the one-third share is payable;[114] and it was emphasized by Atta v. Amoah[115] that such a payment was not necessarily attributable to ownership, but may only be in recognition of paramountcy. But in general payment of abusa from subordinate to superior stool is by virtue of the absolute interest in the paramount stool, and is the price of the barring of that interest, effected by the sale of the whole interest authorized by the paramount stool. Casely Hayford agrees with this view:

> "Where a paramount chief happens to receive abusa, that is 1/3 share of the proceeds of land, then it is by reason of the fact that the right to possess is ultimately traceable to his stool." (116)

(The wording might be more refined, if "the right to possess" - an English concept - were excluded or modified.)

D. EVIDENCE OF SALE.

Some of those things which serve as evidence when a sale has taken place may also be the binding element of the transaction, or else may be validating or essential factors. The cutting of guaha and the giving of tramma (and perhaps the modern use of writing) serve both to evidence the sale, to

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114. E.g., in Akim Abuakwa.
115. In re Asamangkese: 1 W.A.C.A. 15 P.C.
116. G.C.N.I. 48.

"stamp" the bargain, to make it enforceable, and to convey the property irrevocably.

The problem that occurred in Roman Law and also with the English Statute of Frauds - whether a prescribed element such as writing is merely evidentiary, or is a vital part of the contract (i.e., the lack of it means there is no such contract as intended) - is met also in the field of African Law. It makes the matter more complicated that the use of writing - originally foreign to the customary law - has now obtruded itself into customary transactions. Again, the presence of witnesses is not significant only as evidence that a transaction has taken place, or that a document is the act of a party, but may also bind the witnesses themselves as to the contents of the document, or some interest which they possess over the subject-matter.[117]

1. WITNESSES.

As has been noted above, one of the significant elements of most (if not all) customary transactions is their publicity, which means that any secret dealing is at least suspect. Any party endeavouring to prove a sale will be asked: "Where are your witnesses?" There are two kinds of witnesses: those who are in some sense parties to the transaction, and those whose presence is purely evidentiary. Where the consent or knowledge

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117. One may compare the medieval laudatio.

of the family is required, the joining of members of the family as witnesses will serve the purpose both of gaining such consent or giving such notice, and of evidencing the sale as against the likeliest objectors by a quasi-estoppel. It is suggested by some sources[118] that there should be both family and extraneous witnesses to a sale of property by a member thereof. It was suggested that the family witnesses might consist of the abusuapanin, the obaapanin, and a nephew or two.[119] Outside witnesses may consist of chiefs, elders, headmen, or other prominent citizens.

Witnesses are called in when boundaries are traced out, and to assist in or witness the giving of tramma or the cutting of guaha. Where there is a written document, even though there is no idea of any requisite number of witnesses in accordance with the English law of deeds (or indeed like some other modern African customary laws)[120] witnesses are always employed - so that it is unlikely that a document without any witnesses signing at all would be admitted.

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118. E.g., Rattray, A.L.C. 356; Sarbah, F.C.L. 87: tramma is paid "in the presence of some of the members of his /the vendor's/ family and witnesses."; "there should be both family and stranger witnesses" - Akim Abuakwa; see also 7 F.L.R. 101-104, and Danquah, A.L.C. 217.
119. Akim Abuakwa.
120. E.g., the Haya customary law (of N.W. Tanganyika) seems to lay down fairly rigid requirements as to the number of witnesses for different sorts of transactions; but the number is a guide rather than an exact requirement; (cf. Cory & Hartnoll, Customary Laws of the Haya Tribe).

It is customary to remunerate witnesses to all transactions. This remuneration may take the form of drink, or of sharing in a small amount of money. Some informants say that witnesses share the tramma;[121] at any rate, it is certain that it is the duty of both the vendor and the purchaser to contribute to the payment of witnesses.[122] The payment serves rather to bind the memories of the witnesses, than as an essential part in the sale or transaction. It is doubtful if unremunerated witnesses would in practice testify, so that their reward is a practical essential, if not a theoretical one.[123]

2. THE ROLE OF 'TRAMMA' AND 'GUAHA'.

What the object of the giving of tramma or the cutting of guaha is in customary sales will perhaps become clearer if first I give a description of a sale of land as collected from some informants.[124] The information relates to purchase of land by a group of persons from a stool: mutatis mutandis it applies however to sales between other persons.

The preliminaries of sale have already been described, namely, the "knocking fee", inspection of the land, fixing of the price, cutting of boundaries, etc.; when the boundaries

121. E.g., Akim Abuakwa, and many Fante areas; Ratt. Ash. 234: it "...was set aside and given to the witnesses of the transaction."
122. Cf. Danquah A.L.C. 217.
123. The token they receive may be drink, as when aseda (for instance, in the case of a gift) is distributed amongst them. The remuneration of witnesses is comparable with the "hearing fee" which is, or used to be, paid not only /over
124. (See next page)

have been cut, then, whether the purchase-price has been paid in full or not, the parties, after returning from the forest, proceed to "cut guaha", which has the effect of making the sale complete and outright. The ceremony takes place indoors before many witnesses. It is as follows:

Vendor and purchaser each provide a representative (usually a small child) to cut guaha. The vendor must provide a piece of fibre or "string" on which are threaded six cowrie-shells (ntramma: the Twi for "cowries"). The two persons cutting guaha squat down; each passes his left hand under his right leg and grasps one end of the string of cowries, holding the three cowries nearest to him. At the due time the string is broken, and each is left holding three of the cowries. This is known as "cutting guaha". During the cutting of guaha the vendor may make a declaration that he has sold the land to the purchaser, and cut it for him; and that henceforth it is only to be for the purchaser, his heirs and successors. If at any time the vendor tries to sell the lands to someone else, or denies the title of the purchaser, he must refund double the purchase-price.[125] If the purchaser refuses the sale without

123. (cont. from previous page) - to the persons actually hearing a case, but also sometimes to bystanders.
124. From Aburi, Akwapim: the Adontenhene and some of his elders.
125. In Twi: "Nne me Asiamasi anase Obenteng masase a eda ha ne ha yi maton ama Asiamasi anase Obenten atew neti guaha ama ono ne nasefo wo adansefo yi anin. Efi nne a matew guaha yi se mereton asase no bio anase mepe se megye nsem a, metua sika no nnoho. Ɛe ono nso se onto a, ende metua sika kom no ma no."

cause, the vendor will have only to refund the purchase-price without interest. The respective parties keep the cowries used during the ceremony for ever, in order that in case of dispute between them or others over the sale, the cowries may be produced as evidence. In fact, it was said, production of the cowries is (or was?) an essential piece of evidence as to the sale.

When the ceremony is over, the purchaser customarily provides drink and sheep for the vendor, to confirm the sale (the reason being to soothe the feelings of the vendor, who is now deprived of his land). The witnesses to the sale sometimes take the hairs of this sheep as evidence of the sale, to be produced in the future in case of dispute. Immediately after guaha is cut, the parties return to the land and plant boundary-trees.

It was stated that guaha is used in all cases of outright sale, and whether the land sold is forest or fallow-land ("kwae" or "mfuwa").

Danquah, in his Cases in Akan Law,[126] refers to guaha and tramma; he says, under the heading of "Sacrifice to land sold", that:

> "A small sum of money called "Ntrama" is given to the two actors in the "guaha" ceremony, and this completes the sale. This money has been called, I think by Sarbah, "earnest" money", after the Roman arra /sic/, but it should be

126. P. xxxii.

> noted that whereas in Roman law earnest money preceded completion of a contract and was only evidence of the parties' intention to carry out promises, the payment of "Ntrama" in Akan law is the final evidence of the absolute performance of a contract. In all sales of land the vendee should consider the transaction imperfect if the cutting of "guaha" and the payment of Ntrama are omitted in the final ceremonies. A sheep is generally killed as a sacrifice to the gods or spirits of the land on completion of the sale."

I have cited this passage at length, because it contains much of importance for our present enquiry. The learned author admirably disposes of the fallacy that tramma has anything to do with earnest; but it will be noted that he implies that both tramma and guaha occur for the sale of land, that the payment of tramma is to the participants in the ceremony, and that the sheep is killed for religious reasons. For Danquah's description of the guaha ceremony, the reader is referred to Akan Laws and Customs, p. 217.

(a) Guaha:[127]

What is the extent of the custom of cutting guaha? Dr. Danquah calls it an essential element in sales of land; and this - at any rate for customary law purposes - is undoubtedly

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127. I have been unable to discover the exact meaning of this word. One Ashanti man I asked, not knowing the meaning of "twa guaha", thought it referred to killing sheep ("oguan"): whilst another thought it was a direction to the boundary-cutters ("cut here"). Rattray, at Ash.L.C. 358, says: "The idiom 'twa gwan' (cut a sheep) was also sometimes used to designate this transaction" (the payment of tramma). In Akim Abuakwa I was told that it meant "cut the forest". I wonder whether it is a non-Twi word?

true for certain states, e.g., Akim, Akwapim, Akwamu, Kwahu, (even Krobo, according to one informant - but I have not checked this). Enquiry in Ashanti revealed that guaha was unknown there today; that this may be due, not to the absence of outright sales of land in Ashanti today, but to unfamiliarity with the custom, was indicated by some of the explanations of the phrase "Twa Guaha" which were given to me in Ashanti; some said: "Oh, that is an Akim custom".

The effect of guaha: all information seems to concur in the necessity for it (in those areas where it applies) in order to make a sale complete and irrevocable. It was noticed in the case of Sintim v. Apeatu,[128] where Lord Maugham said:

> "/K.A./ and another man performed the ceremony of cutting the "Guaha", a very important ceremony, which, according to the evidence would have the result of transferring the property in the land to the purchasers..." (at p.203);

and

> ..."there seems also to be doubt as to the effect of the ceremony of Guaha in cases where the purchase money for lands has not been paid. The ceremony, as the law stands, does not require any permanent record whatever and it is evident that after the lapse of years it may be almost impossible to prove that the ceremony has been performed." (at p. 205) (129)

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128. (1934) 2 W.A.C.A. 197.
129. But after a short lapse of time an English Court would apply the maxim omnia praesumuntur rite et solemniter esse acta.

(b) Tramma:[130]

Danquah says that the giving of tramma (cowries), a small payment to seal the bargain, is confined to dealings with movables, and that for immovables guaha is used.[131] There is a great confusion of information, and it is doubtful if this statement completely covers the question of the use of tramma. Official answers from Akim Abuakwa (Dr. Danquah's own state) said:

> "Strictly, ntrama is the term used upon the sale of a chattel. The fee paid for the sale of land is called guaha ("cutting the forest").."

But it was also stated (in regard to sales of land) that:

> "An ntrama fee (originally a cowrie, but now any handy sum, 5/- or £5 or more) must be paid by the vendor and purchaser or by the purchaser alone. This amount is shared by the witnesses to the sale and serves as a stamp."

In sales of land the provision of cowries was originally purely symbolic; they were provided by the vendor, and divided afterwards between vendor and purchaser as evidence of the conveyance. Rattray in one place[132] seems to imply that tramma is used for all sales; whilst from another passage[133] it might be inferred that sales with tramma were confined originally to movables only. The expression "tɔ́ŋ no ntrama" seems to be very widely used throughout the Akan area in the sense of "to

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130. In more usual spelling "ntrama"; it also appears in old reports as "trimma".
131. Akan Laws & Customs, 217.
132. A.L.C. 358.
133. Ash. 234.

sell outright"; and Rattray calls sale as such tramma.[134] In the course of my inquiries in Ashanti there seemed to be no familiarity with sales with tramma; but whether this was because of the prohibition on outright sales of land there I cannot say. The rule that guaha is appropriate for sales of land, and tramma for movables, seems (in lack of further evidence) to be limited to Akim. Another view, that the terms are interchangeable, and are used for all outright sales, was given me in Akwapim. But another Akwapim informant said:

> "In Fanti custom they give ntrama (cowries) instead of cutting guaha."

There is no doubt from Fante informants that tramma is used for sales of land; and even that its principal use is for sales of land. The cutting of guaha is apparently not found there. It seems likeliest that either the giving of tramma alone is a watering-down of the old custom of guaha; or that tramma is standard, and guaha is an intrusion from the non-Akan tribes to the East (which may explain the fact that it appears confined to the states of the former Eastern Province).

In Fanteland I discovered a certain amount of confusion regarding the mode of payment of tramma. It seems certain (but note the information from Akim Abuakwa above) that it is paid by the purchaser. But there was conflict on the person to whom it was paid. Three answers were given:

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134. Ash. 234, A.L.C. 355 et seq.

(i) to the vendor alone, or to his representatives;[135]

(ii) to the witnesses alone;[136]

(iii) to the vendor and witnesses.[137]

It seems possible that there may have been confusion between the symbolic cowries that were divided between vendor and purchaser, and the remuneration of witnesses; and that now one payment serves a double function, as "stamp" for the sale, and as a payment to bind the witnesses' memories. One notices the alteration in the scale of tramma (from a token to a pro rata amount), which may also point in the same direction.

When is tramma paid? Although there was some confusion in information, there seems no doubt that it is paid after the sale.[138] All informants stressed that without payment of tramma the sale was not complete, and if it is not paid, the vendor

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135. Cf. Sar. F.C.L. 93: "without the payment of Trama to the vendor no contract exists"; but Ratt. Ash. 235: "it was not originally paid to the vendor."

136. "Tramma is paid to the witnesses for both sides": Ajumako. "The Trama is sometimes distributed among the witnesses to the contract, as token of their presence when the bargain was struck": Sar. F.C.L. 94. "This amount is shared by the witnesses to the sale": Akim Abuakwa. "given to the witnesses": Ratt. Ash. 234, 235.

137. It is divided between the vendor, purchaser and witnesses in three equal shares: Ratt. A.L.C. 358. "It is paid to the vendor, who then pays all or part of it to the witnesses": Essiam.

138. Cf. Ratt. A.L.C. 358; and "paid immediately after the sale is concluded": Essiam; "Tramma must be paid immediately after the sale, whether the purchase-money has been paid or not": Ajumako; Sar. F.C.L. 93; and many informants.

can take the land back. It was said that even if there is an English-style conveyance, tramma must still be paid.

On what scale is the tramma? Some informants said the amount was a mere token (six cowries originally); all agreed that the amount varied; in many cases it varied in accord with the value of the subject-matter of the sale.[139] The idea that it should be proportionate to the purchase-price seemed the most popular, though often on no fixed scale.

Is it part of, or in addition to, the purchase-price? Again, there were two answers. There seems little doubt that it is in addition to the price - which makes the use of the English term "earnest" as a translation of tramma still more inappropriate. In English law earnest is paid before the conveyance is made, and forms part of the subsequent price, unless it is the consideration supporting a separate contract to negotiate.

Whether originally tramma and payments to witnesses were distinct, which seems likely,[140] there seems little doubt that they are confused today.[141]

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139. "Sometimes 1/- in the pound"; "any handy sum, 5/- to £5"; "There is no special value, and it varies"; "it was a fixed proportional amount": Ratt. Ash. 234.

140. My view is supported by Sarbah, F.C.L. 94: "it is more usual for the vendor on receiving the Trama to give to the witnesses a distinct amount of money".

141. One may note lastly the unintelligible statement in Kofi v. Kofi: (1933) 1 W.A.C.A. 284, that "there was no evidence of tradition as to the price paid, whether as guaha or as ntrimma".

3. ASEDA.

Aseda is included in the list of customary modes of sealing or "stamping" a bargain here, since it is such an outstanding feature of other transactions in Akan Law. It is the thank-offering that a recipient gives to a donor or grantor; it occurs in marriage, where the prospective husband gives aseda to the person giving in marriage, and so regularises the union. Aseda is given by the donee to make a gift or bequest irrevocable. A person who, at an arbitration, has "begged back" his land will give aseda in token of his thankfulness. One can see at least some resemblance between it and the payment of tramma as it now is. In sales of land where guaha is cut the purchaser customarily provides drink after the ceremony is completed, which is shared by the parties and witnesses. It was alleged that this was to soothe the feelings of the vendor, who now stands deprived of his land. The empty bottles may be buried later in the land (sometimes at the corners), in order to establish the new claim to ownership.

4. WRITING.

We come lastly to the use of writing to evidence a sale. This is obviously a fairly recent development, though writing has been in use since the last century. It is intended to consider the significance and development of the use of written documents in the customary law elsewhere;[142] and therefore

142. See the Chapter on WRITING passim.

discussion of its role is similarly postponed, whether - when English forms of conveyancing are used between Africans - it is the operative part of the transaction, a defect in which invalidates the sale, or an optional mode of evidencing a sale, i.e., as a note or memorandum.

Here we consider the use of writing as evidence of a contract of sale and/or conveyance. The propensity of the African for written evidence is well-known; the kinds of documents used vary from the most informal to the formal. Commonly, a receipt for money paid, which also specifies the purpose for which it was paid (the causa) is given. Alternatively, there may be a memorandum that the land has been sold, especially where part of the purchase-price is outstanding. Not uncommonly a written conveyance in English form is given after the land has been customarily sold, the value of which is probably evidentiary only. Lord Maugham, in the case of Sintim v. Apeatu[143] already cited, pointed out (p. 205) that

> "The ceremony, as the law stands, does not require any permanent record whatever... In small cases where the purchase-money is paid and possession is taken this leads to little trouble;"

but the noble Lord thought it should be considered (at p. 206) whether in larger cases

> "and especially if all or some of the purchase-money remains unpaid, a written contract should not be made essential in the interests of the natives and with a view of preventing useless litigation."

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143. (1934) 2 W.A.C.A. 197.

All such written documents will frequently be signed by witnesses, who - besides their evidence of a sale orally concluded - will also be bound by their mark or signature as testimony to the sale having been carried out.

It has been ruled that, where a conveyance is used, it is sufficiently executed if it is signed by the Chief and his linguist - in cases of sales by stools - on behalf of the Stool.[144] Where two stools are concurrently interested in the subject-matter - as where a subordinate stool has a dependent interest from its Paramount, or where the confirmation of the superior stool is required before a grant by a land-owning subordinate stool - then it is the present practice that either both parties, the Paramount and subordinate stools, should be co-grantors, signing the conveyance to this effect; or else that the grantor should be the subordinate stool, but the Paramount Stool must sign as "confirming party".

Conclusions: To summarise our conclusions on the need for evidence of a transaction:

(1) Many of these forms are alternative, but some at least are universally present, e.g., witnesses.

(2) Some of these forms go to the validity of a sale, some to its proof, some to both. Guaha and tramma go to the validity of a sale,[145] as also may writing. The presence of

144. Quarm v. Yankah II: (1930) 1 W.A.C.A. 80.
145. "Without tramma the contract is not valid": Ajumako. "Where /this custom of guaha/ is not observed the sale is considered null and void." - Danquah, A.L.C. 217.

witnesses goes firstly to proof of a sale; although, as already noticed, notice to witnesses or their consent may be an essential element of a sale. Both guaha and tramma go also to evidencing a sale, though - as said one informant - "all sales are now encouraged to be made with a document, and not by guaha alone".

(3) The courts have not always kept clear the distinction between proof, enforceability, and validity, so that one cannot expect to find clear statements of the law either in the text-books, the law reports, or the views of informants.

E. BOUNDARIES AND MEASUREMENTS.

The following are some of the indications of the boundaries of land sold (apart from plots in towns, etc.):

(1) The path made by the boundary-cutters, who cut away creepers, etc., but leave the large trees standing.

(2) The blaze or mark put on large trees standing on the boundary.

(3) Natural features - paths, streams, etc.,- since it is often the custom to use natural features as delimiting lines.

(4) Special "ntome" or boundary-trees planted at the corners of the land sold.[146]

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146. The boundaries were marked with rows of pineapples in Acquah v. A. & Tsetsewa: (1941) 7 W.A.C.A. 222. And in a case in a native court, it was said that "nkrangyedua" or candle-trees were planted.

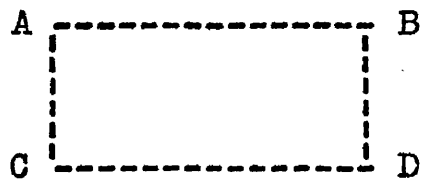
(5) The bottle from which libation is poured (or the bottles of drink provided at the conclusion of the ceremony as aseda) which is buried under one of the ntome trees.[147]

(6) Sheep are slaughtered under one of the ntome trees.

(7) The evidence of witnesses, including neighbours.

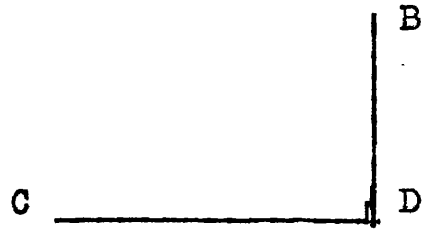
The delimitation of boundaries is of importance, first for ascertaining the subject-matter; and secondly, as evidence of the sale. It also prevents disputes with neighbouring farmers.

Customarily, all land is measured and sold off a baseline; this base is always clearly defined.[148] If the land ABCD is to be marked and measured



then the base CD is first marked and measured

and the side BD then cut on it

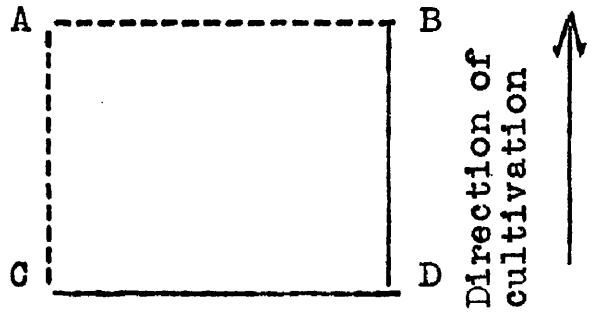


147. The corners of a farm were marked each with a buried empty bottle in Darko v. Agyakwa: (1943) 9 W.A.C.A. 163.

148. Cf. Baatse Angmor v. Teinor Angmor Ter: (1943) 9 W.A.C.A. 148: "The custom is that, after the bargain of sale and purchase is complete, the purchaser's "bottom" boundary ... is demarcated and the direction of the two side boundaries indicated but the points to which they respectively extend are not fixed then; when payment of the purchase price has been completed the "top" boundary ... is demarcated, between two points

/over

and accurately measured. The direction of cultivation is then along the line DB. The remaining sides, AB, AC, are then cut, but not accurately measured:



The sides CD, BD, are measured in "ropes" each of 24 fathoms (a fathom of six feet or a full arms-span) - but the measurement appears to vary slightly in different areas.[149] If CD = 5 ropes, and BD = 10 ropes, the purchaser pays for CD plus BD = 15 ropes. Rope-measure is thus a linear measure of a plane! It is obvious that this measure may produce freakish results.[150] The method is not as unreasonable as it appears, taking into account the typical method by which Africans cultivate their farms, proceeding outwards year by year, clearing and cultivating a further zone each year.

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148. (cont. from previous page) -
which are then fixed, and Guaha is then cut, and that has the effect of passing ownership."
(But whose custom? The parties were Krobos, buying land in Akim Abuakwa.)

149. In Tupri v. Wayo: (1912) D. & F. '11-'16, 28, a rope of 17 armslengths is mentioned - there is also an error of arithmetic in the judgement.

150. Cf. Darko v. Agyakwa: (1943) 9 W.A.C.A. 163:
"'Ropes' are only linear measures and not sufficient to define a superficial area."

Religious observances: We may note these briefly here. They lend a supernatural sanction, rather than a legal one, to the transaction; but they also serve to publicise, record, and solemnise the sale. They include the slaughter of sheep and the pouring of libations to the ancestors.[151]

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151. Cf. Danquah, A.L.C. 217: "the cutting and measuring of the land is completed by the slaughter of sheep, which act is considered customarily essential."
Also Ratt. A.L.C. 358: "(c) The Samanfo were informed".

IV. THE EFFECTS OF A SALE.

Assuming that the interest sold is capable of being sold, that the proper parties have been joined, and that the necessary form has been observed - witnesses, an agreement to sell, determination of the subject-matter of sale, fixing of the price, tramma, guaha or writing, etc., we must now ask what is the effect of such a sale, both on the parties themselves, on other persons interested in the subject-matter, and on the subject-matter itself.

Before doing this, however, I wish to consider when an agreement to sell is deemed to have been reached, when the actual sale or conveyance takes place, and what opportunities are given to each party to withdraw either before a sale is completed, or to rescind it once it has taken place.

A. THE FORMATION OF A CONTRACT OF SALE.

The agreement to sell and the sale itself are distinguished in English law (vide the Sale of Goods Act, 1893). The distinction between a contract and a conveyance is of vital importance in English law; in Akan custom too the distinction can be made, so that, until the conveyance is completed, the title to the property does not pass, although a claim in personam by the purchaser is feasible. But in Akan customary law the distinction is not of the same importance as in English law; since it

seems that even if there is a valid agreement to sell, there is no possibility of a decree of specific performance if the sale is not completed, nor (probably) of an action for breach of contract. Once the sale itself has taken place, on the other hand, then it is possible for the purchaser to ask the court to put him in possession of the piece of land sold; or, if this is impossible (as where the vendor has already sold the land to a third party) to decree that the vendor who unjustly warranted his good title to sell should replace the parcel sold with one of equivalent value.

The agreement to sell is not, then, of itself actionable; but no sale can take place (obviously) without a previous agreement in that regard. The object of such observances as guaha and tramma is to indicate the time when the sale takes place, and no locus poenitentiae is left to either party. Before the sale, either party can resile from the contract; though no doubt the party at fault would be made liable by the court to refund any expenses caused by the breach (and perhaps "pacify" the disappointed party).

Once the sale has been carried out, which (in the case of immovable property) would be indicated when guaha has been cut, or tramma given, in the presence of witnesses, or the writing (if an operative conveyance) signed or marked, then - according to Sarbah[152] - it is still open for either party to withdraw.

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152. F.C.L. 95.

If the purchaser withdraws, he will forfeit his tramma and the expenses of witnesses. If the vendor withdraws, then he must refund the tramma and pay expenses. I do not feel that this correctly states the law today, and I am sure that the courts today would enforce such a sale, certainly as against the vendor who wishes to go back on his agreement. Nor, in any case, would the vendor be able to revoke the sale if part of the purchase-money had been paid, or the purchaser had actually been put into possession. Information given to me was that after guaha has been performed (or tramma paid), then the vendor cannot take back the land. The actual words used in the guaha ceremony[153] imply that if the vendor attempts to deny the title of the purchaser, or to sell the land to another person after its valid sale to the purchaser, he must refund double the purchase-price. Customary law therefore seems to contemplate the possibility that the sale will not be respected. There is also an idea that if the vendor does resell the land, then he must replace it free with another land of equal value. Neither of these rules argues for a complete, irrevocable, perfect sale.

The fact is that in the ancient customary law the idea of a permanent and absolute alienation of land was unknown, and even a sale which appeared to be outright could apparently

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153. Quoted at p. 354 (note 125) ante.

be re-opened.[154] The affinity of sale and pledge was close, even if they were not two aspects of the same institution. In pledge there was never any idea in the minds of the parties that all interest in the property could pass in any circumstances from pledgor to pledgee - there was no such thing as foreclosure or power of sale. In sale the vendor's interest in the property apparently passed to the purchaser; but the ~~purchaser~~ vendor could redeem his land in the future if he could refund the price and some overplus.[155] When a vendor desired to redeem land which he had sold, it is true that he would go and "beg" the land back, and not demand it as a right - so that it would be wrong to talk of any right of redemption. Anyone familiar with African usage today would be aware that rights are frequently begged for. Today such a practice still seems to be common: the vendor will beg through someone else, perhaps a chief, odikro, or elder; and although it cannot be said that the redemption is of right in such circumstances, a purchaser would be considered very hard-hearted if he refused a request of this nature, except for good reason. The vendor will tender the price, a sum to cover expenses and improvements on the

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154. As given also by Rattray, Ash. 236-7, q.v.
155. Rattray, A.L.C. 358, corrects his assertion in Ashanti 236; he says: "...the land could not be recovered directly once it had been sold. A legal fiction was employed whereby it was assumed that it had only been mortgaged. This having been arranged the mortgage was redeemed in the customary manner."
And cf. Danquah, A.L.C. 218.

land, and also a sum to pacify the disappointed purchaser.

Such a redemption is of most frequent occurrence in cases where, for instance, family property has been injudiciously disposed of, and the family desire to recover it - so that it will be scarcely distinguishable from the right of a family, discussed below, to demand rescission of a sale when one of the rules relating to consents, etc., has been infringed. Generally the effect of the giving of tramma is the same as that of aseda in the case of gifts - the transaction becomes irrevocable and permanent.

B. THE EFFECTS OF A VALID SALE.

1. ON THE PARTIES.

Little need be said of this here. One may note that it is commonly claimed that when stools sell land to individuals today, only surface-rights (usufructuary farming interest) are alleged to pass, and that title to timber, minerals and treasure-trove does not pass. Ex majore cautela where a stool is vendor of stool lands today, it will commonly retain by express agreement (perhaps in consonance with implicit custom) the following rights:

(a) Jurisdiction.

(b) Right to timber.

(c) Right to minerals.

(d) Right to tribute of snails; (this is retained for the

stool, "but usually when land is fully cultivated for farms the snails disappear").

(e) Right to treasure-trove; ("always reserved for the stool, like minerals").

(f) Right to tribute of game; ("not fully enforced nowadays, except in the case of an Obopon, big game, such as an elephant (esono)").

(g) Water-rights: ferries, rights in river-beds, etc.

(h) Perhaps other customary privileges and incumbrances.[156]

2. ON OTHER PERSONS INTERESTED IN THE SAME SUBJECT-MATTER.

Interests which other persons may have in the subject-matter of sale validly sold by the person entitled may vary widely. The question will be discussed with especial reference to any right of pre-emption which may exist in other parties; with the right of retreat which may be enjoyed by other parties - to cancel or draw back a sale which would otherwise be valid; the effect on the concurrent interests of other persons in the same subject-matter, whether these are the interests of the family in an individual member's property, of the stool, or of citizens where stool lands are sold; or finally of persons who, for instance, hold mining or timber rights where agricultural rights are sold, and vice versa.

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156. Information from Akim Abuakwa.

(a) The interest of the family:

Where an individual sells his self-acquired property, the family have at least a spes successionis which may be adversely affected. Sometimes an individual has complete and free power of sale over his self-acquired property without reference to anyone. In such a case, of course, the family are in no position to object to the sale. Where the family are required to be notified first, if they are so notified and the sale goes ahead, they have no ground for objection. If a member of a family is in debt and requires money which he wishes to raise by selling or mortgaging his property, then there is at least a recommendation that he should offer it to the family first, and - if they are unwilling or unable to provide the money - then he may freely offer it to strangers. At times this would appear to be more than a recommendation; but it is probable that courts today would not upset a sale by an individual of his self-acquired property simply on the ground that he did not give his family first chance to buy it (and we have met no cases to such an effect). If the individual did sell in this fashion, then, although there is no right of retreat in the family, they have a strong equitable claim to redeem the land from the purchaser - which they would realise by begging for the land back.

Where the individual member sells his self-made farm on family land the conditions are more stringent; and if he did

not consult the family first about the sale they might succeed in a claim for retreat if the family's claim (which is a present interest) to the land were adversely affected.

Where an individual sells an inherited property, then a sale without the consent of the family is void and meaningless. There are today two competing views about the effect of such a sale. The former customary rule was undoubtedly that the family had the right to demand the land back on satisfying the claim of the purchaser for reimbursement - if he was innocent. They could exercise this right at any time, even if they had notice of the unjust sale (since a family's title to its land is never lost). No kind of estoppel or prescription could bar the family's claim. Today it is claimed that such a sale is voidable; but the word "voidable" may have two meanings: either that it is void unless approbated by the family; or that it is valid unless repudiated by the family. The former view is supported by expert information from Akim Abuakwa:

> "/The sale is void/ unless they /the family/ for many years sit by and allow the third party, i.e., the purchaser, to occupy and improve the land beyond its normal value. Even so the Courts have always recognised the indefeasible right of the family to question such a sale which remains voidable."

The latter view was put in the old case of Quassie Bayaidee v. Kwamina Mensah[157] before the Full Court. The Court said:

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157. (1878) Ren. 45, at p. 46.

> "Now although it may be, and we believe it is, the law that the concurrence of the members of the family ought to be given in order to constitute an unimpeachable sale of family land, the sale is not in itself void, but is capable of being opened up at the instance of the family, provided they avail themselves of their right timeously and under circumstances in which, upon the rescinding of the bargain, the purchaser can be fully restored to the position in which he stood before the sale."

Again, in the more recent case of Manko v. Bonso,[158] a case from Gomoa Assin, W.A.C.A. held that the family must act in good time: if the purchaser cannot get restitutio in integrum, then the family are deemed to have acquiesced in the sale. The facts were than one Botsio sold the house in question, which was family property, in 1885. W.A.C.A. found that "...the fact that Bentil /purchaser from Botsio/ and those who inherited from him paid no rent is no evidence that the family acquiesced in the sale of the property to Bentil." But the Court went on to hold that

"...the plaintiffs having taken no steps to set it /the voidable sale of 1885/ aside have no title to the land in dispute." The plaintiffs (the family of Botsio) had not discharged the burden of proof of title necessary in order to ground an action of ejectment.

The case of Appreku v. Kwakyi[159] is of considerable point here, although the question at issue in this case was whether

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158. (1936) 3 W.A.C.A. 62.
159. Unreported: Land Court, Kumasi, 6/3/50; coram Jackson, J.

a portion of land held by a member of the family is attachable for his private debts, since the question of the rights of the family came up here. The facts, as found by the learned judge, were:

> K.A. (the judgement debtor) exercising his citizen's right, cleared a portion of the virgin forest on Kumawu Stool land and planted a cocoa farm there. He alleged that he divided it into three parts, one for himself, one for his wife, and one for his children. The apportionment to the wife was taken as proved.

The part which was allocated to the wife Jackson J. found not to be attachable for the debt of the husband:

> "Clearly that part of the land having been severed from that of the husband, it is unattachable in payment of the husband's debts."

The learned judge gave as his reason that:

> "By customary law what family land is apportioned to a man's wife with the consent obtained from the Head of the Family is land which the family are entitled to inherit and which in the law of succession would include a woman's children."

On the question of the attachability of the remaining portion of the land, the learned judge quoted the opinion of the assessor:

> "The Assessor tells me that the part of the land retained by the husband is attachable in respect of his private debts and may be sold, and sold outright. He says that the reason for that is that the family, by the attachment of the land, must be deemed to have had notice of the debt of a member of the family and that they should pay that debt on behalf of that member or permit the land to be sold outright."

This view was rejected:

> "I cannot believe that this can be customary and ancient law for two very good reasons. Firstly that sales of family lands were by ancient custom wholly unknown and that at the highest it was an alienation of the user of the land, and with which proposition the Assessor concurs. Secondly a sale by public auction could in its nature never have been an incident of ancient law, and what this Assessor is telling me is rather the /course/ which has been adopted in comparatively modern times in distinction to what was ancient and which alone can constitute native customary law, i.e., apart from any amendments and modifications formulated by Ordinance."

Mr. Justice Jackson continued that if it was the ancient law that an individual could sell family land (or have land seized), he would hold it repugnant to justice, equity and good conscience. He continued:

> "That life interest of the judgement debtor, i.e., his rights in this case to enjoy the usufruct of the land is one which he can convey to another without that family's consent and to that extent and to that extent alone his interest in the land may be sold. Its value will depend upon the length of the judgement debtor's life since whoever may purchase such an interest at a sale purchases it for the period of the judgement debtor's life and which interest after his death ceases and becomes vested in the 'successor'."

One may, with great respect, submit that there are several points here worthy of notice, and indeed of modification. One may note, first of all, that K.A. cleared a portion of virgin forest for his own use; the effect of this is to make the farm self-acquired property in his hands, in which his family has no

more than a spes successionis until his death, a hope that may be defeated by an alienation inter vivos, or by a death-bed disposition. It is therefore inappropriate to treat of his interest in the present case as though it were an inherited interest only dependent on the family interest in the land. The land is not, until the death of K.A., family land; the question is not of the right of an individual to dispose of his interest in inherited property without the consent of his family, but of his right to dispose of self-acquired property vis-à-vis his family; this misconception, it is submitted, has the effect of making the whole of the judgement obiter. One can, however, take it as persuasive authority of a contrary tendency in the courts today in regard to the disposal by an individual of his interest in inherited property. (It will be noted that the assessor rightly gave the law applicable regarding the seizure of a member's self-acquired property for his private debt). Jackson J. strengthens the family's hand by equating a member's inherited interest with a life estate at English law. It need hardly be remarked that life estates form no portion of Akan customary law: a member's inherited interest is one of use, dependent on the family's title to the property; it is true that it may endure for his lifetime, and in no case longer. But there is no reason why it should last so long, since the family have power to dispossess a successor and appoint another for good reason. A stranger cannot step into a family-

member's shoes - for at least one very good reason, that he is not a member of the family. It is not suggested in customary law that a member may freely alienate his inherited limited interest, without disturbing the family's title; since in all cases the family in practice join with the individual in alienating his interest, and their own. The only alienations which an individual can make are to his wife and children; and these are gratuitous. They do not endure, unless the family consent, after the member's death; so that they are faintly analogous with an estate pur autre vie. But the wife or child cannot alienate this interest.

The attitude of the courts, then, at the present day, is that if a person sells his interest in inherited property without the previous consent of the family, then

(a) the sale is valid, but voidable at the family's option;

(b) this option must be exercised in good time;

(c) it is not exercisable if the family approbate the sale, either expressly, or impliedly, by failure to take action in good time;

(d) the right is exercisable only if restitutio in integrum is possible.

It is submitted that these rules are unsatisfactory, since, inter alia, they tend to defeat well-established principles of customary law. It is suggested that a better result would be

obtained if it were held:

(a) that the sale is prima facie void (since the vendor conveys that which he has not title to convey);[160]

(b) that if at the time of the sale the purchaser is aware (or but for his failure to make proper enquiry would have been aware) that the land is family property, the onus is upon him to show that the consent of the family was obtained;

(c) that if the purchaser fails to show this, then the sale can never be validated by any subsequent action or inaction on the part of the family;

(d) that if the purchaser is not aware that the property is family property, the sale is void, but it may be adopted or approbated by the family, either expressly, or impliedly, by failure to take action for a considerable period after the fact of the "sale" comes to their notice;

(e) that in particular it is inequitable for the family to sit by and allow an innocent purchaser to effect improvements to the land, thus putting himself in an inferior position to their knowledge.

It must be appreciated that there are competing equities at stake, that of the innocent purchaser, and that of the innocent family. It is therefore ultimately up to the court,

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160. Cf. Koran v. Bafour Kofi Dokyi: (1941) 7 W.A.C.A. 78, when the native court held that there was no power to sell under writ of fi.fa. family property for a member's private debt; and were supported by W.A.C.A.

if the error is not challenged for a considerable period, to decide which of two innocent parties should suffer - there is no prima facie reason why this should be the family (who have good title) as opposed to the "purchaser" (who has none). As a guide to deciding what is a "considerable" period, it may be indicated that in customary law there is no period of limitation - rights are not lost by lapse of time; and that in English law (and in the Gold Coast, if the Statutes of Limitation were applied there)[161] the period would be twelve years.

It might be of interest to recount what was done in one town of New Juaben on local initiative in order to prevent such a competition of equities arising. Formerly, I was told, a man might pledge or sell some property; and later his family would come along and prove that it was family property, and exercise their right to cancel the sale. This produced hardship for purchasers. The rule now is that all pledges and sales of land within the area must be taken to the chief for counter-signature. The chief satisfies himself that the vendor or pledgor is entitled to sell or pledge. This he finds out by consulting the family of the transferor (viz., from the head of his family). A document is made, which the relatives of the transferor must sign as witnesses (which also binds them, of course). Such a simple solution might be adopted elsewhere.

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161. The Statutes of Limitation apply in the Gold Coast to dealings with land under English law, but not to dealings regulated by customary law. (See WRITING, post, at p.681.

The customary law is similar where a head of a family sells family property without the consent of the necessary members of the family. If only one or two from amongst those who should have been consulted are not consulted, then at most the sale is voidable - if they act with despatch; but in some cases the defect is ignored.

(b) The interest of the stool or landowner:

A stool may have the power to rescind the sale of a lesser derivative interest in its stool lands, which has taken place without its consent or knowledge. This applies in particular to sales by citizens of their limited interests to stranger-farmers. As far as I know, the stool's power is rarely exercised; and any want of consent or notice is frequently cured after the sale, perhaps with some pacification to the stool. The power is not applied in dealings between citizens. The rule is stricter where a subordinate stool, if required to have the consent of its superior stool before disposing of its lands, alienates some or all of its interest in its lands. In such a case the paramount stool may cancel a sale which has taken place without its knowledge; though frequently the paramount stool will ratify such a sale ex post facto (on suitable terms).

The case is different where the subordinate stool is the landowner, and the paramount stool has a mere jurisdictional right over it. If the subordinate stool is required only to

give notice of a sale to its paramount, and if the paramount stool has not signed as confirming party, then the sale is still valid; the defect can be remedied subsequently. In such a case it is submitted that the paramount stool has no power to rescind the sale.

Apart from the power of a superior stool to revoke or rescind sales by stools serving it, one has also to consider the vexed question of paramountcy or jurisdiction. The problem is this: if a subordinate stool validly sells some of its lands, does the paramount stool retain jurisdiction over the lands? One cannot be dogmatic, but it seems true to say that even where land is sold outright, jurisdiction will still be retained over the land and the persons occupying it. Such is probably the rule today: though it was probably not the rule in former times. Today it would seem absurd to say that because a state sells some of its land, it thereby diminishes the area of its state; though this would not have been so absurd at the time when jurisdiction was concerned principally with persons, and not with land: and states or stools could transfer both their subjects and the land which they occupied. Some of the problems are considered below.[162]

There is also some evidence of a right of pre-emption in favour of stools. This particularly arose where a stranger took a limited interest in stool land from the stool, which he

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162. And see JURISDICTION AND OWNERSHIP, ante.

wished to dispose of because he was quitting the state. One example given me was in the case of a house built by a stranger: if a stranger wishes to dispose of a house which he has built on a plot granted him by the stool, because he is going away, then he must offer it to the stool first. If the stool is not willing to pay him the economic price for it, then he may sell the house to another individual, who will hold it on the same terms as himself. This really ties up with the rule that property acquired by a stranger escheated to the stool at his death or departure. Today, when many stools find the grant of interests to strangers a profitable activity (not only financially), the rule is falling into abeyance, as it discourages fresh settlement.

We have considered so far the position and powers of the holders of superior interests in the subject-matter. What is the position of the holders of subordinate or concurrent interests when a sale of the superior interest takes place?

(c) The interest of citizen-farmers in stool lands:

Citizens are interested in stool lands in a dual capacity; generally, as members of the tribe (and thus sharing in the absolute interest), and specifically, as makers of farms on stool or tribal land (thus acquiring an individual dependent interest). Besides their share in the common title, citizens also enjoy common rights in the stool lands, such as their rights to collect snails, firewood, mushrooms, to gather wood

for building and fufu poles, rights of way, and rights to hunt and fish. Apart from the particular interest which a citizen has acquired by making a farm, he also has a latent or prospective interest in unallocated stool land, since he might decide in the future to exercise his right as a citizen to farm there.

When stools dispose of their mineral or timber rights in land, the interests of citizens farming there may or may not be affected. Where a mining concession by way of lease is granted, the free access of citizens to the land for farming or other purposes may be restricted or altogether curtailed. Where either standing timber is sold, or a timber lease granted, interests of farmers may be affected. For one thing, the stool may have granted to the timber-exploiter the right to make roads; and the question of compensation for damage done to farms by this, and by the processes of felling and hauling, arises. One cannot be altogether satisfied with the stool's having power thus to affect its citizens' interests, unless the citizens have been previously consulted. It is true that in such a case the customary law says that there is an onus on the landowner to replace the affected land with other of comparable size and quality. But where a cocoa-farm in bearing has to be abandoned, the grant of a plot of untilled forest-land will bring greater effort and diminished returns to the farmer - not an equitable procedure.[163]

163. In New Juaben, at any rate, a scale of compensation (so much per cocoa tree) is laid down for land taken by the State for such purposes as building.

Stools also purport to sell the land outright, i.e., their absolute interest in the soil, both where the land is unoccupied and where farms have been made thereon. Where the land is lying unused, the present common rights of the citizens are prejudiced; where the land is occupied, the citizen cannot take the change of landlord (not a landlord in the English sense) lightly. Citizens cannot be evicted from their farms by the purchaser. These farmers should in any case have been consulted.[164] At least consultation is recognised in custom; the consent of the citizen-farmer is required by the Courts.[165] But an indispensable adjunct of an African farm is its ability to expand: the farmer's interest goes beyond the cultivated area itself to the forest surrounding it. By such a sale of the absolute interest in the land the farmer's accessory right is threatened. Threatened also are all the common rights which a citizen-farmer enjoys. And apparently the interest of the tribe is barred for ever from realising itself by new cultivation. This is again questionable;[166] and the difficulty could not have arisen at a time when sale of land was either unknown or not permitted.

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164. "Land with farms on it belonging to natives of Akim Abuakwa cannot be sold by a Chief at all, except under special circumstances, and in that case with the express permission of the owner of the farm. Once the land is sold the native loses his right to his farms." (Information from Akim Abuakwa)
165. Cf. Quarm v. Yankah II: (1930) 1 W.A.C.A. 80.
166. The citizen's right to farm is lost, but it may revive.

If the customary law now permits absolute sales of land to take place (a point which is practically decided in the affirmative) it is time for the legislator to consider whether the process has not been carried too far. One may read Dr. Danquah's impassioned plea for reason, and those of others who have reported on this problem: should the rights of citizens now and in the future be irretrievably bargained away by the stool they serve for a mess of pottage?

C. EFFECT OF THE PERSONALITY OF VENDOR OR PURCHASER.

This is a most important topic, since it involves consideration of the position where either party is a stool; and, even where neither party is a stool, it is suggested that the stool of the purchaser may acquire rights in the subject-matter. It is also a topic on which it is difficult to find out information by question-and-answer; mostly one must elicit rules by considering past transactions; and such transactions are less frequent today.

1. STOOL TO STOOL.

One is mainly interested to discover whether sales by stools pass jurisdiction as well as ownership. Where a stool is vendor and another is purchaser, then the presumption is that all the vendor-stool's rights, whether of ownership or jurisdiction, pass to the purchaser-stool unless expressly agreed otherwise. Now to take some special cases.

(a) Paramount stool to its subordinate stool:

This very rarely if ever occurs; more frequently in the past a paramount stool owning the land may have transferred the land to a stool serving another paramount stool. In such a case the presumption that all rights pass operates; whilst rights of ownership such as may be exercised by a subordinate stool pass to it, the vendor's rights inherent in paramountcy pass not to the purchaser, but to the purchaser's paramount stool.

(b) Subordinate stool to paramount stool:

As above this very rarely if ever happens in the case of a stool serving the purchaser paramount stool. But it may occur in the case of another paramount stool. If the sub-stool owns the land, then confirmation by its paramount stool passes the rights of its paramount stool to the purchaser. If the sub-stool does not own the land, then, if authorized by its paramount stool to sell, the vendor can pass the absolute interest and jurisdiction; if not so authorized, the sale is invalid.

(c) Subordinate stool to a stranger subordinate stool:

If the vendor owns the land, as with (b) above; but the practice of obtaining confirmation by the vendor's paramount stool is of fairly recent origin. Hence, if there is no confirmation, the sale probably stands, but jurisdictional rights do not pass (although by effluxion of time they may accrue to

the purchaser). If the vendor does not own its land, then as with (b) above. The purchaser cannot deny his relation with his own paramount stool, even if he owns his own lands. Hence his purchase is held in the same way as his existing lands, and subject to his paramount stool's rights. That is, he cannot - as to the land bought - pretend to set himself up as an independent state.

(d) Stool to stool, both serving the same paramount.

This has sometimes happened, according to Warrington.[167] In particular, it would occur where there is an unredeemed pledge, the benefit of which is taken, or is enjoyed, by the purchasing stool. The transaction then takes the form of a surrender by the first stool of its existing rights (to the reversion) to the second stool. Paramountcy is not affected, and the purchasing stool holds from its paramount with respect to his newly-acquired lands as for its existing lands.

2. STOOL TO INDIVIDUAL.

This class of transfer causes the most difficulty. The rights of the stool over the land which are attributable to jurisdiction and not to ownership cannot pass to an individual purchaser; but they may pass to the purchaser's stool. Since this kind of sale is that most frequently met with, it is the cause of most of the disputes regarding jurisdiction which occur.

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167. Cf. Matson, Digest, pp. 58 et seq.

(a) Stool to subject:

Jurisdiction will not pass, and - as a pure commercial transaction - such a sale is most rare.[168] Two cases may, however, occur.

The stool has pledged some of its land; one of its wealthy subjects redeems the land. The citizen then holds the land and works it - the stool having no right to allocate it for farming, etc. As soon as the stool has collected sufficient money, it redeems the land, which then becomes stool land again. This is not a true sale; but a peculiar aspect of the customary law of pledge.

Alternatively , stools sometimes sell their land outright to their subjects, who may then sell to strangers (often non-natives). This is done to avoid the odium which falls on a stool selling land direct to strangers. The citizen in such a case is little more than an agent. The jurisdiction of the stool cannot pass to the citizen, and will probably not pass to the ultimate purchaser's stool (although where there is a judicial sale, and a man buys with the intention of reconveying to his stool, it has been suggested that jurisdiction may pass).

(b) Stool to individual stranger:

This is one of the commonest forms of sale; and difficult points arise therefrom. A citizen - where land is owned by

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168. It is theoretically possible, but usually it is transferred by Deed of Gift, subject to payment of a thank-offering (Akim Abuakwa).

the stool - can found a village in the forest (i.e., on stool land) of which in time he may become Odikro. His position is then as follows: ownership - the absolute title remains with the stool; jurisdiction - he will exercise jurisdiction, subject to his overlord's paramount jurisdiction.

A stool can sell land to a stranger - even a large tract. Case A. If the sale is not of the absolute interest, the stranger may found his own village as above, but:

ownership - remains with the granting stool;

jurisdiction - is exercised by the stranger as Odikro or headman, subject to the granting stool. At the same time, the stranger will owe allegiance (personally) to his own stool; so a dual jurisdiction may be claimed.

Case B. If the sale is of the absolute interest, a fortiori the stranger can found his own village, in which case

ownership - is with the stranger;

jurisdiction - is exercised by the stranger, subject (probably) to the overlordship of his own stool. That at any rate was the probable result in former days.

Sales in which certain special rights do not pass may be of two kinds:

absolute sale of the land, but with reservation of mineral and/or timber rights (which will be an example of Case B);

sale of agricultural rights, in which case minerals

and perhaps timber are automatically reserved to the vendor. This will probably be an example of Case A: the sale will be treated as absolute only in opposition to the idea of tenancy or pledge, but it is limited in extent.

Are these two types the same thing stated differently? One remembers that in English law the limitations to A, a widow, with a gift over, "but if she remarries", and "until she remarries", have a different effect in the nature of the estate granted. It is permissible to conclude that the two types of sale are not the same thing stated in different terms.

The history of land sales (in the Eastern portion of the Colony, at any rate) appears to have passed through three stages:

(i) a sale by guaha was absolute; all rights of the vendor - including jurisdiction - were barred.[169]

(ii) the sale by guaha was absolute, but did not pass absolute title to minerals, which were subject to abusa to the vendor, or (but this was contested between the different sides) jurisdiction;

(iii) a sale of land to individuals is a sale of agricultural rights only.

The important thing is that at no stage could jurisdiction pass to the individual stranger (i.e., of the same type as

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169. Cf. Sarbah, F.C.L. 92.

enjoyed by a stool).[170] This has been contradicted, however, by certain individual purchasers in the Colony, who have claimed that they take free of any stool's jurisdiction.

Further complications are caused by:

the use of written conveyances alternatively, or in addition to, customary modes of sale;

the purchaser being, not an individual stranger, but a group of individuals.

Written conveyances: in general, if the "fee simple" was conveyed, the assumed intention of the parties was to transfer the absolute interest. This applies only if the conveyance takes effect as an instrument; and, of course, only where there is no specific conveyance of agricultural rights only (which is now increasingly favoured by vendors). If the conveyance takes effect only as a memorandum, then the previous intention and acts of the parties must be scrutinized.

Group purchase: land-hungry groups of strangers (especially

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170. Warrington, pp. 36-7, says in regard to sales with the consent of the Head Chief and his elders, that "the freehold title in the land passes. The individual is however incapable of freehold ownership, and such ownership is transferred, not to the individual purchaser, but to the Stool which he serves." And at the present day (1934) the land becomes a part of the Stool lands of the Head Chief whom the individual purchaser serves. But "this system of selling land is quite modern."
Akim Abuakwa informants said: "The Stool never loses its right over a land when sold: absolute ownership of a piece of land is always subject to the Stool's jurisdiction and the customary incumbrances."

Akwapims and Krobos) have frequently in the past approached a chief - say in Akim - and applied to buy a large tract of land as a group. Where a group is purchaser, then the presumption for transfer of jurisdiction may be strengthened.

(c) Stool to subject of allied stool:

Stool A might sell land to X, who serves stool B, both A and B serving the same paramount stool. I am not aware of actual instances of such a case, though it is possible. If the sale is outright, then - whilst the land will not be owned by stool B, presumably it acquires jurisdiction.

3. INDIVIDUAL VENDOR.

CITIZEN.

(a) To his stool:

A citizen may acquire land or own land situate in the state; if he conveys this to his stool, then, if the citizen owned the land absolutely, the stool acquires the absolute title in the land (which becomes stool land) and the farms, etc, thereon become stool property in the narrow sense. If he acquires land outside the state, and sells it to his stool, then it seems probable that it would acquire jurisdiction as well. There was certainly at least an inkling of a theory that a man who goes to another state and buys land absolutely there - though not himself acquiring jurisdiction - yet bars the jurisdiction of the granting stool. This dormant juris-

diction would be revived in favour of his own stool if he reconveys to that stool. This is probably not true of today.

(b) To his Paramount Stool:

An unlikely occurrence, though gifts to the stool are not uncommon. It might raise the question whether a citizen serving his paramount stool, P, through a chief, W, who is caretaker of his stool-lands for P, will create rights of caretakership for W over the land sold to P by his act.

(c) To a stranger stool:

If the citizen's stool owns the land, a citizen cannot pass the absolute interest unless expressly authorized to do so; no question of the passage of the absolute interest and jurisdiction therefore arises. But since sales to all strangers, even of limited interests, are subject to control by the stool, it is very doubtful whether such a sale would be permitted, for fear that the grantee might raise a claim to jurisdiction. Where stools do not normally own the land, there is nothing to prevent such a sale. If it occurred, it would probably raise enormous difficulties of construction and administration. I should be interested to know if such sales have taken place.

(d) To a stranger:

In Class I areas (where the stools own the absolute interest), restrictions are placed on a citizen's power of disposing of his limited interest to strangers. Such arrangements

must normally be notified to the landowning stool. In fact, the position is anomalous, since the stranger becomes a kind of tenant of the stool, unless a permanent settler; and he cannot acquire a citizen's interest in the land. Hence in theory certain states deny a citizen's power to sell his limited interest; and say that he can only surrender his interest to the stool, receiving compensation in exchange (which equals the purchase-price paid by the stranger), the stranger thenceforth becoming a lessee from the stool. Other states, however, talk about "sales". The most exact description is as follows: a citizen has a limited interest in the land; and an absolute interest in the house or farm thereon. The citizen's limited interest is not vendible to strangers; but it is replaced for strangers by the interest which they take as tenants under a lease or grant from the stool. The citizen's absolute interest is vendible; hence no lease is taken (despite words in leases to the contrary) of the house or farm bought.

In Class II areas there are no restrictions on sales by citizens to strangers.

STRANGER.

(e) Stranger to citizen:

This case is a peculiar one. If the stranger has an

(i) Absolute interest: in Class I areas, where sale of the absolute interest is permitted (e.g., in the Colony),

then a stranger may have bought this interest, and later resell it to a citizen. The effect of this double transaction, as far as one can see, whilst giving the citizen the absolute interest, is of course not to give him jurisdiction, which will be in his stool. Other rights possessed by the stool may be revived.

(ii) Limited interest: a stranger may be seised of property (a house or farm), either bought from a citizen, or made by the stranger under tenancy from the stool. Saving rights which the stool may have of pre-emption or forfeiture, the stranger may sell such property back to a citizen. The effect of this is generally to restore the status quo ante: the citizen does not become a tenant of his own stool, but enjoys a citizen's interest in the land; and usually, if a lease was made between stool and stranger, it is ignored or torn up.

CHAPTER VI.

PLEDGE AND MORTGAGE.

A. HISTORY OF SECURITY.

1. PERSONAL SECURITY.

Forms of security have always been divided into classes, real and personal, according as the security is taken on the person of the debtor, or on his property. A similar division exists in African Law, and analogies with Roman Law present themselves throughout. It is useless to argue whether real or personal security came first: but the taking of the person of the debtor, or of his representative, as security is a very ancient practice. It will be recalled that one of Solon's reforms at Athens was to forbid security on the person of the debtor, which had led to widespread enslavement. In Rome too it was customary (in the early period) to seize the person of the debtor under any obligation (obligation here being wider than contract, and covering obligations in delict). In African Law persons acting as security for debt are called "pawns";[1] and persons might become pawns by various circumstances.[2]

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1. Awowa acc. to Ratt. A.L.C. 47.
2. See Ratt. A.L.C. 47 et seq. for a full treatment of this institution.

(a) Voluntary Pawns:

(i) for debtor for his own debt:

in this case the debtor surrendered himself to the creditor to work for him for as long as the debt remained outstanding. This was, however, more frequently replaced by -

(ii) by a representative of the debtor:

in this case the pawn pledged his own person as security for the debt of another; this would usually be for the debt of his family, or of another senior member of his family, or of his stool or political superior. In such cases it was considered a correct thing for a junior member to volunteer himself as a pawn.

(b) Involuntary Pawns:

(i) by act of the creditor:

who might seize the person of the debtor for better security for his debt. At the same time it is likely that he would seize the debtor's assets.

(ii) by the family of the debtor:

if one of the family was in debt, the family would meet together; if no-one volunteered (as above) as a pawn, they would select one or more of the junior members to be pawned. The person chosen was then expected to submit; but it was difficult, if not impossible, for him to resist, especially as he or she would be a junior member of the family. The children of the debtor might be similarly liable. (This practice, al-

though officially abolished, still goes on under the guise of sending a young relative as servant of the creditor.)

(iii) by the stool:

when stools ran into debt, they might (and it seems frequently did) pawn some of their subjects as security for the debt. The persons thus pawned might remain in pawn for a very long time, and might in fact never be redeemed. Their status was, however, little inferior to that of free subjects of the creditor stool. Whole villages were thus pawned to neighbouring stools.[3]

2. REAL SECURITY.

Very frequently when persons were pawned, their lands also went in pledge;[4] and this is especially true of cases where stools pledged villages to another stool; but Rattray in Ashanti Law and Constitution, p. 357, denies this. Both land and inhabitants were pledged. It was not essential that pawns and pledges should always go together: at the time when we have reliable knowledge, pawning of persons is disappearing,

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3. According to Warrington, the Odikro could only pawn his own subjects (i.e., members of his own abusua) in the village; and not the whole village: - sed dubito.
4. Pledge: The use of this word to describe the giving of land as security has a hallowed history in works on African customary law. It is true that in English law it can refer only to the giving of chattels as security. I follow the customary usage, but only for those cases where possession, or the use, of the property pledged passes to the creditor. Where it does not pass (as in the 'native mortgage'), the term 'mortgage' is preferred.

and pledges of land were taken alone.

Although theoretically possible, pledge of chattels seems to have been never (or hardly ever) practised; although it is not unlikely that a creditor would keep an article of the debtor's, especially where the debt was a trifling one, and if the debt was in some way connected with the chattel.[5]

It is customary to talk about pledge of land and sale of land as two distinct institutions in the old days; but it is doubtful if genuine sale of land existed at all formerly; and when it appears it resembled pledge very closely, traces of the resemblance appearing in the law to this day. The idea of an outright sale of land was abhorrent to the Africans, even if they had thought it possible.[6]

If redemption of the property which passes is the test of a pledge, we find that in the ancient pledge the land pledged can always be redeemed by the pledgor or his descendants on refund of the sum owing, whatever the lapse of time; whilst, even where there was a "sale", it seems that the vendor had the right in ancient customary law to redeem the property on refund of the purchase-price (and certainly not less than a moral right).

The old pledge was not for a determined period;[7] nor was interest usually charged: the occupation of the land (which

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5. Ratt. A.L.C. 367 et seq. gives rules regarding the pawning of chattels.
6. See, for instance, Sarbah, Fanti Customary Laws: 86; Danquah, Akan Laws & Customs: 212-214.
7. Cf. Ratt., Ash. 232.

always passed to the creditor) was itself the interest on the debt. The land was redeemable at any time on tender of the original debt,[8] provided this did not inconvenience the creditor (e.g., by being in the middle of the planting season). The old Akan pledge is thus merely a representative of the customary pledge of land as found in the tribal law of many different peoples all over Africa.

B. PLEDGE: ITS DEVELOPMENT.

Owing to the effect of the legislation passed by the Gold Coast Government prohibiting slavery,[9] the institution of pawning of persons was officially abolished, and is now illegal, although, as noted above, it may still continue in modified form.

Pledge of land, on the other hand, has developed and grown. This is a consequence of the increased commercial and agricultural development of the Gold Coast, and the propensity of the African farmer (encouraged by the fluctuating prices for his crops) for running into debt.[10]

From the juristic point of view, pledges of land can be separated into three main divisions:

(i) A pledge may be exacted as security for an already

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8. Cf. Rattray, Ash. 232.
9. Slaves Emancipation Ordinance, 1874.
10. Though for the development of peasant agriculture, it is essential for a farmer to be able to raise capital; and the land is usually the only security he can offer.

existing debt or loan; in this case, the main aim of the pledge is security for debt on the part of the creditor, and relief from calling in of the loan on the part of the debtor.

(ii) A pledge may be given for a loan created at the same time that the pledge is made; in this case, the aim of the debtor is to exchange the use of his land temporarily for ready cash; on the part of the creditor, to invest his surplus funds and/or acquire a piece of land to work.

(iii) A pledge may be a concealed form of sale. This is especially the case where outright alienation of land is prohibited. In this case, the debtor's aim is to exchange the use of his land for cash permanently, but with a hope of redemption if possible in the future. On the part of the creditor, the acquisition of land for permanent cultivation is the aim.

It must be stressed that in the first case the debtor is the poor man, short of money, while in the other cases he may be as rich as the creditor, but anxious to achieve a more rational spread between his liquid and frozen assets.

The first case seems to be the primeval form of pledge all through Africa. The second is a more advanced concept of law, through the influence of commercialism; the last the immediate precursor of sale.

All three forms are found in the history of Akan law; once direct sale is permitted, the last form becomes unnecessary;

but the first two forms are still found, though their rules have been made more precise, and more rigid. These last have now to compete with adaptations of the English-type mortgage.

The modern pledge: In modern customary law, the primeval form of pledge has almost entirely disappeared; but if there are no express terms, an ancient pledge will still be presumed (though this rarely happens). It is necessary, however, to keep clearly in mind the distinction between pledge and mortgage.

1. DISTINCTION FROM MORTGAGE.

The higher courts of the Gold Coast, nurtured as they are on the study and enforcement of English rules of law, tend to look for some type of English mortgage in every case of the giving of real security. The distinction has indeed become more difficult to make, since the terms are loosely used in practice, and the mortgage in unsophisticated African hands takes on an African dress; whilst the pledge, owing to the influence of persons knowing a little law and the use of writing, is growing more different from the pledge as it used to be.

Where there is real security on property, the presumption is that the African parties intend a pledge, unless it can rigorously be shown that they intended a mortgage. This indicates some revision of attitude on the part of the courts applying English Law, since the law holds that where there is an instrument purporting to be a mortgage, but through some want of form it fails to take effect as a legal mortgage, it

must take effect as an equitable mortgage or charge. (In some cases the parties can call for the rectification of the mortgage-deed, or for the execution of an instrument of legal mortgage in proper form.)

It can be argued[11] that the mere fact that a document is drawn up by African parties in the case of the giving of real security does not necessarily imply that the parties are bound by the rules of the English law of mortgages; how much more so when there is only an approximation to the correct form.

2. FORMS OF PLEDGE.

There now appear to be three forms of what the African will call pledge:

(a) Pledge for an indefinite period: where A pledges property (usually a farm) to B for an indefinite period, until such time as A is able to repay the money. Possession of the property pledged passes to B until A redeems.

(b) Pledge for a fixed term: where A pledges his property to B for a specific period, fixed at the time of pledging (e.g., two years). In this case, possession again passes to B, and when A repays, he may take back possession.

(c) Self-liquidating pledge: where A pledges his property to B, with the agreed proviso that part of the proceeds of the property are to go to interest, and part to reduction of the

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11. Cf. the chapter on WRITING, especially at p. 676.

principal. If B goes into possession, then there is a true self-liquidating pledge. More commonly, he does NOT go into possession, in which case the transaction is an example of a self-liquidating African Mortgage (q.v.).

But a true self-liquidating pledge as opposed to mortgage, i.e., where possession and use pass to the pledgee, is found. The terms vary widely: see, for instance, the details given in the case of Anokye v. Abu (referred to at p. 411 below). This was a most interesting case because here a self-liquidating pledge was combined with a fixed term; and the native court had to adjust the conflict between them.[12] A similar case is considered in the abortive declaration of customary law relating to pledge made by the State of Akim Abuakwa, namely, that one-third of the proceeds of the pledged farm must be credited to the pledgor's account until such time as the property is redeemable; at the due date this amount is deducted from the total payable, and the balance is due and owing from the pledgor. The declaration was rejected, since it was felt that it did not accurately represent the existing customary law (see: C.E.P. File 2178/1932). The motive behind the declaration was laudable, even if the procedure was wrong.

And again, it was put forward as a ground of appeal in

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12. And Rattray, Ash. 232, mentions this type of pledge as an alternative form: he says that "the sale of the produce for a fixed time was taken as liquidating the entire loan and interest." See also Ratt. A.L.C. 357 in regard to the pledging of a river, where the loan was liquidated by the fish caught by the pledgee.

one case from a native court that it was customary for pledges where the term exceeded six years to be of the self-liquidating variety.

3. THE TERMS OF A PLEDGE.

In former times a pledge would not have embodied any express terms - there was no need for any provision about redemption, since redemption was automatically permitted at any time under the customary rules. Nor was there any need for powers of sale or foreclosure, since neither of these remedies was open to the pledgee. There was no need to set any term to the pledge, since the pledge might run indefinitely. Nor was there any call for provisions affecting the payment of interest or the destination of improvements made to the pledged property during the continuance of the pledge, since the interest on the pledge was satisfied by the profit which was made out of the pledged property by the pledgee during his occupation of it; and improvements belonged to the pledgor, and were handed back without compensation when the pledge was redeemed.

Today, all has changed, and it is open to the parties to set what terms and conditions they please at the time that the pledge is given, or by mutual agreement thereafter. It will be understood that possible terms can vary widely, and the notes below can be no more than generalisations.

(a) Term.

It is still not essential to set any term to the pledge,

and unless the contrary is agreed at the time, the pledge continues indefinitely. But it is becoming increasingly common to set a definite term to the pledge, i.e., a certain number of years or months, after which the pledge must be redeemed, or the security enforced. In theory, if there is no term, then the pledgee should be unable to foreclose, sell, or sue on the original loan. Owing to confusion in the African mind on remedies, it has sometimes been held in the native courts that the creditor does not lose his right to enforce the debt by action, which, if it is successful, is realised by execution against the property of the debtor, including the pledged property. But this seems erroneous, as in the ancient customary law the real security for the debt was limited to the property pledged alone. An opinion was ventured by some informants that if no term is fixed, then after a number of years the pledge comes to an end (determined on principles of equity), there is no need to repay the original loan, and the pledgor receives back his land unencumbered.[13]

Apart from this, I was given many different examples of terms customarily set to pledges:

one year;[14]

for a certain time;[15]

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13. Essumegya, and others.
14. Bekwai.
15. Essumegya.

a term certain;[16]

two years;[17]

"an appointed period";[18]

after the term is complete, it generally follows that either the debtor must pay back or the pledged land is taken in satisfaction.

But in many cases where a debtor is unable or unwilling to redeem on the expiry of the term he will "beg" for additional time to pay; and this will often be granted him.

(b) Redemption:

In former times the pledgor had the right to redeem at any time, and this right could never be barred by any act of the pledgee.[19] When a term is now set to a pledge, then the pledgor must redeem on or before the date fixed, or he will forfeit this right. Sometimes very short terms are set, and this has an effect quite contrary to the spirit of the pledge as known to the customary law. There is no court of law which has preserved the right to redeem as zealously as the Court of Chancery has done for English mortgagors. It is submitted that where provisions about redemption are inequitable, the Gold Coast courts should not enforce them. The aim of a pledge is

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16. Akim Abuakwa; and see Danquah, A.L.C. 219.
17. Nyako v. Atiadevie: (1935) D. Ct. '31-'37, 120.
18. Danquah, loc. cit.
19. Length of time is no bar to recovery of land pledged: Kofi v. Kofi: (1933) 1 W.A.C.A. 284, (sc. in the absence of terms to the contrary ?). And see Sar. F.C.L. 83.

security for debt, and not the chance to pick up a property on the cheap. So long as the creditor keeps the property pledged, and is allowed to enjoy the profits therefrom as interest, he cannot complain.

Pledge is now a commercial transaction, and Danquah hints that a pledgor who redeems unseasonably, so that the creditor does not gain the interest which he expected to get from his investment, may be required to compensate the mortgagee for any improvements he improvidently made to the property pledged.[20]

(c) Interest:

In the true pledge, possession passes to the pledgee, and the profits which the pledgee makes from his operation of the land are his interest on the loan. It is possible to fix the matter of interest at the time the pledge is given: it is possible for the pledgee to leave the proceeds with the debtor to reduce the amount of the principal, and continue to exact a money-interest on the loan.[21]

It is a matter of some chance what sort of interest the pledgee derives from his pledge; if the land prospers, and the price of produce high, then he makes a good profit; if times are poor, or the land sick, he makes little. It is possible

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20. Danquah, loc. cit.
And in Kwasi Anokye v. Kwaku Abu (Adansi B. Ct: 1948) the plaintiff maintained (unsuccessfully) that a pledgor could not redeem before the term fixed for the pledge had expired.
21. See: Danquah, A.L.C., 219.

for the operation of the rule regarding interest to work injustice: an instance may be given:[22]

The pledgee took the land on pledge for a term of 30 years for a sum of £23.3.6, the proceeds of the farm for the term going to full satisfaction of the debt. At the time of taking the land, the price of cocoa was very low. It later rose considerably, so that the pledgee realized large profits from the sale of the cocoa from the pledged farms over the period of currency of the pledge. These profits were many times larger than the whole of the principal lent. After 17 years, the pledgor asked for his farms to be returned, since the principal had been satisfied more than tenfold; the pledgee refused, since the 30 years' term had not expired. The court held that:

> "the terms of agreement of pledge was harsh and unconscionable, and must be set aside. Because he had recovered more than tenfolds the principal amount loaned. He was wrong to refuse redemption."

But the native court ordered that the pledge was to be redeemed on payment by the pledgor of £23.3.6, the original amount lent.

(d) Improvements:

These originally went with the land, so that if the land was redeemed the pledgor kept the improvements made by the pledgee without the necessity to reimburse him. Whilst no general principle of compensation for improvements seems yet

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22. Kwasi Anokye v. Kwaku Abu: (Adansi Divisional Native Court B: 25.9.1948).
23. Cf. Ratt. Ash. 233.

to have emerged, the customary law appears to recognise that the pledgee can take with him any improvements - made by him - if they are easily severable. Those which he cannot take away without damage to the property he may still be able to retain ownership of, through the operation of the customary rule that ownership of land and of the things in or on it do not necessarily go together. But such a rule does not apply to improvements designed merely to restore the land to the condition in which it was when pledged. Hence it has been held that, in the case of a cocoa farm, plantings of trees merely as replacements of trees already on the pledged property go to the pledgor. But separation of ownership has been allowed, for instance, in the case of plantain suckers from plantains planted by the pledgee. Other improvements revert to the pledgor without compensation, since the pledgee has no doubt made the improvements in order to earn a larger profit from the land.[24]

The pledgee is contrariwise under a duty not to waste the property pledged during his occupation; otherwise the pledgor will find on returning to his land that it has depreciated through neglect.

There is obvious scope for legislation laying down distinct rules regarding the ownership of improvements, and compensation for them when not severable; but the Africans and their courts

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24. Danquah, A.L.C., 219: "The cost of such improvements is not repayable by the mortgagor...", except perhaps when the pledgor redeems unseasonably.

may evolve satisfactory rules to deal with these points, as they have done with other difficulties in the past.

(e) Sale:

It was contrary to the former type of pledge to permit the pledgee ever to sell the property pledged in order to enforce his security. At the present time, the parties frequently insert in the written memorandum of the pledge a provision empowering the pledgee to sell the property pledged either privately and/or by public auction, in case the debtor defaults in repayment at the due time.

It also seems to be admitted by some of the native courts that a creditor has this power even if no express provision is inserted in the memorandum of pledge at the time; but some insist on his coming to court first. Where sales take place without a prior order of a court, there is little scrutiny of the merits of the terms of the pledge; and frequently injustice is thus done to the debtor. It is questionable how far the parties can agree on provisions designed to oust the jurisdiction of the courts, inasmuch as the Supreme Court especially is always ready to hold that there is an English equitable mortgage, which means that the creditor can sell the pledged property only by order of the court. This was the case in Sei v. Ofori;[25] but in Nyako v. Atiadevie,[26] Strother-Stewart, J., held

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25. (1926) F. Ct. '26-'29, 87-93.
26. (1935) D. Ct. '31-'37, 120.

that where there was a pledge of land, with a memorandum by which the pledgee was "empowered to sell publicly and privately in case of failure to repay",

> "I am satisfied that the document in question, as it sets out in its own wording, is a pledge of the land mentioned in it, according to native customary law. It can therefore be distinguished from Kwaku Adu Sei & Kweku Ansa v. Johnson Ofori..."

The distinction rested on the fact that possession passed under the pledge to the pledgee: since it was a customary pledge, the pledgee could, in the terms of the document, sell the land at once, and no injunction was granted as claimed to restrain the defendant from selling the land.

Apart from the fact that the customary pledge does not (or did not) recognize any right of sale in the pledgee, it is to be hoped for once that the courts will treat customary pledges accompanied by memoranda as equitable mortgages for the purpose of sale, thus requiring that the creditor should in all cases go to the court for an order before selling; if this runs contrary to the cases, it will be necessary to introduce legislation to rectify the situation.[27]

(f) Foreclosure:

As with the power of sale, modern pledges sometimes permit

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27. Danquah, A.L.C., 219, indicates that at least notice to the debtor is required before the creditor enforces his security: "If payment is not made within an appointed period, the creditor may, after due notice to the debtor, sell the property."

the pledgee to realise his security by foreclosure.[28] This is not, however, such a popular course of action, and the native courts naturally scrutinize it more closely, since it may be the instrument of personal gain to the creditors. This will especially be the case where the creditor is a person who makes a profession of lending money. The activities of money-lenders are intended to be circumscribed by the Moneylenders Ordinance;[29] but in practice, the provisions of this ordinance are not observed; and there should be stricter enforcement of them.

4. WHO MAY PLEDGE.

(a) Individual versus family:

The list of those who may pledge property is wider than that of those entitled to sell. Although an individual may be prevented from selling inherited property without the consent and authorization of the family, in many cases it was stated that he might pledge the property without the family's consent. But in as many or more cases the opposite opinion

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28. There was no true foreclosure in the old days, since the remedy of the pledgee who wanted his money back was (i) to ask the pledgor for repayment; (ii) to ask the family of the pledgor to repay if the pledgor did or could not; (iii) if this course failed, to lay a complaint before his chief: in which case, says Rattray (Ash. 234) either the pledgor's family satisfied the debt, or the pledge was converted into a sale. Since sales were redeemable (from moral rather than legal causes), the possibility of redemption was even then not entirely gone.
29. No. 21 of 1940; see below, p. 448.

was also given.[30] Opinion does not seem to be divided by areas, but probably depends instead on the customs of the different families. I prefer the view that the pledgor must generally obtain the consent of his family, since it has great weight of authority behind it. It seems that a person may pledge inherited property without the consent of his family only in exceptional cases; and then only when the property involved is of minor importance. The proper course for a member of a family to adopt if he is in debt is to go to his family for aid; if they cannot provide him with the money, then they may authorize him to pledge a farm to which he has succeeded.

Despite the fact that in general, then, a person is not entitled to pledge inherited property without the consent of the family, this is still possible and also frequently done in practice. This arises from the difficulty of verifying the title by which a person is entitled to possession of property. The creditor may not know (or may not care to know) whether a farm pledged to him is inherited property or not; and in cases where inherited property has been so pledged without the consent of the family (cases which are often encountered in the reports), the rule seems to be that:

(i) the interest of the family is not affected if the property is taken in satisfaction;

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30. Evidence from: Akim Abuakwa, Ashanti, Adansi, New Juaben, etc.

(ii) the conduct of the pledgor is sufficient to justify his being relieved of the inherited property, since he puts the family title in jeopardy;

(iii) the family may however be bound by the pledge if: (1) they allow the pledge to continue to their knowledge for a long time, thus placing the pledgee in a false position (especially where he improves the pledged property); or (2) they fail to contest a sale in enforcement of the unauthorized pledge, after it has been brought to their notice - although they are under no necessity to contest it by interpleader action at the time of the sale; they may do so subsequently by a suit for a declaration of their ownership;

(iv) the signature of members of the family to the pledge-memorandum may bind the family;[31] conversely, the absence of any family-signatures will make the pledge unenforceable both against the land, and against the successor of the pledgor.[32]

It should be pointed out that if it is held that a judicial sale even under such an unauthorized pledge of inherited property takes the property out of the control of the family (as some native courts have tended to hold), then family property is liable to be dissipated by improvident members; and, what is more, the individual can then do indirectly what he cannot do directly, namely, dispose of inherited property. Nor is there

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31. So: New Juaben.
32. New Juaben.

any need for the family to offer to satisfy the debt of the member, when a sale of inherited property under an unauthorized pledge is brought to their notice, with the penalty of forfeiting the property in default - though this is consonant with the former rule, now non-existent, that a family is liable for the debts of its members.[33]

The erroneous attitude of some courts comes from a confusion between the taking of the debtor's property in execution under a writ of Fi.Fa., when the creditor has treated the pledge as a simple debt; and a sale by order of the court enforcing the terms of an unauthorized pledge of inherited property. It has been suggested that if an individual's inherited farm is seized in execution under a writ of Fi.Fa., then a purchaser at a sale by public auction acquires only the right, title and interest of the judgement-debtor in the property, that is, he acquires an estate pur autre vie, conditioned on the life of the judgement debtor. The view that the purchaser takes an estate pur autre vie is not to be recommended, since: first, Africans do not recognize the possibility of a stranger's acquiring a person's interest in inherited property in any manner (of stepping into his shoes, as it were), since this interest is dependent on membership of the family and appointment and confirmation in the position of successor by the family;

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33. If a member of a family in debt has given land to someone to satisfy a debt without the knowledge of the family the latter (when they find out) can pay back the money to the creditor, and redeem the land from him. - Essumegya.

and secondly, since a person's interest in inherited property can be terminated at any time by decision of the family, it would seem that the family could similarly determine the purchaser's interest as freely. Nigerian cases[34] to the contrary are not worthy of extension to the Gold Coast, even as a persuasive precedent: in Lagos, partition of family property is an established institution; the same cannot be said of the Gold Coast.

It is a better rule that the family should forfeit their interest only when they have expressly or tacitly acquiesced in a pledge by a member of family property;[35] and in the latter case only when the acquiescence is of long standing.

An individual must at least give notice to his family before pledging a self-made farm on family land.[36]

Even if permission of or notice to the family is sometimes necessary when a person sells his self-acquired property, in no case is it necessary to give notice to the family, or obtain its consent, before a member pledges his self-acquired property.[37]

Where the family is divided up into sections, and sections have section-property, if the absolute title is with the family, the section will in general need permission to pledge it;[38] if

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34. Cf. Odejoke v. J. Holt: (1942) 8 W.A.C.A. 152.
35. E.g., New Juaben.
36. -do-
37. So, for instance, in Akim Abuakwa.
38. In Akim Abuakwa, for instance.
Cf. Chapter IV, THE FAMILY, ante, esp. at pp. 223-4.

title to the section's property is with the section, this permission will not be necessary. Even in the former[39] case, the power of a section to pledge the property controlled by it is admitted if, for instance, the property is of little value and unimportant.[40] Since pledge does not immediately take the property outside the family, the rule is less strict than it is with sale.

(b) The Family:

The family, working through the head, may in all cases pledge the family property, just as they are empowered to sell it. The head of the family must of course be authorized so to pledge the property by the family, and if he is not so authorized, the pledge is not valid.[41] If the family acquiesce in the pledge when it comes to their notice, lapse of time may make it enforceable against them.[42]

But in all cases where the family, or one of its members, is short of ready money, it is customary to approach other members of the family, and only if these refuse or are unable to help will family land be pledged to an outsider. Where an individual has pledged part of his ancestral land, another member of the family may pay off the debt, and then either hold

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39. Cf. Essiam (Fante).
40. Akim Abuakwa.
41. Effiduase (New Juaben).
    Edmund v. Ferguson: (1939) 5 W.A.C.A. 113.
    And cf. Chapter IV ante, esp. at pp. 220, 237.
42. - do -

the pledged land himself, or allow the debtor to continue to occupy it. Where the family have pledged land, and one of the individual members, with his own money, redeems it, then it seems to be accepted that he has first claim on the land. His position is not that of an owner of the limited interest in the family-land, which is transmissible to his successor; he is in no better position than the pledgee, and he cannot keep the land for ever. The family may pay off the debt to him; but up till that time (it is a debatable point) he will have exclusive use of the land.

(c) Individual versus Stool:

Where the land is not owned by the Stool (i.e., owning the absolute interest, or an interest dependent on the absolute interest of a superior stool), the individual needs no permission to pledge his land. In other cases, the custom varies. In general, an individual needs the permission of his Stool before selling his limited interest in a farm or house to a stranger. Even where this rule operates, it is sometimes admitted that he needs no permission to pledge his property to a stranger, although in such cases he may be required to notify the Stool.[43]

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43. A farmer should inform the land-owning stool before pledging his farm: Kumasi.
A person should inform the Odikro before pledging his land, especially to a stranger: Adansi.
All pledges - especially to strangers - should be countersigned by the local Chief: this avoids litigation: New Juaben.

In those areas where it is not customary to inform the Stool before pledging a limited interest, judicial sale of the pledged property may take place whether the stool knows anything of the matter or not; and the sale will still be of effect. Willy-nilly, the stool will then be called on to accept the stranger - if such a one is the purchaser - even though the stool exercises a discriminating choice as a rule of those strangers whom it permits to farm within the State.[44] The stranger-purchaser is expected to go before the Chief when he has completed his purchase, so as to regularise his position concerning the payment of rent or tribute, if this is exacted.

(d) Individual versus land-owner:

This situation occurs especially in Fante areas, where an individual owns a plot upon which another has by permission built a house; and also in areas where the owner of the plot has only a limited interest. Two different answers were given: (1) that the pledgor should give notice to the landowner of his intention to pledge;[45] (2) that he must obtain the consent of the landowner.[46]

Some informants also gave it as their opinion that the pledgor need neither inform nor obtain the consent of the landowner.

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44. According to different informants in Ashanti.
45. Mankessim.
46. Akim Abuakwa: the house-owner "cannot pledge without the knowledge of the family owning the plot, but he may pledge with their consent, and not mere knowledge".

(e) The Stool:

Whenever a Stool is permitted to sell part of its stool lands, it can pledge them. But as in the case of sale, it must not do so if the effect is to disturb actual occupants of the soil. This category of pledge was formerly a most important one; but nowadays stools which have fallen into debt have preferred to sell their lands outright, or else leave them to be taken in execution. The powers of the Stool to pledge its Stool property are now regulated, for Ashanti by the Stool Property Protection Ordinance;[47] for the Colony by the Native Authority (Colony) Ordinance, 1944.[48]

(General Notes: (i) At first only land was pledged, and houses would not be pledged, since (a) a person could always build his own house; (b) it would not be possible to gain any profit from the house, since in those times tenancy of a house was unknown. Today, especially in the towns, where the letting of rooms is a major occupation, pledging of dwelling-houses is a valuable method of security. Similar rules apply as in the pledge of land; but the terms are usually shorter, and the

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47. No. 22 of 1940; see especially s. 3.
This ordinance has now been replaced by the State Councils (Ashanti) Ordinance, No. 4 of 1952 (Part V), ss. 23 and 24. (See also APPENDIX below).

48. S. 27A: No. 22 of 1944 as amended by No. 13 of 1947.
The provisions of this section have now been replaced by those of the State Councils (Colony and Southern Togoland) Ordinance, ss. 15 and 16.
(See also APPENDIX below).

conditions more stringent, and further away from the ancient form of pledge.

(ii) The pledge by stools of entire villages subject to them in former times may well appear to be contrary to the general nature of pledge, since the pledgee-stool did not receive the right to occupy the land, and evict the persons already on it. The whole transaction illustrates the fact that formerly it was the persons who were the substance of the pledge, the land being merely accessory to them. The allegiance of the subjects was pledged, and as they were together in a village, they were pledged with their lands. Such a pledge differed from a sale of the land, and a compulsory transfer of the citizens' allegiance. The land was not sold, but remained the property of the pledging stool. All present rights in the land were forgone by the Stool, as was all present jurisdiction over the inhabitants. All that was left was the eventual right to redeem. If the land was ever returned, the status quo would be restored: until then, the inhabitants served their new chief. Such claims to have pledged and not sold land form the basis of actions by stools regarding land today (especially in Ashanti). Where such a pledge is in existence (and some have been recognized to apply today), although the subjects of the pledgee stool have settled on the pledged land, it is agreed that they cannot be made liable to pay tribute to the pledgor stool, which is, however, permitted to charge

strangers from other states. In regard to this, argument may arise, as the pledgee stool may claim the right similarly to tax strangers, and will in any case tax members of the pledging stool who settle on the land after the pledge was made.)

5. MEMORANDUM OF PLEDGE.

It is by no means essential that a pledge should be recorded in writing: in fact, Africans have managed for a long time without written record of their transactions. In former times pledge - like other African transactions - was concluded publicly in the presence of witnesses. Rattray in Ashanti at page 233 describes the ancient form, which bears many resemblances to the form used for a sale. He says that a proportion of the sum lent was paid to the witnesses in order to bind their memories (like the ntrama in sale). Today, although witnesses are a wise precaution, in order to be able later to prove the existence and terms of the pledge, if necessary, and are an essential if the pledgor requires, for example, the consent of his family, yet they are no longer an essential part of the transaction, whose absence would be fatal to the validity of the pledge. The most than can be said is that a pledgee endeavouring to prove a pledge today which was secretly concluded would be met with a certain amount of suspicion, a suspicion which the use of writing in a large measure overcomes.

But since writing as a record of all legal transactions has become so popular, very few pledges are given at the present time without there being some note or memorandum recording the transaction. It must be stressed that the written document is not the operative part of the transaction. It merely records the terms agreed between the parties, and may have been made some time after the pledge is given. It is valuable at times in that it carries the names of witnesses to the transaction, both independent and interested.

It follows that where there is conflict between the actual terms agreed, and the writing, the oral agreement prevails. Such documents must not be construed strictly by the law applied in England to the interpretation of deeds, but should be interpreted liberally; and in particular, so as to preserve as far as possible the typical features of a customary pledge, and equitably, so as not to cast injustice on either party. Since the writing accompanying a pledge is only a note of the oral agreement, such writings are very various in form. Frequently, indeed, they do not appear to record a pledge at all, or if they do, merely as an afterthought. It is especially common to make the writing in the form of a receipt for the loan granted in respect of the pledge; and then to record lower down that such-and-such land has been pledged to the creditor as security for the loan. Even where legal terms are introduced into such a writing, they are not to be construed in an

exact manner, as if the parties fully comprehended all that the English Law understands by such terms. The rule is therefore different from that which applies in England to wills, where the aim of the court which is interpreting a will is to fulfil the intentions of the testator - even where informal language is used - holding, however, that if he employs legal terms, these must be construed strictly.

Memoranda of this kind are frequently drawn up by letter-writers, lawyers' clerks, and others who have little or no acquaintance with the law. Where they have some acquaintance, the result is often more disastrous than when they have none.[49]

6. EFFECTS OF THE PLEDGE.

(a) On the debt:

Whilst the pledge is in operation it might be maintained that the normal action by which a creditor might recover his debt, by action, is not open to him, i.e., he cannot, ignoring the existence of a pledge, sue on the debt. Once the term of the pledge has expired, he can no doubt sue either on the pledge, or on the debt.[50] In English law a creditor can, of course, once the contractual period for repayment has expired, ignore the mortgage and sue for the debt on the covenant to

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49. See the chapter on WRITING for a fuller consideration of the effect to be given to such documents, especially at pp. 678 et seq.
50. Where the pledge is for a definite term, then the creditor, when the date is due, may sue for the loan; but frequently makes a fresh arrangement (New Huaben).

repay. In customary law the pledge is the record of an agreement to give the debtor time to pay, coupled with the giving of property as security. Where the pledge is for no certain term, then the custom seems today to be that the creditor can sue at any time on the debt itself, ignoring the pledge.[51]

(b) On other property of the debtor:

Although it appears somewhat inequitable that where the creditor has received real security for the debt, he should be able to ignore the pledge, and sue on the debt, which he may satisfy by execution against other property of the debtor, the custom is for him - if he wishes - to satisfy himself out of other property of the pledgor; and he will do so particularly where the pledged property has declined in value. In olden times, a pledgee would not have been able to take any action against other property of the debtor.[52]

(c) Sale or foreclosure: its effects:

Of these, sale is by far the more common. Where the property pledged is sold in default of redemption at the due date, it appears that in some cases the practice has sprung up of the creditor's taking and keeping the whole proceeds of the sale. That is, where a property worth £100 is pledged for a debt of £10, if sale of the pledge takes place, the creditor keeps the

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51. Where the pledge is for an indefinite period, then (acc. to New Juaben) the pledgee cannot sue for the loan (until the pledgor is in a position to repay?).
52. Cf. Sarbah, F.C.L., 84.

whole £100, after paying expenses to the auctioneer. Such a course is obviously inequitable and wrong: it is likelier to happen where the sale is not by order of any court, and usually indicates collusion between the creditor and an unscrupulous auctioneer, the creditor buying in at a low price, or else pocketing the proceeds of a sale to a third party.

When a person pledged a farm formerly, he could be sure that when the debt was satisfied, he would receive back the pledged property entire; that is, his expenses were limited to the amount of the loan. Today he should receive back the balance after deduction of

(i) the amount of the principal;

(ii) accrued interest, if any;

(iii) costs of the sale, and legal action.

If the pledged property by itself is insufficient to cover these expenses, then the debtor must make good the difference.[53]

Where a sale takes place by order of the court, then the money is paid into court, the proper deductions are made, and the debtor receives the balance; hence the value of requiring a court-order before sale of the pledged property.

(d) Fi.Fa.:

There is some confusion in the mind of individuals and

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53. It is for consideration by the legislator whether it should be provided that neither sale nor foreclosure may in any case take place without a regular suit in court, and a court-order (as is the practice in India).

native courts between a sale under a pledge, and execution by way of writ of fi.fa. Fi.fa. is not the appropriate remedy where a creditor wishes to enforce a pledge; nevertheless, a writ of fi.fa. is often issued in such circumstances. A certain amount of laxity has been detected at times in making sure that the proceeds of the sale are properly accounted for to the court.

It is advisable, in my opinion, to develop concrete rules for the guidance of native courts in the matter of sales in enforcement of pledges, and under fi.fa. Where pledges permit the creditor to sell the pledged property without any order of the court at all (a provision approved in Nyako v. Atiadevie),[54] then some regulative action is obviously needed.

(e) Competition between creditors:

This is a topic where it was found practically impossible to observe any concrete rules as enforced by native courts. Some members of native courts were apparently willing to allow a creditor A to seize the property of debtor D[55] pledged for another debt to creditor B; and to hold that B could only protect his security by taking action in the court first. There is little or no question of priorities between different pledgees of the same piece of land, except where this is through the fraud of the debtor in pledging the same land twice.

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54. See above, pp. 413, 414.
55. This opinion is of course not typical.

Since the typical pledge is usufructuary, there is little opportunity for second and third charges over the same parcel of land.

(f) Powers of the pledgee:

The primary right of the pledgee, unless different terms are agreed, is to possession of the property pledged, and exclusive enjoyment of the proceeds therefrom, during the continuance of the pledge. This right of use and possession is in lieu of interest.

The pledgee can probably thus maintain his right to exclusive possession by action for trespass against anyone infringing it.

The pledgee may in no case sell the land pledged outside the terms of the pledge. It is stated that he customarily grants an extension of time (in conformity with common African practice) if the debtor is unable to pay at the due date.

The pledgee may only repledge the land pledged with the consent of the pledgor.[56] Such a case occurs more rarely today

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56. "By customary law ... a mortgagee cannot transfer to another any rights which he may have under the mortgage without notice to the other party to the mortgage transaction..." per Jackson, J., in Clarke v. Nkrumah: (Cape Coast: Land Court: 22.12.48; unreported);
"... if a land is in your possession by pledge you have no right to pledge it to another without the original owner's knowledge..." - evidence of an expert witness in the same case.
See: Sarbah, F.C.L., 83.

that it did in the past, when the creditor could not raise money by sale of the property pledged. I am not aware of any cases which deal with the competing rights of pledgee and sub-pledgee; but the opinion was put forward that the effect was only a substitution of creditors. That is, if the pledgee wishes to get his money back, and the pledgor is unable or unwilling to repay, either the pledgee will transfer the benefit of his pledge to a third party, who then becomes sole creditor vis-à-vis the debtor; or else, on the part of the pledgor, the pledgor will find another person from whom to borrow enough to pay off the loan due; the pledgor and the third party may then make a new pledge or other arrangement between them.

(g) Death of a party:

Can the benefit of a pledge be claimed by the successor of a pledgee after his death? The answer is in general, Yes. It is, according to one case, customary to offer drink to the successor of a deceased pledgee in order to "keep alive and evidence the transaction of the pledge".[57] This would presumably be done to avoid the danger that the family or successor of a pledgee would later allege that the transaction had been, not a pledge, but an outright sale, an allegation often met with in the reports.

Is the burden of a pledge enforceable against the successor

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57. In Clarke v. Kofi Nkrumah: (unreported: Cape Coast (Land Court: 22.12.48), per Jackson, J.

or family of a deceased pledgor? Again, the answer is generally "Yes", provided the pledge is a valid one (made with the knowledge or consent of the family where this is required). If the family were not consulted, or there is no written evidence of the pledge, it is possible that the family will contest the existence of any pledge. It is customary for all creditors to put their claims in evidence at the meeting of the family of deceased called for this purpose; and they will customarily offer drink on such occasions. In these days, there is not such insistence on the observance of the time-limit.[58]

C. MORTGAGE.

This is, of course, not an indigenous institution, and has been borrowed from English Law (as it was before the sweeping reforms made for England by the legislation of 1925). The choice of a mortgage form rather than that of a customary pledge by the Africans indicates a desire for greater rigidity, security, and sophistication. Wherever an attempt is made to draw up a document as a record of real security taken, then - except where the writer is completely ignorant of English law - a certain copying of the features of an English mortgage takes place. In this fashion powers of sale have been created for the pledgee, a definite term set, specific conditions agreed

58. See: SUCCESSION, post, at p. 569.

on. There comes a point when one must say whether a document is a pledge or a mortgage. The natural tendency of the Supreme Court where there is a document is to apply English law in order to decide whether a pledge or a mortgage is intended. The criterion adopted by the courts has in general been: does the mortgagee go into possession under the mortgage or not? If he goes into possession, then the transaction is a customary pledge, or "native mortgage"; if he does not, then it is some form of English mortgage or charge. If it is too imperfect to operate as a legal mortgage, then the courts will hold that it takes effect as an equitable mortgage.

Professor Vesey-FitzGerald has observed with mixed feelings in another context[59] the introduction of English equitable rules into the Indian law of property: and here too one can see the dangers. Can one make the same distinction between legal and equitable estates or interests in Africa as one does in England? The equitable estate in England is a grafting on the English estates in law - fee simples and the rest. Can these equitable interests be grafted on to the very different interests in property found in the Gold Coast? No - it is like trying to play chess with a pack of cards.

Once it is held that an equitable (or a legal) mortgage exists so as to affect an African interest in property, there

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59. In his Inaugural Lecture as Professor of Oriental Laws in the University of London.

is a whole series of rules which must be presumed to apply. Can the African parties be lightly held to have agreed, even tacitly, to bind themselves by such technical provisions of a foreign law? It therefore requires very strong evidence before one is willing to accept that the African parties intended an English-type mortgage; and in default of proof of such intention, they must be presumed to intend to govern their relations by the unwritten rules of the customary law, as developed in practice.

What is such evidence? - Where the parties are literate, conversant with English ideas, and where the property-laws have approached the English most closely - in the towns and coastal areas - then it is probable that the parties wish to bind themselves by English law, if they use a written deed or document.

Otherwise, one must conclude that the Africans have adopted an English form for the record of their agreement, because they know no other, and because they attribute mystical power to such formal records to safeguard their interests. One may compare the written lease executed between a stool and a stranger-tenant-farmer, where the parties nevertheless regulate their day-to-day dealings solely by reference to customary law; and the conveyance which may be given by the vendor of land to the purchaser often years after the land has been customarily conveyed, merely to serve as evidence in a law-suit, or for some similar purpose.

The conclusion is that one cannot take such documents at their face-value: no more need one accept even a perfect English mortgage by deed executed by Africans at its face-value.[60]

1. VARIOUS FORMS OF MORTGAGE.

Since the salient distinction between a pledge and a mortgage in Gold Coast law is that the former is usufructuary, and the latter is not, I propose that wherever the mortgagee, or pledgee, has the power to enter into immediate possession of the property pledged, and enjoy its use and the profits therefrom, or some part of them, the agreement should be termed a "pledge"; otherwise, it is some form of "mortgage" or "charge".

It may be thought that it matters little whether any one transaction is termed a mortgage or a pledge, because the result is much the same. On the contrary, in the pledge the pledgee enters into possession, and enjoys the fruits of the pledged property during the continuance of the pledge. It has never been suggested that a mortgagee in English Law can do the same; even when he enters into possession to enforce his security, he is held strictly accountable by the Courts, not only for what he receives, but for what he ought to have received. He can deduct from the receipts only enough to satisfy payments

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60. The above puts the view of the African, and his attitude of mind in his dealings; for the attitude of the Gold Coast courts, the reader is referred to the chapter on WRITING, post, passim.

of interest, and necessary expenses in connexion with his possession. At African Law, all is different.

The pledgee is not so accountable when he enters into possession of the pledged property. The pledge is usufructuary, and so he is entitled to the use and profits of the pledged property. His only duty is not to waste the property in such a way as to depreciate unreasonably the value of the property when it is returned to the pledgor.

The various sorts of mortgage which may exist can then be indicated.

(a) English:

At the head comes the English legal mortgage, which is presumed to be the rarest of them all.

Next comes the English equitable mortgage, which the courts have found to exist in certain cases, principally where some form of writing has been used by the parties.

(b) African:

In the field of customary institutions, there is a further form of security, for which one must appropriate a special designation. The Courts have tended to hold that the charges to be specified are English equitable mortgages.[61] I prefer to

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61. "Possession is an essential element of a native mortgage"; hence if the mortgagor remains in possession, it is not a native "mortgage" (sc. pledge). There is no third category - there is a document; therefore it must be an equitable mortgage - Asafu Adjei v. Dabanka: (1930) 1 W.A.C.A. 63.

think that they indicate the creation of a new category of mortgage by the Africans, and belong to the sphere of African rather than English law.

This is so because in most cases their parentage is obvious: e.g., the self-liquidating pledge mentioned above develops into a self-liquidating mortgage by the omission of the mortgagee to go into possession.

There are also certain charges over house-property, which will be considered below. In them, the mortgagee may not be entitled to exclusive possession, or not entitled to possession at all.

The following types of such charges have been observed:

(i) Self-liquidating African mortgage:[62]

This type of mortgage is only suitable where the property pledged yields a high rate of interest or profit; its only application so far encountered is in connexion with the mortgaging of cocoa-farms.

The essence of the self-liquidating mortgage is that the profits from the cocoa-farm mortgaged (unlike in the normal case of a pledge) do not all go to the pledgee in lieu of interest, but are rather used to satisfy both principal and interest. This is no doubt a result of the higher cocoa prices now prevailing.

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62. Information from New Juaben; also reported from Akim Abuakwa.

Term: If A mortgages his cocoa-farm to B on this kind of arrangement, then the mortgage continues until such time as either A repays the loan with any interest accrued (or the balance thereof); or the principal is satisfied from the proceeds of the farm.

Possession: remains with A, the mortgagor. A looks after the farm in the interests of B, - in African terms, he is "caretaker" for B. Juristically, it would no doubt be more exact to say that possession is with B, the mortgagee; and custody with A, the mortgagor; since at the time the loan is made, B (at least notionally) receives possession of the farm, but hands it back to A to look after for him. The close analogies with pledge are thus obvious.

Proceeds: A, the mortgagor, manages the farm, engages labourers, and disposes of the crops. He sends the proceeds to the creditor, B. The proceeds are divided by B into three parts:-

One part to A: this goes for the payment of the labourers and the expenses of upkeep of the farm.

One part to B: as interest.

One part to B: to reduce the principal lent.

(ii) African charge:

Where there is what might be thought to be a pledge, since it makes no attempt at English form, but the pledgee is not entitled to immediate possession, it would be inappropriate to hold this any kind of English mortgage. It is a new form of charge, developed in African custom.

One finds, for instance,[63] that a dwellinghouse is taken as security; the chargee is not allowed to take the exclusive possession, use and profits of the charged property; but if default in payment of the debt occurs at the due date (usually a short one), then he is entitled to sell or to enter into possession. Frequently, such a charge is accompanied by an agreement for his free occupation of one room in the house. This is not a pledge, ancient or modern, nor an English mortgage. It falls in the category of an African mortgage or charge.[64]

Such charges are also created over cocoa-farms; the main essentials are (1) possession does not pass;

(2) a high rate of monetary interest is charged;

(3) the charge is for a short term.

All such charges may be converted into varieties of pledge if the pledgee-chargee enters into possession.

2. VALIDITY OF MORTGAGES.

(a) Competition between English and African Law:

In the field of mortgages, as elsewhere, there is competition between English and African forms, and it seems likely that the more sophisticated will drive out the less. English form is used increasingly. How far is this permissible? The question is considered in Chapter XI on WRITING, so need not

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63. Reported from, inter alia, Adansi.
64. A similar charge on a farm was considered in Adu Sei v. Ofori: (1926) F.C. '26-'29, 87; but the Court held it to be an English equitable charge.

be treated comprehensively here. It is enough to imagine here the possible results if the positions were reversed, and English individuals were endeavouring to regulate their property-positions in England in accordance with African customary law. If the courts were called on to deal with such phenomena, and especially if the parties endeavoured to create a usufructuary mortgage, the courts would try to make this fall under some category of English law, perhaps as an equitable charge coupled with a tenancy. They would likelier hold that the whole arrangement was bad, because it clogged the equity of redemption. (Similarly, if a vendor in England endeavours to pass "an absolute interest" in land, it is submitted that the courts would say that he intended to pass the whole fee simple.)

The courts in the Gold Coast should, similarly, attempt to give effect to the intentions of the parties, so far as is possible within the framework of the law to which they are subject; and should especially abstain from attempting to force modern customary developments in the law of mortgage into the English legal system. Just as English real-property law developed as a result of the activities of the conveyancers, so African Law develops new institutions (where every man is his own conveyancer).

English mortgages by deed are now frequently executed by Africans, more especially in commercial transactions. If the parties intend to be bound by English Law, then it should be

noted that the writing is an instrument and not a memorandum.[65]

(b) Permitted terms of mortgages:

There is little need to say anything here, except to warn the interpreter of a mortgage deed made by an African that terms derogating from rights customarily enjoyed must be strictly construed in favour of the party who thus forfeits his rights (which, for instance, he might have if the transaction were a pledge).

(c) Who may mortgage:

Theoretically, the same persons may mortgage as may pledge. But the fact that customary rights are much cut down by use of an English mortgage, and in particular that the contractual right to redeem is extinguished in six months (or the term agreed), means that the mortgagor may quickly lose his right to the property; and more important, that other interested persons (e.g., his family), may be taken by surprise.

At present individuals are sometimes permitted to pledge property when they have no strict right to do so (inherited property); this practice is tolerated by their family, since the likelihood of the family's losing its land is much postponed. This does not apply where an English mortgage is used.

Legislation may be necessary to prevent undue hardship arising in this manner.

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65. Cf. WRITING post, especially at pp. 646-7.

D. MISCELLANEOUS.

It is intended to consider here a few questions which arise owing to English forms of procedure now adopted, and certain ordinances. The major topics are the question of Fi.Fa.; and the Moneylenders Ordinance[66] and Loans Recovery Ordinance.[67]

1. FI.FA.

Attachment by way of writ of Fi.Fa. is the appropriate form of execution in the Gold Coast as against real property, thus differing from the law of England, where it is a remedy against personal property only, the proper remedy against real property being by way of elegit. Again, it is usual to fi.fa. property as a means of securing execution for an unsecured debt, any real property of the judgement debtor being liable to seizure and sale in satisfaction. It thus differs from an order for judicial sale of mortgaged property, when the right is exercisable against the property mortgaged. These distinctions are not kept clearly in mind by the Africans and their courts.

There are also some contrary dicta with regard to the rights of persons who are true owners of property, which has been seized in execution for the debt of a person who is not owner, but at best the holder of a limited interest in the property. Such cases especially occur in connexion with inherited

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66. No. 21 of 1940.
67. Cap. 146.

property. What are the rights of the family, and what method should they adopt to assert their rights, if an inherited property is seized in execution for the debt of the holder, the successor to that property? In view of the dicta in Bobo v. Anthony and Sri II v. Anthony, it seems clear that the real owner of the property need not interplead at the time of the execution proceedings; and if the property is in fact sold unlawfully, he may afterwards sue to set the sale aside, provided he has not been guilty of laches. The certificate of purchase is evidence only of purchase by the purchaser at such a judicial sale of the "right title and interest" of the judgement debtor; it cannot thus operate to bar the title of the true owner or owners.[69] It has, however, been suggested that where inherited property is sold in execution, the purchaser acquires the right, etc., of the successor, which means that he thus acquires an estate pur autre vie in the property, the life in question being that of the successor. On the principle of nemo dat quod non habet, it is obvious that he cannot acquire more; but does he acquire as much? It is submitted that he does not, and that the sale is in fact a nullity; since the view above assumes that the successor has a life-interest in the inherited property; he has, however, nothing of the sort. His interest is one unknown to English Law; it is terminable

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69. For the effect of a certificate of purchase, see: Miller v. Kwayisi: (1930) 1 W.A.C.A. 7, and see also, Bobo v. Anthony: (1931) 1 W.A.C.A. 169.

by the family which granted it at any time, if the proper formalities are observed. It is not transferable; and it is rather a delegation of management, together with a right to enjoy the proceeds of the property.

It is therefore recommended as a matter of some urgency that this question should be regulated by statute, so designed as to preserve the interests of the family where they have not adopted the debt, acquiesced in the pledge or mortgage, or permitted the purchaser to alter his position substantially to his detriment for a considerable time.

It was stated by some African informants[70] that a creditor can enforce his security under a pledge or mortgage by:

(a) Fi.Fa: "after judgement of the Court";

(b) Private Sale: (where this is permitted by the terms of the pledge) "but it is wiser to sue first";

(c) Foreclosure: "rare, except between commercial people, under a proper English mortgage";

(d) Public Sale: on the same conditions as private sale;

(e) Action: by suing for the debt.[71]

Another matter that needs consideration and possible rectification is the present Sheriff Law of the Gold Coast. The distinction between movables and immovables is not an entirely apt one for the Akan system of land tenure; and the

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70. Akim Abuakwa.
71. See also ante, p. 428.

probability that in theory crops and structures on land seized adhere (as in English law) to the realty for the purposes of the Sheriff Law is not very satisfactory either. Such an attitude applied to a land tenure where severance of interests between the land itself, and the things thereon, is freely recognized, leads to confusion and injustice.

The seizure of stool property in execution is now limited by ordinance, for Ashanti by separate ordinance,[72] and for the Colony by s. 27 A of the Native Administration (Colony) Ordinance, No. 22 of 1944.[73]

The Stool Property Protection Ordinance, 1940, (s.3), provides for Ashanti that no Native Authority or other person may alienate, pledge or mortgage any stool property without the consent in writing of the Chief Commissioner. If this is not obtained, then the transaction is null and void.

(s.4) It is also provided that stool property cannot be seized in execution if there has been no pledge or mortgage in accordance with the terms of section 3.

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72. The Stool Property Protection Ordinance, No. 22 of 1940. The Ordinance applies only to Ashanti.
(This Ordinance is now replaced by the provisions of the new State Councils (Ashanti) Ordinance, No. 4 of 1952, especially s.24. See APPENDIX below.)

73. The new section was inserted in the N.A.(C).O. by the Native Authority (Colony) (Amendment) Ordinance, No. 13 of 1947, s.6.
(The functions of this section are now performed by s.16 of the new State Councils (Colony and Togoland) Ordinance, No. 8 of 1952. See APPENDIX below.)

(s.2) "Stool property" is defined to include:

> "(a) the stool itself;
> (b) insignia or other property usually held or enjoyed by the occupant of the Stool or used at ceremonial functions;
> (c) official buildings belonging to the Stool;
> (d) Stool land."

The terms of this Ordinance are very much wider than those of the corresponding provisions in the amendment to the Colony Ordinance.

A new section is inserted by Ordinance 13 of 1947 in the N.A.C.O. The section reads:

> "S. 27 A. Preservation of Stool Property.
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> (1) It shall not be lawful for any Stool property to be alienated or pledged in any way, and any instrument and any transaction or agreement (whether in writing or not) which purports to effect any such alienation or pledge shall for all purposes be null and void."
> (A provision about inventories of Stool property.)
> " ... For the purposes of this section 'Stool property' shall be deemed only to include the insignia and such other property as may be attached for customary, traditional and ceremonial purposes to the Stool of any Chief."

Stool lands are therefore not affected by this provision, unless it is held that stool lands are "attached for customary purposes" to a stool. The phrase is difficult of interpretation.

The Ashanti ordinance thus effectively deals with cases which had previously occurred where stool property other than

insignia and the stool itself had been seized in execution, or cases where stool lands had been pledged to creditors. The Ordinance might be improved if under (d) it was made clear that stool property in the narrow sense, e.g., stool farms, were also incapable of pledge or seizure.

2. THE MONEYLENDERS ORDINANCE:[74] was designed to restrict the activities of moneylenders, confining them as far as possible to registered or licensed moneylenders. It is not, however, observed in practice to any great extent. The Ordinance provides:

(s.4) That every moneylender shall have a licence. The term "moneylender" is defined at section 2. The saving terms of section 3 are worth quoting in full as additional to this definition, since they import a presumption of law, which in general operates in favour of a debtor:

(s.3) The section provides that persons who lend money at interest or for repayment of a larger sum are presumed to be moneylenders until the contrary is proved.

(s.12(1)) No moneylender's contract is valid unless there is a memorandum in writing of it.

Permissible interest-rates are laid down in ss. 13 - 17.

(s.20) There is in general a limitation period of 12

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74. No. 21 of 1940.

months from the date when the cause of action arose, operating against a moneylender suing on a contract.

3. THE LOANS RECOVERY ORDINANCE:[75] is also more often ignored than enforced. It provides:

(s.3(1)) In suits by creditors on a secured or unsecured loan any court (including a native court) can re-open the transaction where the interest charged is excessive, etc.; or comprehensively, where "the transaction is harsh and unconscionable", and can (i) "relieve the person sued from payment of any sum in excess of the sum adjudged by the Court to be fairly due in respect of such principal, interest, or charges.";

(ii) order the creditor to repay such an excess if it has already been paid;

(iii) set aside or revise any agreement in connexion therewith.

(s.3(2)) At the instance of the debtor, a court may exercise similar powers as though there were proceedings before the court for the recovery of money lent.

4. THE CHATTELS (TRANSFER) ORDINANCE:[76] this very new Ordinance is considered in the APPENDIX below.

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75. Cap. 146 of the 1936 revision.
76. No. 51 of 1952.

CHAPTER VII.

TENANCIES AND LEASES.

The different forms of legal relation which may be comprehended under the term "tenancies" in Akan Law are very various: this is attributable mainly to the differing terms and purposes for which these tenancies are brought into existence.[1] One may pass all the way from the free tenancy between relatives or friends, by way of abusa tenancy, to leases in proper English form. Doubt may be cast on the propriety of collecting all these forms of dependent interests under the single heading of "tenancy"; and, especially where no rental or consideration is charged, then it is hard to separate (and African terminology does not clearly separate) the tenancy from a temporary partial gift of rights. Is it pointless to separate the tenancy from the gift? It is not entirely so, since a juridical distinction may be made between the gift, where one considers the form of the transaction or conveyance or grant by which the tenancy comes into existence (with especial emphasis

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1. The line between tenancy and subordinate ownership is often difficult to draw. Of certain relations one can state confidently that they are not tenancy - for example, the interest of a citizen. Of others one can be sure that they are merely tenancies - e.g., the grant of land for cultivation for one season. Since it appears that there is a definite historical connexion between the two forms of interest, and many of the same rules apply, the customary law is given below without any attempt to draw a hard-and-fast line between them.

on the fact of its being for no valuable consideration), and the tenancy or continuing relation which thereafter subsists between owner and tenant, and which determines their mutual rights and duties.[2] Abusa tenancy is too far removed from gift, as being a tenancy where annual rent is payable, to fall within this last statement; but since it is possible for a free tenancy, or one for a nominal rental, to be converted into an abusa tenancy, it is arguable that they are members of the same genus (and this is perhaps the historical explanation of them); the process of acquisition of such a tenancy (by "begging" the landlord, and thanking him when the tenancy is granted) is similar both for the abusa and free tenancies.[3]

Finally, it is possible for the parties to substitute a lease in English form instead of an abusa tenancy, though this is obviously a recent alternative. In this manner the different forms of tenancy are related to each other in increasing degree of stereotyping and commercialisation.

A. CUSTOMARY TENANCIES.

1. FREE TENANCIES AND THOSE WITH A NOMINAL RENTAL.

"Free" tenancies, those which are for no valuable consideration, are of frequent occurrence in customary law. They

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2. See: GIFT, at pp.516 et seq;and see also: Quayson v. Abba: (1934) D.Ct '31-'37, 50.
3. Such lettings may be called adiasie in Twi; this is a general term meaning "previous arrangement", "agreement", or "contract".

are usually granted on the basis of some relationship - whether of blood or friendship - existing between the parties: this relation is the causa of the transaction. The characteristics of such tenancies are:

(1) that they are free (no rental being charged);

(2) that they are friendly (express terms being at a minimum);

(3) that they are of indefinite duration;

(4) that this benefit is not assignable without the consent of the landlord.

(a) Between relatives by blood:

If A has a self-acquired farm or farm-land, he may be approached by B (a relative by blood) for some land on which to farm. It is open to A to refuse, and B cannot demand a tenancy, even of unused land, as a right; but if A has unused land to spare, his refusal may be censured by a family arbitration if B chooses to complain; and this is much more likely if A holds the farm or land, not as self-acquired, but as family or inherited, property.[4]

4. An example of such a grant of a free tenancy is to be found in Kofi v. Manu & Mensah: (1949) (Unrep: N. Juaben Native Court A, Suit 57/49), where an uncle now deceased gave to his maternal nephews (i.e., his sister's sons), land without cocoa trees then on it "to plant cocoa trees thereon for their use, to avoid them from future embarrassment after his death". The nephews were then little boys, "who had very unfortunately lost their parents (orphans) and were living under the supervision of their said uncle". During the uncle's lifetime, the nephews did not account to him for the proceeds of the trees which they had planted on the land; and the case arose through a dispute, after the uncle's death, between the nephews and the family, who claimed that, at his death, the land had become family property, a contention which did not succeed.

In a similar fashion, if A has a self-acquired house, B may approach him for a room in which to reside, which A may give to B if he agrees.[5] Again, as with farms, if the house is not self-acquired but inherited, B may place the matter before a family arbitration if A refuses to comply with B's reasonable request.

The termination of such tenancies is usually either by mutual agreement, or else by the unilateral desire of either the tenant or the landlord. But in general the landlord should not determine the tenancy unreasonably, otherwise he may be taken before a family arbitration to justify his actions. Sufficient reasons include:

(1) the setting up by the tenant of a claim to title in the property so as to prejudice or deny the title of the landlord;[6]

(2) ingratitude or bad behaviour by the tenant to the landlord;[7]

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5. It might be maintained that in this latter case it is too much to describe B's right as a "tenancy"; even English common law would no doubt call him a "tenant-at-will"; and the original arrangement might in African custom crystallize into something more durable and permanent than a mere right of free lodging.
6. Cf. Adai v. Darku: (1905) Red. 231; and see also Onisiwo v. Gbamgboye: (1941) 7 W.A.C.A. 69, (a Nigerian case), where a tenant purported to make a lease of the property which he held, under a claim of title as owner in himself.
7. This is necessarily a very vague reason; what is such bad behaviour depends on the view of the family arbitration.

(3) wasting of the property.[8]

If a farm is granted for one purpose, and it is quite customary so to do, then the tenant must not use it for another purpose without the consent of the landlord. The tenant cannot create subsidiary interests in the property he holds without the permission of the landlord. He cannot, a fortiori, sell or pledge his interest without first consulting the landlord. Where the tenant plants permanent crops, and the tenancy comes to an end,[9] the tenant customarily receives compensation for them, which may take the form of a physical division of the property into thirds. If the arrangement continues for some time, the tenant comes increasingly to think of himself as an owner; and his successor will continue to farm there. The successor should, however, approach the landlord first; the latter should not refuse to admit him except for good reason. Since both landlord and tenant are of the same family, no danger of injuring the family's claim to title in the property

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8. A tenant acquires no right to valuable trees already growing in the land, or to minerals therein; hence, if there are palm-trees on the land, they cannot be felled by the tenant unless he first obtains the consent of the landlord: Yaw Donkor v. Kwesi Ayaah: (1946) (Unrep: Land Ct, Cape Coast, 31/10/46, coram Jackson, J.). If there are timber-trees on the land, similar rules apply.
9. According to some informants a new arrangement must be made if the tenant had planted trees, and these die. At such a time the land reverts to the landowner; and there must be new terms before the tenant may plant more trees. - Asikuma, Essumegya.

exists, since, at the death of either party, the family continue to have a claim: if the landlord dies, the family take the absolute interest; if the landlord A gradually relinquishes his rights in favour of the tenant B, as may happen as cultivation progresses, then B's holding is likewise subject to the family's claim. Where a stool is the owner of the absolute interest in the land, no difficulty or prejudice to its title is caused by the creation of such tenancies, which need not be notified to the stool; nor has the stool any claim to tribute or rent.

It will be appreciated that the juridical position differs slightly where A, the grantor, holds not an individual, but an inherited, interest in the property. A does not own the ultimate interest, which is with the family; hence, in a sense, he is not the landlord to B. It might be argued that B's interest supplants A's interest, instead of being carved out of it; but this may merely be begging the question in verbal form - does A retain any rights over the property in question? No general principle seems applicable to such cases, each of which must be dealt with on its own particular facts.

(b) Tenancy for dependents:

This is the commonest form of free tenancy, occurring whenever A allows his wife, or children, or servants (in former times his slaves), rights of cultivation over a portion of his property. This is frequently done, either for economic reasons,

as a reward for services rendered, or as a method of setting up the recipient with, as it were, a "start" in life. Assistance in cultivation rendered to A is thus frequently rewarded by the grant of a tenancy of this nature.

In a tenancy of this type, the grantees do not belong to A's family; in theory, therefore, there is a sharp distinction from the last category, in which the rights of the family of both tenant and landlord could not be said to be imperilled in any circumstances. Despite the difference, little objection is ever raised in practice to such an arrangement for the benefit of dependents. Over his self-acquired property the holder may create usufructuary interests as he wishes, and family consent is not required. The grant of such interests to dependents is not an outright gift unless

(1) the family concur; and

(2) the intention to make an outright gift is present.

Outright gifts of the land are rare, and normally the wife is given a portion of her husband's land for her own purposes, and especially for the growing of foodstuffs (these may be interplanted between her husband's permanent crops); as for the children, these, especially the sons, are similarly benefited as they reach a suitable age. The rationale of such gifts is obvious: a man, his wife or wives and children, frequently form a cultivating or economic unit.

Such tenancies come to an end on:

(1) for the wife -

(a) the divorce[10] or death of the wife - the tenancy is not transmissible;

(b) the death of the husband; the tenancy may however be prolonged by the family of the deceased husband if she marries the successor, or remains to look after the children of the deceased; or if her conduct has been pleasing to the family (as by being a good wife to her husband, by showing respect to the family elders, etc.): but all such matters are in the discretion of the family, and she has no claim as of right;

(2) for the children - on the death of their father: normally their tenancy does not determine, but continues; it is no longer at the absolute discretion of the father's family to evict them or not, and usually good reason for doing so must be advanced;

(3) for servants - probably when they cease to render the services which justified the grant of the interest;

(4) and in any case - at the wish of the landlord, before any of the above occurrences - but this is necessarily rare.

The basis of the wife's and children's occupation of the husband/father's house (if self-acquired) is not tenancy, but if a man is owner of more than one house, he may make his son

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10. Unless the family consider the divorce unjustified. The family receives the land on the death of the husband, or the divorce of the wife; if there was no outright gift. - Adansi.

a free tenant of one of them. Whether the son, in such a case, has power to enjoy the proceeds of the house depends on the terms of the arrangement; and he cannot sell or pledge without his father's authority.

As with other such free tenancies, the tenancy is not alienable or transmissible without more: usually there are two interested parties, the father or husband, and his family. Pledging, sub-letting and sale of all such properties by the tenant - whether over land or houses - are impossible without the authorisation of the interested parties; and are a ground for forfeiture if attempted.[11]

A man may also create subsidiary interests in favour of his wife and children over inherited farms. This power is, however, restricted. There are three possible courses which a father may adopt in favour of his son. First, he may permit his son to farm on inherited property in the father's control

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11. In the Nigerian case of Onisiwo v. Gbamboye: (1941) 7 W.A.C.A 69, where G., a domestic, was given permission to occupy a portion of the family property in accordance with native law and custom, and leased the property to P.J. without the consent of the family, the Court said that:
"The real foundation of the misbehaviour which involves forfeiture is the challenge to the overlord's rights. This is commonly shown by some form of alienation and such alienation may take the form, as in this case, of leasing under claim of ownership. But it is not difficult to imagine cases in which the granting of a lease, e.g., for a short period, would carry with it no challenge to the overlord's right and consequently involve no misbehaviour or forfeiture."
In this particular case, the lease was for thirty years without consent of the landlord; and the tenant forfeited his rights thereby.

without the knowledge of the family. Although exceptionally the father might be dispossessed by the family for doing so when they find out, the arrangement is customary and normal, and no objection is raised. The arrangement cannot continue after the death of the father, unless the family agree. The second course is for the arrangement to be made to the knowledge of close relatives of the father, and this is the general practice. Again the interest does not automatically endure beyond the father's death, but the family will generally continue it. Lastly, with the consent of the family, a permanent and outright grant may be made to the son, in which case the right obviously continues even after the father's death; but this course is not so frequent.

Apart from cases of outright gift, the father contemplating such an arrangement for his son should not extend it over too great a portion of the property; and it is wise to bring the matter to the notice of the head of the family, although the head's consent is not essential.

Although a father may not instal his son as tenant in a house which he controls, but which is the property of the family, unless the family consent, yet the wife and children may freely reside together with the man in an inherited house without the family's consent or knowledge, since this is a right consequent upon marriage.

It is possible for all such free tenancies to be converted

into longer tenancies, or into an outright gift. Whilst the interest-holder is alive, if he wishes to make his gift of rights to wife or children absolute it is necessary for him to call in his family and obtain their consent. After his death, the family have the right to determine such a tenancy, but in the case of the widow they may, and in the case of the children they must, either:

(1) continue the tenancy on the same terms, subject to good behaviour, unless for good reason; or

(2) make an outright grant, thus taking the property entirely outside the family's control and ownership for the future. From the former alternative arises the so-called "right of residence in his late father's house subject to good behaviour" in favour of the son; but rights in regard to agricultural land may be equally or more important. Where a son thus continues to reside in his deceased father's house, if he makes a claim of title to the house or part of it, this is sufficient grounds for his eviction. There is evidence that even such a claim may not be ground for eviction;[12] and also evidence that the usual remedy open to the family if the son is troublesome is not to evict him.[13] Some informants said that if the father dies, and the son continues to cultivate

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12. See: Richardson v. Fynn: (1909) Earn. 13; (incorrectly spelt "Fenn" in Brandford Griffith's Digest.)
13. According to informants from Adansi, for example.

that portion of land granted to him by his father - as he is entitled to do - the free tenancy continues provided the son does not give offence to the family; if he does give offence, then he will be charged abusa by the family.[14]

(c) Tenancies between friends:

A man may create a free tenancy in favour of a friend over his self-acquired property; in fact, this appears to be one of the more popular methods of acquiring land, whether for farming or for house-plots. The grantor may be, and frequently is, a family owning land rather than an individual. As regards house-plots, it was said that

> "If a man wants a plot on which to build a house, he will approach a person owning land in the town. Such land may be given to him .... or given to him on condition that he gives a sheep annually to the landowner." [15]

But it appears that such arrangements are restricted largely to those areas where land or a house has little commercial value for sale or letting. And, as regards land for farming, it was said by one informant that:

> "it is frequently done for one man to approach another family for land on which to farm. He should specify the purpose for which he wants it";

and this purpose is often commercial (i.e., for the growing of cash-crops).[16]

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14. Information from Asikuma.
15. Aburi; information also from, inter alia, Essumegya, Kwahu, Mankessim.
16. Essiam.

The grant of such a tenancy is informal, andapart from the usual "stamping-fee" (rum or sheep) no payment is made, unless there is a nominal annual payment. If the land begged is a house-plot, then the tenant of the land will own the house which he builds thereon absolutely, and his successors will be similarly entitled.

The tenancy is of indefinite duration; but if the grantor is an individual, then normally the tenancy does not continue after his death, except by agreement between the grantor's family and the grantee. Other information maintains, however, that the normal rule is for the tenancy not to come to an end, and in fact to be permanent (unless there is some breach of the implied customary terms). This means that the successor of the tenant is automatically entitled to continue his predecessor's tenancy, and that the arrangement is not affected by the death of the grantor. Obviously, where the grantor is a family, no possibility of the death of the grantor normally arises. Hence the tenancy will be indefinite in duration, limited to the life of neither the tenant nor the landlord. Yet another rule given is that the tenant may be evicted at any time (with allowance to gather standing crops) if the land held is a foodstuffs farm; but not at all if the crop is cocoa. Some of the statements with regard to the duration of the tenancy are given below.[17,18,19]

17, 18, 19. - See next page.

(From previous page) -

17. His successor continues farming on the same terms, paying at the most drink to the landowning family at the time when he enters upon his succession: Essumegya.

There is no agreement for definite terms; the tenant does not farm for a fixed number of years, or so long as the farm is in bearing: he farms it indefinitely (i.e., in perpetuity). His successor continues to farm on the same terms as he did; and he does not require the permission of the land-owning family before doing so: Adansi.

In the case of house-plots, the landowner could theoretically tell the tenant of the plot who has built a house thereon to pull the house down; and then tell him to quit. But this is rarely if ever done in practice: Mankessim.

The donee has permanent rights in the house-plot: Kwahu.

A tenant may or may not be charged for his tenancy of land for farming; if the land is begged free, then the landlord may claim back the land at any time when the crops have been gathered; but this does not apply if cocoa is planted: Jumapo, N. Juaben.

18. The case of Kuma v. Kuma: (P.C.1938: reported at 5 W.A.C.A. 4), shows that there is a certain danger that courts might allow the landlord's right to be extinguished by the long possession of the tenant. The highest legal tribunal, however, authoritatively reversed W.A.C.A. (cf. 2 W.A.C.A. 178), and restored the judgement of the trial judge, holding that possession by defendant's ancestors for six generations "is not conclusive evidence of the defendants' title" (p.7.). Plaintiff followed the practice of his ancestors "in not extracting tribute from the persons occupying the land: and ... he only objected when the defendant tried to dispose of it" [by sale]. The Privy Council summed up (at p.8):

> "It appears, therefore, that among the natives occupation of land is frequently allowed for the purpose of cultivation but without the ownership of the land being parted with. The owner of the land being willing to allow such occupation so long as no adverse claim is made by the occupier; the occupier knowing that he can use the land as long as he likes provided he recognises the title of the owner."

19. According to some informants the arrangement automatically comes to an end when trees planted by the tenant die; and new terms must be agreed before the tenant may plant fresh trees: Asikuma, Essumegya.

In the case of Owusu v. Nyatsia[20], which reached the Supreme Court, the contest was between plaintiff O, representing the family of deceased B, and defendant N. The question at issue was the interpretation to be put on a transaction between B and N some fourteen years before. O, for the family of B, maintained that

> "the land was merely given to the defendant for friendship's sake by /B/ and only for the purpose of temporary cultivation and that on the cessation of such cultivation the family had a right to claim it back and did so."

The learned Chief Justice agreed that if this was the case, and N was merely given a right of occupation for food cultivation, then N could obviously have no claim to the land now.

N maintained that there had been a valid outright sale of the land to him, and that in any case he had been left in undisturbed possession of the land for 13 or 14 years by the family. This last statement of fact was conceded. So also was the finding of the Native Court below that the land was family land; the question was whether, if there was a sale, the consent of the family had been obtained, as was requisite.

The Appeal Court reversed the finding of the court below on the facts, holding that there had been a sale, and that the family had joined in the sale. The Court branded the proceedings as a "try-on".

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20. (1950) Unrep: Land Appeal No.72/1949, S.Ct Land Division, Accra, coram Wilson, C.J.

Whilst one would not, of course, dream of objecting to the terms of this judgement, it does reveal one pitfall or one difficulty in the interpretation of the evidence with regard to title which may be presented to a court. Absolute undisturbed possession is a feature equally of an outright sale and of a free tenancy of indefinite duration: one of the sole distinguishing marks between them will be in the fact of aseda or some payment of a nominal amount having been given in the case of the grant of a free tenancy; whilst the payment in the case of a sale will bear a relation to the value of the land granted.

Over inherited property it is more rare to find that the holder grants a free tenancy of this nature and duration, since he cannot as a rule act without the consent and concurrence of his family, the holders of the absolute interest. The customary procedure, therefore, when A, holder of inherited property, is approached by B, a friend, for land on which to farm or a plot on which to build, is for A to take B before the head of A's family; and B will be expected to pay the aseda to the family. It thus happens that, since the most frequent instance when there is land for farming or houses to spare is when land is lying fallow or a plot previously occupied by a house is now free, these will probably be family property, and the family is the proper party to grant the tenancy to B. At the very least the tenant should be known to the head of the family, or pay a annual nominal/rental, so that the family may see that A has not com-

promised the family's title, thus giving ground for at least displeasure, and at most dispossession.

The rules with regard to the rights of landlord and tenant are similar to those already given above.[21] The purpose for which the land is required should usually be stated at the time when the arrangement is made, and this purpose should be followed. In particular, the tenant must not dispute his landlord's title, as this may be a ground for eviction.[22] Alternatively, the tenant may be treated thenceforth as an abusa tenant, and abusa demanded from him.[23] The tenant may neither sell nor mortgage the land without the consent of the landlord. If he builds a house on a plot thus acquired on a tenancy, the house is the absolute property of the tenant.

The tenant almost certainly should inform, or obtain the consent of, the landlord before selling his house. Since the land reverts to the landlord if the tenant abandons his holding, or goes away, the tenant is under an obligation not to waste the holding, though this does not apply to "meliorating waste".[24]

If the tenant abandons his holding, or is evicted, then the land reverts to the landowner who granted it.

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21. See ante pp. 453-4, 458.
22. Adai v. Darku: (1905) Red. 231.
23. But in Kufuor v. Kwamin: (1910) F.Ct. Ren. 540, Brandford Griffith, C.J., said that the rule that a tenant denying his landlord's title may be evicted is a hard rule, and should not be extended.
24. An example of waste is cutting down economic trees already on the land: Donkor v. Ayaah; (cf. p. 454 ante).

It is unusual to set definite terms to the agreement, and it is not customary to use writing for this purpose. Aseda is paid when the arrangement is made: the rum given has the effect of stamping the agreement.

The rights of the original owner are not extinguished by fluxion of time; the possession of the tenant is not adverse to the title of the landlord.[25]

(d) Tenancy at a nominal rental:

Such tenancies are in fact a sub-type of free tenancies, and do not differ in their essential points from them. At the time when the tenancy-agreement is made, it may be agreed between the parties that the tenant should make a nominal annual payment to the landlord, usually of drink or sheep. The main object of this is to preserve the evidence of the landlord's title to the land, which might otherwise tend to evaporate as

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25. "Ownership of land by customary law can never become extinguished by long possessory rights enjoyed by a tenant who has a right to occupy free of rent subject to customary rules." - Donkor v. Ayaah: (1946) (Unrep: Land Court, Cape Coast, 31/10/46) per Jackson, J.
But the convolutions of transfer are sometimes surprising: in one case, according to plaintiff, B his grandmother permitted A to farm on her fallow-land; A permitted defendant to farm there. A went away, and therefore the land reverted to B, though farmed by defendant D at the time.
According to defendant D's story, A asked D's uncles for land on which to farm; he was shown virgin land on the edge of D's uncle's farm. A later stated at a family funeral that as he was given the land by D's uncle, and as he was now going away "and no more returning" he would hand back the land to D. The court did not dispute the existing ownership of B, but non-suited plaintiff as not officially representing B, and thus having no locus standi.

the possession of the tenant continued year by year.[26] The payment is nominal, and bears no relation to the annual value of the holding.[27] It is therefore distinguishable from those tenancies where annual substantial payments are required. Tenancies where the annual rent is payable in "sheep-money" may be an extension of this idea; although the sum thus expressed is rather more substantial than that connoted by the nominal rental. In any case, tenancies for sheep-money are tending to be related more and more to the size of holding.

The payment of a nominal annual rent does not radically affect the rights of the parties to such a tenancy; but it serves to strengthen also the right of the tenant to continue in possession. It is a practice which is customarily followed where the grantor is an individual requiring the consent of his family to grant such a tenancy; but families also frequently ask for its payment.

2. TENANCIES FOR A DEFINITE TERM.

So far the tenancies which we have considered have had no definite term assigned; but it is possible to have a specific agreement for a tenancy for a certain number of years. In the agricultural sphere we find the aboriginal tenancy of this kind

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26. And so, in Kuma v. Kuma: (1934) 2 W.A.C.A. 178, the fact that drink was not paid to plaintiff for permission to farm told against his claim.
27. The payment is variable: "it depends on what is charged for the drink (aseda). The payment is often enough, but the landlord's title must never be denied by the purchaser, or he loses his right to occupy." Akim Abuakwa.

in that called "corn tenure", by which the tenant is allowed to cultivate the soil, and reap one crop of foodstuffs, e.g., maize. Once the crop is reaped, the tenancy determines, unless expressly renewed. Some proportion of the crop may be given to the person owning the land; but no definite amount was stated to me. It is possible for the grant to be for no rent at all, for a small fine or premium before commencing farming (which may be drink); for a fixed sum; or for whatever the tenant thinks appropriate at the end of the tenancy.[28] There are few express terms.[29]

Apart from corn-tenure, a tenancy for a fixed term may be for a fixed rent, a nominal rent, no rent, on the abusa or crop-sharing system, or granted by way of demise and the use of documents in English form. It will thus be appreciated that of themselves such tenancies are not a distinct species; but rather that the fixed term may be written into any type of

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28. I found it difficult to get much information about "corn tenure" on the spot; information to hand refers mainly to the coastal regions (i.e., Fante and so on) where cocoa is not the staple crop, and there is little spare land for farming. I surmise (perhaps wrongly) that it is of little importance elsewhere.
See Sarbah F.C.L. 68-9, where it is called "sowing tenure".

29. Where there are palm-trees on the land, these - if commercially valuable - are the property of the landlord. Under the "abehyem" tenure the tenant has to give a specified portion (usually one-third) of the oil derived from oil-palms on the land to the land-owner annually.
- (Consolidated Suits Nos. 2 & 5 of 1945: Land Court, Cape Coast, per Jackson, J.)
And see: Sarbah F.C.L. 70.

tenancy. Fixed terms (obviously) are however encountered oftener with the more sophisticated and commercial types of tenancy - abusa, money rental, leases; and especially where writing is used, either by way of instrument or of memorandum. Even when a definite term is assigned to a tenancy, however, this is in practice frequently disregarded; so that a position somewhat similar to that of statutory tenants in England holding over ensues.

Rattray says in Ashanti, p. 231, with regard to the grant of tenancies that the grantee becomes "to all intents and purposes owner of the land"; but this is to put the position far too strongly, else how could it be that the reversion remains in the grantor?

Perhaps the most frequent instance of tenancies for a definite term is to be found in the letting of houses or rooms. The practice of letting rooms is prevalent; rent is payable monthly, and the tenancy is therefore by English law a monthly tenancy. These tenancies are usually informal and without written agreement. Although English-type law has intruded, sufficient of customary ideas remains for one to consider such tenancies as customary in nature, as modern developments of customary institutions, and not as the pure offspring of English law. English law cannot in any case apply in its rigour, owing to the possibility of a separation of title as between a house and the land on which it stands, and also between different rooms in the same house.

I was informed that in the larger towns it is now the practice for some persons to build large houses especially to use for letting-purposes, and not for the owner's private occupation. This indicates the increasing commercial attitude developed by modern urban conditions.[30]

3. TENANCY ON THE ABUSA SYSTEM.

(a) The definition of abusa:[31]

The word itself means nothing more than "division into three parts". The commonest form of tenancy in Akan custom for agricultural purposes is the tenancy on the abusa system,[32] and it is so called because the annual gross produce or proceeds of the property in the hands of the tenant are divided into three parts, of which the landlord takes one. One meets with the word and the notion in many different spheres of the

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30. Such tenancies may be subject to the provisions of the Rent Control Ordinance, No. 2 of 1952 (which repealed the Rents (Control) Ordinance, No. 30 of 1947). The provisions of the Ordinance, though admirable, appear to be often evaded in practice, to my own knowledge. S. 12 prescribes some of the offences which a landlord may commit: subsection (1) (a) forbids demanding or receiving more than the standard rent, (1) (b) forbids the exaction of premiums, subsection (5) demanding excessive rent in advance. Both premiums and payments of up to a year's rent in advance are frequently demanded by landlords, according to my information.
31. Variously called "ebusa", "ebusah", "abusa", of which the first is Fante, and the last Twi. Field, Akim Kotoku, spells it "bu'sa".
32. Cf. Danquah; A.L.C., 220, for this point; and pp. 220-1 for a description of abusa tenancies in Akim Abuakwa.

customary law: a subordinate stool selling its timber may have to pay one-third of the proceeds of the sale over to its Paramount Stool; a citizen may have to pay over one-third of the purchase-price for land or a house which he sells to a stranger; one-third of extraordinary gains from the land may be the due of the stool. It does not follow because a person pays abusa that he is therefore necessarily an abusa tenant. What is essential is that there should be in addition a relationship recognizable as tenancy existing between payer and payee. The theory which underlies all payments of abusa is however similar: "one-third of what comes out of the land should go to the landowner". The rider for this rule is that citizens should not pay for the occupation of land controlled by their State or overlord.[33] The rule for citizens is therefore modified to read: "one-third share of extraordinary or windfall gains derived from the land should go to the landowner". On the former rule is based the right of a landowner to exact abusa from a tenant on his land. On the latter rule is based the right of the landowner (i.e., usually the stool) to receive one-third of the profits from the sale of land, houses, minerals, timber, of snails gathered and gold nuggets found, etc. In this connexion the notion of "tribute" is wider than abusa: abusa is an incident of ownership, whilst tribute may be payable

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33. The rights of citizens and strangers are considered in Chapter III, THE INDIVIDUAL AND PROPERTY, ante.

even where the superior stool does not own the land.[34] The rules are alternative, so that we should find, and do find, that a stool which charges one-third of the purchase-price for the sale of a house or farm should not charge one-third of the annual profits from the new stranger-occupier.

The right to receive abusa from a tenant or occupier is a right of landowners, i.e., those with a proprietary interest in the land.[35] It is necessary to make a distinction, therefore, between cases where a stool does, or does not, own the land occupied by the tenant. Where a stool has only jurisdiction, it cannot charge abusa. Where the stool owns the land, abusa is charged on strangers who cultivate stool land. Citizens are not charged, even where the Wing Chiefs own their own land, and the subject of a stool cultivates on land belonging to a different stool in the same state: this is however a principle

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34. Cf. Atta v. Amoah: (1930) 1 W.A.C.A. 15; and Impatasi Case at C. Hayford, p. 50; see also Ren. 221, and F.L.R. 134.
35. Although this is in theory correct, yet there is no doubt that this statement should be limited to unoccupied stool land. The stool is not concerned with transactions between citizens affecting land the dependent interest in which is owned by a citizen family or individual, even though the stool holds the absolute interest in such family land. It follows that a citizen, though not owning the absolute interest, may grant a tenancy to another citizen out of his interest in occupied stool land (an interest which is exclusive as far as the other individuals are concerned). But he cannot grant a tenancy to a stranger without the consent of the stool; and in certain states he cannot apparently grant a tenancy to a stranger at all: this is the province of the stool (even when the land concerned is held by a citizen).

which has been tardily recognized. The effect is to extend the exemption from citizens serving the landowning stool to citizens of the same state - a wider loyalty, perhaps. This abusa chargeable on stranger-tenants is thus found in such areas as Ashanti, Akim and other parts of the Colony where stools are landowners.

Where individuals own land, e.g., in parts of the Colony, abusa is charged by the private landowner on all tenants who occupy his land, whether they are fellow-citizens or not.

Although almost any form of profit-making property may be held on abusa, the commonest form is as an agricultural tenancy, and there is usually a further restriction to land carrying permanent economic crops. Such crops include palm, kola, rubber, and last - and by far most important - cocoa. Subsistence or foodstuffs farms are not usually subject to abusa; but often payment is made by a small annual sum or tithe.[36] It is possible for abusa to be substituted when the foodstuffs are grown, not for personal consumption, but for sale on a large scale (especially corn). It is unusual to hold houses on abusa, since, although receipts from rents are growing in importance in the larger towns, a normal lease at an annual rental is preferred.

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36. So: Field: Akim Kotoku, 76: "The growing of mere food is not taxed by the landlords even when the tenant makes heavy profits..."
Danquah, A.L.C. 220, mentions foodstuffs farms on the abusa system.

(b) How the tenancy arises:

The tenancy may arise by prior agreement: where the stool is the granting landowner, then a stranger who applies for land from the stool on which to farm cocoa will be given such land to hold on the abusa system. Normally abusa is only exacted by the stool when the stranger is going to farm on unoccupied tribal or stool land, so that if he farms on family-land (i.e., land belonging to a citizen-family) the stool does not demand abusa. Even in such circumstances, however, the stranger may still be charged by the stool. If the grantor is a private individual or family, then a tenant may similarly pay abusa. It is a general rule that anyone who cultivates another's land, with or without permission, is to pay abusa unless otherwise agreed.

Or the liability to pay abusa to the stool may arise through purchase: a stranger purchasing a farm from a citizen will have to pay abusa on the annual proceeds of the farm to the stool. This rule is not always applied.

The liability to pay abusa may arise without previous agreement: if a stranger is found farming stool land he will usually be allowed to continue in occupation, henceforward paying abusa. If he is troublesome, a successful claimmay be made for retrospective payment of abusa, or, failing that, for eviction. But in Pobee v. Takye[37] it was said that "there is

37. (1912) Ren. 699.

no recognised custom that a tenant at will should pay as tribute one-third of the cocoa grown on the land". In this case, where a free tenant planted cocoa without the permission of his landlord, the court fixed the terms on which he might remain. This case rather illustrated the rule (given before) that a tenant in breach of the customary rules of a free tenancy, one of which is that the land is to be used only for the purposes for which it is given, is liable to be treated as a commercial tenant.[38] Despite this case, the custom is recognised; but today, as far as stools are concerned, something less than full abusa is often asked of the tenants.

The payment of abusa is most important evidence of the title of the landlord, since occupation for some years by A of land to the knowledge of B, the alleged landlord, without payment of abusa is taken as evidence against B's claim, if any, unless he can show that A was a permissive tenant on some other basis.

(c) The term of the tenancy:

There is usually no fixed term to the tenancy, although it may be coupled with a tenancy for a fixed term. Normally the tenancy is of indefinite duration, and the tenant - unless the

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38. Cf. Danquah A.L.C. 220: "a landowner who has levied a tax on a free user of his land can, whenever he chooses to do so, call on his tenant for payment of an abusa share of the proceeds henceforth to be obtained by the tenant; but of proceeds already obtained the landlord would be well advised not to disturb his tenant's title with respect thereto."

parties fixed otherwise - cannot be disturbed except for good reason. Danquah[39] says that:

> "where the crops cultivated are of a permanent nature, /abusa tenancy/ is always made on the understanding that the tenant's successors-in-ordinary are entitled to enjoy the interests of their predecessors."

A stranger who is cultivating stool lands has the right to continue cultivation throughout his lifetime, and the good reasons which entitle the landlord to terminate the tenancy are few: one is the non-payment of the abusa share to him by the tenant;[40] others are denial of the landlord's title,[41] abandonment by the tenant, etc. The former rule with regard to all tenants from a stool was that the stool could take the property if it so wished at the death of the tenant or when he abandoned the property. In the former case, the tenant's successor was entitled to remove improvements made by the tenant, provided he could do so without damage to the realty. But today this custom has largely or entirely fallen into disuse; the tenant's successor is entitled to continue cultivation on the same terms, usually paying some drink to the stool by way of introduction at the time when he enters on his inheritance.[42]

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39. A.L.C. 220.
40. Although it was said in Pobee v. Takye: (1912) Ren. 699, that "non-payment of cocoa tribute by the tenant is no ground for ejectment", yet there is general agreement (cf. Danquah A.L.C. 220) that it is a ground for eviction.
41. Cf. Adai v. Darku: (1905) Red. 231.
42. Cf. THE INDIVIDUAL AND PROPERTY, at pp. 186-7, ante.

The case of Bodoa v. Ofoli[43] illustrates what the law is not. The facts were that plaintiff claimed damages from his tenant, who held lands on abusa. The tenant had cut down the oil-palms on the land, and planted cocoa there instead without the permission of the landlord.

Earnshaw J. said that this was the first action for waste in the Colony, and then proceeded to apply the English law. On this basis he found that it was "meliorating waste", and there was therefore no right to damages. Although there was no claim for eviction, the learned judge considered the nature of such a customary tenancy obiter:

> "This tenancy, by native custom, may continue for a long and indefinite period..... No-one can fix a time at which, by native law, the possession of this farm will revert to the owner of the land."

Both halves of this statement are at first sight an accurate description of the customary law, but the second part is unhelpful, since we are interested in the right to possess, and not in the actual possession; one can definitely fix a time when the right to possess reverts to the owner of the land. One such instance would be in facts like those of the above case. The case brings to notice the rule of African law that if land is granted for one purpose, it must not be used for another without the permission of the grantor. Changing the

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43. (1910) Earn. 51; (spelt "Bodaa" by Brandford Griffith, Digest).

course of husbandry, whether ameliorating or not, is therefore a ground for determination of the tenancy. The intricacies of English law are entirely out-of-place on this topic; and cannot in logic be applied to what is conceded to be the prime example of customary tenancies in Akan Law.

It is probably still open to a private landowner to refuse permission for the tenant's successor to continue in operation; and a fresh agreement is necessary, unless the landlord consents tacitly to the successor's continuing by conduct. Otherwise the tenant is assured of a perpetual right, provided he continues to pay abusa. The presumption to this effect is stronger in regard to cocoa, than for foodstuffs, farms.[44]

(d) Method of receiving and calculating abusa:

With cocoa farms, where there is a private landlord, after the crop has been collected and sold, the proceeds received and the labourers paid, the remainder may either be taken to the landlord, who takes one-third and returns two-thirds; or the tenant sends one-third to the landlord, and pockets the remainder. There seems to be no fixed custom on this point. In general, the landlord's share is calculated from the gross profits of the land held, so that all the expenses (the wages of the labourers, etc.) have to be met by the tenant.[45] Accord-

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44. The "tenancy" thus becomes for most purposes a form of subordinate ownership in such a case.
45. But in a written agreement made in Adansi, abusa was calculated on the net proceeds.

ing to one informant, the 1/3 share is calculated from the loads: if 30 loads of cocoa are produced from the farm, then 20 loads go to the farmer, and 10 loads go to the landlord, and there is no question of dividing the money which is received in payment for the cocoa. But some evidence suggested that working expenses were sometimes deductible from the profit for the purpose of calculating abusa.

Whilst the standard ratio for division of the proceeds is 2/3:1/3, other ratios are possible; and it is open to the parties to vary the proportion in whatever manner they agree - so that the proportion $\frac{1}{2}:\frac{1}{2}$ is sometimes found ("if the landlord is lucky", said my informants).

Where the stool is landowner, tax-collectors are sent out to collect the tax or cocoa-tribute. The difficulties of assessment are great: hence it has become the custom in some areas for the stool's representatives to make an estimate of the annual yield, and levy 1/3 on this; or else to substitute a simpler and more definite mode of assessment, as by 1d. a tree, or the payment of "sheep-money". The total revenue from the farm is not, however, paid into the stool treasury and out again, as is sometimes done by a private landowner.

Abusa is only reckoned on the commercial yield of the farm, so that if the tenant plants foodstuffs in between his cocoa, these are not liable to abusa.

(e) Rights of the landlord:

The abusa tenant is a farming tenant; other rights of the landlord are therefore not affected, so that he remains the granting party for leases, concessions, or sales, in respect of timber (or other valuable trees) and minerals in the same land. Where the tenant is exceptionally permitted to exploit timber as well, the landlord is entitled to 1/3 of the proceeds from this. Palm-trees and kola trees, if already standing in the farm, are the property of the landlord, and he alone is entitled to their fruits; although it is sometimes the practice for the tenant to be allowed to tap palm-trees for palm-wine, in which case he sends a portion to the landlord.[46] The landlord has no right to evict the tenant from his holding except for good cause; and he must not do anything which will impair the tenant's enjoyment of the property without the tenant's consent and/or paying compensation for loss which is caused thereby (as by granting mining rights to others in the same land).

46. Danquah, A.L.C. 221; and see, for Fante areas, the dictum of Jackson J. in regard to palm-trees, in Consolidated Suits Nos.2 & 5/1945: (Unrep: Land Ct, Cape Coast):

> "By a study of the judicial decisions covering the past 80 years, it is quite clear that ownership of palm trees remains with the true owners, and never pass to the tenants unless by specific agreement. This area is one in which palm trees are few, the fruit is apparently not used except in a few instances; the trees are used primarily for the production of palm wine.
>
> The customary law is quite clear that the owner retains the right to tap these palms, or alternatively that a portion of the wine is given to him by the tenant."

(f) Rights of the tenant:

He has no right to work or get timber and minerals without permission.[47]

He has a right to security of tenure; he has also ancillary rights - similar to those enjoyed by citizen-farmers, where necessary to his farming: i.e., common rights of way, water, to forest-produce, etc. But in general he does not qualify for these rights unless he is a permanent settler.

The tenant has a right to interplant food-crops between the young or growing cocoa-trees, and is solely entitled to the proceeds thereof. Apart from this, he should use the land only for the purpose for which it was given him.

The tenant is not permitted to alienate his interest without the prior consent of his landlord; but he may transfer his interest (not of course the land itself) to a third party if the landlord agrees. I am not sure what is the position in regard to pledges of his interest by the tenant. But, generally, the landlord is not bound to accept dealings with the tenant's interest unless he has been consulted.

The tenant has, however, the right to introduce his dependents (wife, children, servants) to work on the farm; and may leave the farm in charge of a caretaker.

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47. Cf. Danquah, A.L.C. 221; and Field, A.K., 76: "All big trees of any market value must be left standing and remain the property of the town."

(g) Form of agreement:

Abusa tenancies are usually contracted orally, and no written agreement is made. Instances do, however, occur of written agreements.[48] Likewise, although the rights given above are those which are customarily attached to the tenancy, it is open to the parties to vary them in any way by oral or written agreement.

(h) General comments:

The abusa system is not really analogous to métayage or profit-sharing schemes, such as are to be found in France, Turkey and elsewhere. The basis of the tenancy is not a partnership, where the landowner contributes the capital, and the tenant supplies the labour. Unlike systems in other countries,[49] the landlord does not supply tools, seeds, or labour, nor does he give any assistance in marketing, etc. The landlord, apart from permitting the tenant to occupy the land, does nothing. The land, and the things in and on it, which are already naturally present (e.g., minerals and timber) already belong to the landowner. The things artificially growing on the land would belong to the landlord also, were it not the tenant's labour which made them grow there. The competition between two rules of customary law: "what is in or on the land

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48. As, for instance, in Adansi; and the agreements incorporate all the customary terms.
49. Cf. Danquah, A.L.C. 220: "The landowner never pays any part of the cost of working or keeping the property."

is for the landowner", and "a man is entitled to the fruits of his own labour", has resulted in the present division of the proceeds into thirds. The owner-caretaker relation[50] is at first sight more analogous to an abusa tenancy; but the two must be sharply distinguished. It is not merely that where there is a caretaker the caretaker takes 1/3 and the owner 2/3. The abusa tenant receives an interest in land, which is transmissible to his successors; the caretaker receives none.

Although the original proportion is 1/3, one-quarter and other fractions have sometimes been substituted, as the 1/3 was felt to be too high, having regard to the parts played by the landlord and tenant respectively. But the law applicable remains the same.

Division of the proceeds or the yield must be distinguished from physical division of the farm or land itself. There is sometimes a voluntary arrangement that A will supply the land, and B the labour. B is to clear the ground, and plant cocoa. When the cocoa reaches the bearing stage, the farm is physically divided, 1/3 going to A and 2/3 to B. But this can only apply where the land is virgin forest.[51] The Africans sometimes say that B is employed as a "caretaker"; and gets only 1/3 for his labours and not 2/3.[52, 53] There is also the

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50. Cf. Chapter VIII, post.
51. Reported from, inter alia, Bekwai and Ajumako (where the division is into halves).

52 & 53. (See next page)

involuntary arrangement, where B has cultivated A's land for some time without A's permission or knowledge. If this was an honest mistake, and A asserts his title, a native court may order ex aequo et bono (if cocoa has been planted) that the farm be divided physically, 1/3 to A, and 2/3 to B.[54]

Until the cocoa comes into bearing, no abusa can be payable. Where there is a stranger-tenant from a stool, he may pay nothing or a fixed annual sum to the stool until the fourth year, as recognition of the stool's title; and thenceforth abusa on the cocoa harvested.[55]

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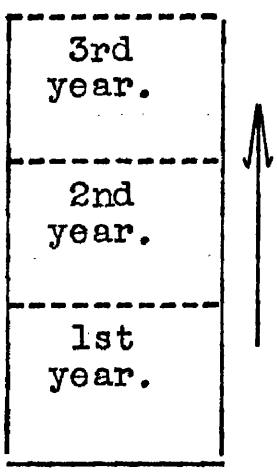
52. Another method of working by a caretaker was put to me as follows:



B makes 3 successive farms from virgin forest belonging to A, the landlord.
B hands over 1 and 2 to A, and keeps 3 for his own benefit.
B may sell 1 and 2 only with the permission of A.
B works 3 for himself, and keeps the proceeds. He does not pay 1/3 share of the proceeds to A.
If B leaves, he hands back 3 to A.
A's successor inherits the right to 1, 2 and 3.

53. See Chapter VIII post.
54. Information from New Juaben. This is a special case, and no doubt a modern development.
55. Cf. Field, Akim Kotoku, 76: "...it is not till the cocoa begins to yield that the landlords take their one-third."

The effect of the abusa system is that the rent varies with the prosperity and size of the farm, the yield of the cocoa and the price realised therefor. It operates equitably both for the landlord and the tenant (since in a bad year the tenant pays less, in a good year more), even though the proportion of one-third may appear high for the contribution of the landlord. It thus differs from tenancies at an annual rent in "sheep-money", which have now been largely substituted for tenancies on the abusa system, in Ashanti at any rate.[56] Abusa going too much against the tenant, stools had to reduce their terms (in order to attract strangers) and charge a fixed annual rent. The terms of the tenancy are otherwise identical with an abusa tenancy, except that the abusa tenant has a guarantee that his rent will not rise beyond his means. The tenant for sheep-money appears to have no guarantee that his rent will stay as it was originally fixed, as actual cases and complaints show. If the tenancy were transitory (i.e., to grow foodstuffs) this would not matter. But as permanent crops are grown, he is threatened with an increase of rent as prices rise. If he refuses to pay, then he is evicted or placed on the abusa system.

(i) Improvements and devastation of the subject-matter:

Owing to the character of the tenancy (that it is of indefinite duration), it rarely happens that questions on the

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56. For this type of tenancy, see post pp.489-490.

destination of improvements to the land subject to the tenancy arise. If they do arise - and the planting of cocoa-trees is the most obvious improvement today - then a Native Court's likely answer would be to recommend a physical division of the subject-matter, of so much (with trees) to the landlord, and so much to the tenant.

The contrary question: who is to bear any loss - arises somewhat more frequently today. The swollen-shoot disease is mainly responsible; and disputes thus occur principally in connexion with the payment of Cocoa Rehabilitation Grants. If the farm - planted with cocoa by the tenant - is devastated by swollen-shoot, then (were there nothing more) the loss would lie where it falls. Government, however, has in the past paid monetary compensation for the loss, and replanting grants as an encouragement to bring the farm once again into production. In one case,[57] W.C.A. gave fallow-land to K.A. on the abusa system; K.A. planted cocoa. The successor to K.A. (M.A.) received a Cocoa Rehabilitation Grant in respect of the farm. It was stated that W.C.A. was receiving 2/3, and M.A. 1/3, of the proceeds of the farm; the reason for the reversal of custom was not given in the case;[58] W.C.A. claimed then that 2/3 of the C.R. grant should be paid over to him.

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57. Kwame Apawu v. Mark Addo (succr to W.C.Addo): (N. Juaben A. Court: Suit 54/49; 11/7/49).
58. Perhaps because the land given was fallow-land? (K.A. was certainly not a mere caretaker.)

The Native Court declared:

> "The grants provided by the C.R.S. are solely paid to farmers who have planted cocoa trees on their land to foster them to maintain their farms property, and not to a mere owner of a farmstead."

This is, the grant is due to planters, and not to owners of land on which cocoa trees happen to stand: nevertheless the court then ordered that M.A. should pay over half the grant to W.C.A., the landlord: the reasons for this order were not given.

4. TENANCY FOR A FIXED RENT.

Owing to the difficulties, which have been mentioned above, which are caused by an abusa tenancy both to landlord and tenant, many tenancies between stools and stranger-farmers (and also sometimes between private landlords and tenants) are now based on a fixed annual rent;[59] and it is increasingly taking the place of the abusa tenancy, especially in Ashanti (and in Akim Abuakwa).[60] A fixed rent may be combined with any length or form of tenancy; but we shall particularly discuss

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59. In Akim Abuakwa, for instance, abusa tenancy was formerly the rule; but the policy now is to substitute a "hiring" or lease for a fixed economic rent. This is because of the difficulty of calculating abusa annually, and of the discouragement to permanent settlers.
60. Cf. Danquah, A.L.C. 221: "Rent or tax is a modified form of the Abusa system; both tenant and landlord derive mutual benefit from the property involved and similar laws apply to both a taxed or rented farm and a farm on the Abusa system."

here customary tenancies between stool and stranger of land for farming, and especially for cocoa. In such a case, the fixed rent may be known as "tribute" or "toll".[61]

(a) Calculation of the rent:

The rent may be either

(i) at so much per cocoa tree;

(ii) in "sheep-money";

(iii) a fixed money rental.

(i) For Ashanti the rate per cocoa-tree was originally fixed by resolution of the Ashanti Confederacy Council at 1d. per tree. This has been progressively reduced to ¼d; but in practice different Ashanti divisions charge as they think fit, and may vary the amount without reference to the latest A.C.C. ruling.[62] The "1d per tree" rate has been employed outside Ashanti, but is not now in favour in the Colony.[63]

(ii) "Sheep-money":[64] such sums as £4.13. 0. and £9. 6. 0. per annum, calculated on the nominal price of sheep, or of the former gold-dust weights, are met with as rents of land held on such tenancies. The actual amount charged varies according to:

the willingness of the farmer to pay;

the amount of land taken (but only a rough scale

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61. As in Danquah, loc.cit.; and in common parlance in Ashanti.
62. See Matson, Digest, paras. 72-75, p. 17.
63. Both sheep-money and "so much per tree" have been used in Akim Abuakwa; but not today. In 1927 the rate was 1d. per tree in Akim Abuakwa.
64. See GLOSSARY.

per acre - or "per farm" - operates);

the price of cocoa;

the favour in which the tenant is with the stool;

the amount desired by the stool.[65]

(iii) Fixed money rent: is especially applied in the case of houses. Tenancies for a fixed money rent are (where agricultural and from the stool) only a variation or extension in many cases of the tenancies for a rent payable in the distinct amounts of sheep-money; but, as they get away from the customary figure, so they tend to be coupled on the one hand more and more with written agreements; and on the other to bear a much closer relation to the value of the land taken (by size). In both these aspects the rent indicates increasing commercialisation.

A short study of actual case-histories (whether of farms under "ld a tree", sheep-money, or fixed money, rent) reveals that the term "tenancy for a fixed rent" is perhaps a misnomer. One observes (so far as stranger-tenants from a stool are concerned) that some stools vary the rent unilaterally without reference to the farmer. Nevertheless, the rent can be called "fixed", in that a sum is agreed on at the time the tenant first enters; and also because the rent is ascertainable before the harvest without reference to the crop of cocoa

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65. Some or all of these factors - given me by informants - may influence the agreement arrived at; but a prospective tenant seems to be in the weaker bargaining position.

actually realised. From the tenant's point of view, it is dubious how far stool landowners are entitled to vary the amount of rent payable without reference to the tenant. Calling the rent (or tax?) "cocoa tribute" gives only the appearance of legality to this variation: if in fact the "1d per tree" or abusa or sheep-money is a tax demandable from strangers, and not a rent payable by those not entitled by citizen-right to farm free, then one cannot quibble: the tenant must be taken to have entered into an agreement for a tenancy of indefinite or perpetual duration, subject to whatever tax may be demanded from time to time. But, where there is an agreement for a money-rent, this should bind the landlord, who should not be able to vary the rent unilaterally. That the latter is probably the correct position to take up seems to be so from comparisons with the rights of an individual landlord, and also from the fact that today, when stranger-tenants are admitted under written agreement (in the form of a lease), it is more obvious that they are tenants at a rent, and not settlers subject to a tax. To put the landlord's point of view, one should not lightly water down the rights of a stool-landlord, since the tenant's rights are now stronger: in custom he is entitled to security of tenure for himself and his successors unless he fails to pay the rent or tribute, (or otherwise fails to meet his obligations?). Hence the only means by which a landlord may now be able to recover possession is by

raising the rent, with the intention of forcing the tenant to quit.

(b) Term of the tenancy:

Just as with the abusa tenant, and the tenant at a nominal rental, the tenant on a fixed rent enjoys his tenancy indefinitely, unless specially otherwise stated at the formation of the agreement for the tenancy. The tenancy endures for the lifetime of the tenant, for the benefit of his successor, and is continued by the successors in title of the landlord. The tenant has security of title and from eviction except for the usual reasons;[66] and his position is almost on all fours with that of a citizen owning a farm or house in regard to his right to compensation if he has to quit his holding. Formerly, when the stranger-tenant died, the stool would take his farm unless a successor quickly put in his appearance; and the stool today still has the reversion to both the land and the farm, so that if the tenant dies without anyone coming to succeed him, the stool takes back the property.

(c) Rights of the landlord:

The rights of a landlord in such a tenancy are similar to those which he possesses in regard to an abusa tenant.[67]

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66. The stranger seems assured of perpetual rights provided he pays the annual tribute: Bekwai.
The "usual reasons" include those mentioned at pp. 478-479 and 481-482 ante.
67. See ante p. 481.

(d) Rights of the tenant:

The tenant has a right to the exclusive use of the land held for the purpose for which it was leased, absolute right to the proceeds of the farm from his own labour, power to create minor interests (like a citizen-farmer) in favour of his wife, children, etc. If he abandons or quits his holding, then - if he does not sell - he has a right to remove everything he has put on the land - houses, trees, plants; but today instead he is increasingly awarded compensation, or allowed to sell.

(e) Writing:

It is becoming commoner, especially as between stool and stranger-farmer, to execute a lease or written agreement, but this is not compulsory,[68] and a tenant previously holding by verbal agreement cannot be forced to take a lease thenceforth.[69]

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68. "If the parties desire a written document, that is done. The Okyenhene has approved forms which must be executed on an abusa." - Akim Abuakwa.
But, in regard to the holding of house-plots for a rent by strangers, certain states have switched over to written agreements; and certainly - at least for new tenants - there is now no option: cf. Bekwai, Kumasi town, Koforidua. Bekwai does not use written documents for agricultural tenancies.
And cf. post, pp. 494 et seq.

69. According to Akim Abuakwa.

B. LEASES.

From a consideration of native tenancies and leases, we turn now to the effect of the introduction of written agreements and formal leases.[70] There are two major classes of lease to be examined: the first is where, if there were no writing, an ordinary native tenancy would exist; the second is where there is a proper lease in English form. In the first case, the tenancy is the important part of the transaction, and the lease or writing, although perhaps approximating to English form, may be intended only as a record or memorandum, and especially to preserve the landlord's reversion. In the second case, without the lease itself the transaction would be null and void. In general, writing or leases are used for house-land rather than for agricultural tenancies, and especially for grants of land to non-natives.

1. NATIVE TENANCIES AND WRITING.

(a) Farms:

States where writing or leases are now used by stools for the grant of agricultural tenancies to stranger-farmers include Akim Abuakwa in the Colony, and Adansi in Ashanti. In Akim Abuakwa the tenancy is created by written document, and may sometimes be called a "hiring". Resident strangers usually pay 10/- per annum, whatever the size of the farm. Approved

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70. And see Chapter XI, WRITING, post.

forms are used by the State Lands Office for the purpose. The position of the tenants appears to be similar in other respects to that of a customary tenant holding by oral agreement. Non-resident strangers may be given an abusa tenancy in writing. In Adansi also documents are used where a stranger acquires a farming tenancy. The Chief granting the tenancy prepares the documents, which are taken before the Omanhene for his approval. If the stranger wishes to make a cocoa farm on land controlled by a family, again documents must be prepared, and again the arrangement must be approved. Customary terms are incorporated in the tenancy agreement.

(b) Houses; and House-plots:

There are more states which use documents for the grant of house-plots to strangers; but such a practice is usually confined to the larger towns.[71] Adansi does not use written documents for such purposes.

In Bekwai leases are used both for citizens and strangers who desire house-plots in Bekwai town. A standard form is used. The granting parties ("lessors") are given as "The Bekwaihene and Elders of Bekwai". The plot demised is indicated by a rough sketch plan which is annexed. There is provision for the determination of the lease by the lessors on five years' notice (but in intention the grant is of indefinite

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71. See also: REGISTRATION, pp. 755 et seq.

duration). The lease is subject to covenants on the part of the lessee:

> to pay the rent reserved;
>
> to fence off the plot within 12 months of the indenture;
>
> to build a house or store thereon within 18 months;
>
> to keep in good repair and fence;
>
> not to assign, underlet or part with the possession of the premises without the consent in writing of the lessors.

Despite the terms of the lease, the tenancy is (so far as citizens are concerned, to whom the same form is applied) subject to the usual customary terms, is of indefinite duration, the tenant (if a citizen - and perhaps if a stranger) underlets freely, and is owner of the house, and not merely lessee thereof, as he would be in strict English Law.

Other towns where written documents are used include Kumasi and Koforidua. Kumasi is a special case, as tenure there is governed by the Kumasi Lands Ordinance, 1943 (as amended by the Kumasi Lands (Amendment) Ordinance, 1945. All persons, citizens and strangers, must hold their house-plots, etc., on lease from the Asantehene. Such leases must be in accordance with English law (s.2). A "Kumasi Native" pays only a shilling a year nominal rent in respect of one house-plot. All leases must be registered, so - although the Ordinance contains no express provision to that effect, all leases must be in, or recorded in, writing. Leases - or dealings with interests under them - not so registered are void.

Kumasi is the only town where such a position exists; it may well be that the system will be extended later to other centres, as it works well in practice.

2. LEASES TO NON-NATIVES.

In former times land was often acquired, especially by missions, as a gift from the local chief; this transaction appeared to differ from the grant of a tenancy to an African in that - after an initial present - the stool usually laid no further claim to the land granted, and it was not thought that the grantee was a tenant of any kind. Even today such grants to missions for no valuable payment are reported as being made. Commercial enterprises, however, are now usually required to take under a lease, paying an economic rent. Reference has been made to Bekwai above; the same printed form, both here and elsewhere, is apparently used both for grants of plots to Africans for residential purposes, and for leases to commercial firms. One such lease I examined contains a covenant by the lessee to build within an agreed period, subject to a right of re-entry in default. But it goes on:

> " PROVIDED ALWAYS AND IT IS HEREBY AGREED AND DECLARED that the Lessee shall have a right and be at liberty to erect any building or buildings on the land hereby demised at any time whatsoever during the continuance of this lease and such building or buildings so erected shall be the property of the Lessee after the expiration of the said term hereby granted but the Lessee shall

> upon such expiration pull down and remove therefrom any building or buildings fixtures articles and things that may be erected and set up or left on the said land."

This provision that buildings erected on the leased land are the property of the lessee is of course in consonance with the customary land tenure. The provision for removal of such buildings is more appropriate for dwellings of perishable materials, and at least in the case of commercial firms compensation is usually paid if the lessee surrenders the land to the lessor. And the provision must be read with one subsequent to it providing that the lessee has the right to sell such buildings, but that the lessor has the right of first refusal.

The rent reserved under such a lease naturally varies; but it is considerably higher proportionally than that demanded of individual strangers. The term also varies; in leases of which I have information it usually ran from about 40 to 99 years; but 60 years appeared the most popular, and I have not met leases for terms exceeding 99 years.

By the terms of the Concessions Ordinance, 1939, s.3, agreements purporting to grant rights of any kind in land from a native to a non-native must be in writing; and, if not in writing, are void.[72]

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72. The Ordinance is more fully discussed under REGISTRATION at pp. 750-5.

CHAPTER VIII.

CARETAKERS.

A. MEANINGS OF THE WORD "CARETAKER".

A word that is frequently encountered in customary law is that of "caretaker".[1] It is unfortunately used in many different senses, some exact, some inexact. Although always terminologically appropriate where one person takes care of some property for another, yet confusion can easily be caused by its use to describe different positions and duties. In brief, the word always suggests that ultimate title is not with the caretaker, who has possession only or some lesser right.

1. ORDINARY CARETAKER.

(a) For individual farmer or house-owner:

First we have the ordinary caretaker appointed by the owner of property to look after it for him, to be in the position of a factor or agent in the management and upkeep of the property, and for the receipt of proceeds - cocoa sales, rents - from the property. Where farms are the subject of caretakership, these are usually of cocoa; but caretakership can be over any type of farm.

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1. Christaller gives ohwefo as the Twi for "caretaker"; and nhweso for "caretakership" (though he does not use the actual word "caretaker" in his definition). I was given the word "ohwesofo".

The individual (or family) farmer or house-owner appoints someone to look after the farm or house for him, if he himself is unable to do so because of absence, ill-health, old age, or other commitments. Such a caretaker may engage labourers to assist him, or may himself be of the labourer-class; although it is by no means unknown for a relative of the owner to be caretaker for the property.[2]

The caretaker of a house usually resides there.

Families owning property appoint caretakers most frequently in the case of town-houses, where someone is required to collect the rents and repair the house when necessary.

The institution of caretakership is an aid to the acquisition and control of properties scattered over different districts; and one can accumulate properties in this manner. It will be appreciated that this is of interest in connexion with the development of an absentee-landlord class.

(b) For stool property:

Stools (in particular those with a large amount of stool property in the narrow sense - farms and houses) have to appoint caretakers for these properties. Such a caretaker of stool properties is quite distinct from a stool which is described to be caretaker for a superior stool. Both are caretakers for the stool; but in the first case, care is taken of

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2. "Any-body can be a caretaker, whether labourer or relative." - Akim Abuakwa.
"But a brother is preferable" - an informant from Kwahu.

the farm; whilst in the second care is taken of the stool's ultimate title in the land. The former has no interest; whilst in the latter the subordinate stool has a dependent interest in the land.

(c) Caretaker and abusa tenant:

Although a caretaker may reside on the property which he is looking after, or may work it like a tenant or owner, and he is remunerated with a share of the proceeds, yet caretakers and abusa tenants are quite distinct in customary law:

The abusa tenant pays 1/3 share to the landlord by virtue of the landlord's title to the land; the caretaker is paid 1/3 share as a reward for his services.

The abusa tenant has a valuable interest in the land; the caretaker has none.

The caretaker is an employee of the landlord; the abusa tenant is not.

The abusa tenant's right to occupy the land endures indefinitely: the caretaker may be discharged (unless there is agreement for a definite period of service) at the wish of the landlord.

The abusa tenant owns the crops; the caretaker does not.

2. SUPERIOR AND SUBORDINATE STOOLS.

One stool is frequently described as "caretaker" for another. This statement implies that the caretaker stool is

not the owner of the land it occupies. This relation is entirely distinct from the preceding one,[3] since the caretaker stool is not the employee of the landowning stool, although it is that stool's subject and servant by virtue of the political bond between them. Most frequently in Ashanti a village Odikro was described as caretaker for his superior landowning stool. By reason of his position, he controlled the occupation of land in the village, sent strangers wishing to farm to report to the superior stool, and generally protected the interests of the landowning stool. In return for these services, he would receive 1/3 or other share of revenue coming from that land to the superior stool. His position must therefore be contrasted with that of an Odikro owning his own land (who may send 1/3 share of extraordinary profits from his land to his political superior by reason of his allegiance).

Some of the towns (e.g., Bekwai, Koforidua), are divided up between different caretakers for the Paramount Stool (of the Division concerned), who are chiefs or elders, and immediately supervise affairs in their quarter.

3. DOMESTIC AND CHILD - MEMBERS OF A FAMILY.

Domestics are sometimes appointed to look after the interests of members of the family under age, which they will do by representing their views and interests at family councils,

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3. 1.(b) above.

and especially by looking after property they have received by will or otherwise until the beneficiaries are of full age, and capable of managing their own affairs.

4. SUCCESSOR AND FAMILY.

Successors appointed to succeed to inherited family property are not infrequently described as being "caretakers" of that property for the family. In so far as a successor must take care of the property in the family interest, and inasmuch as the successor does not have the absolute interest in the property - which is with the family - the terminology is apt. But of course a successor is in quite a different position from an ordinary caretaker:

> He has a qualified interest in the property.
>
> He has a right to exclusive use and possession.
>
> He has an absolute right to the proceeds of the property, out of which he does not pay any share - qua ownership - to the family.[4]

But on the other hand, a member of the family is sometimes appointed as caretaker of family property in the wide sense, e.g., houses, with instructions to collect the proceeds for the family; but his appointment will be made expressly for this purpose, and he may incorrectly be described as "the successor"

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4. A person who acts as agent of the family may be called a caretaker: Ruttmern v. Ruttmern: (1937) 3 W.A.C.A. 178. The caretaker must account for all the proceeds from the property, and for the property itself.

with regard to such property.[5]

5. MORTGAGOR IN POSSESSION.

In the variety of pledge where the mortgagee does not go into possession[6] of the pledged property, but leaves the mortgagor in possession to collect the proceeds (1/3 going to capital repayment, 1/3 to interest,1/3 for working expenses), then the mortgagor finds himself in the position of caretaker of his own property, since the pledge has not affected his title to the land, but only his right to possession. The mortgagor acquires custody, and not possession. In such a case, then, he is a special variety of caretaker.

In one case, Donkor v. Ologo,[7] in a native court, the brother of the pledgor was appointed caretaker of the pledged cocoa-farm by the creditor. The caretaker rendered accounts to the creditor. The case was interesting, in that the defence (the pledgor) claimed that the debt for which the pledge was given had already been satisfied by the caretaker's felling of palm-trees on the pledged land, and sale of them for palm-wine. The evidence of this was rejected by the court.

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5. "Caretaker" may include a "trustee" under a will; see SUCCESSION, p. 618; and Nelson v. Nelson: (1932) 1 W.A.C.A. 215 (a Ga case).
6. See PLEDGE AND MORTGAGE, p. 438.
7. (Unreported) New Juaben A Court: June 1950.

B. RIGHTS AND DUTIES OF CARETAKERS.

1. APPOINTMENT AND DISCHARGE.

The ordinary caretaker, whether labourer, relative or friend,may be appointed at any time. One must distinguish between the caretaker of a virgin forest or fallow-land, and of an existing farm. A caretaker of an existing farm is a true caretaker; but there is also the custom of appointing a so-called caretaker over virgin forest or fallow-land belonging to the person appointing him. Frequently the land is adjacent to an existing farm of the owner, over which the caretaker additionally undertakes supervision.

An ordinary caretaker's rights and duties are specified at the time of the appointment, as also is his term of office. If no agreement is made, he is dismissable at pleasure; but will receive compensation for his loss of employment if this occurs before, say, the cocoa-season (so that he loses his percentage remuneration).[8]

It appears to be sometimes made a condition of a caretaker's appointment that he should clear a new portion of the

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8. Term of office:- May be for a season, a year, several seasons, or unlimited: Akim Abuakwa.
He may be sacked at any time if he offends the owner, but will receive compensation if terminated before the cocoa-season: Kwahu.
His appointment is determinable by either side at any time, but without prejudice to rights already acquired: Akim Abuakwa.

virgin forest for the owner, as well as supervise the picking of cocoa from the existing farm.[9] But the practice in regard to their appointment seems to vary widely from village to village.[10] It is possible to appoint a caretaker for part of the year only - from January to June being usually a slack season in the agricultural world.

2. REMUNERATION.

Unless otherwise specified a caretaker is entitled to one-third share of the proceeds of the farm. But the parties can agree for any proportion, or for a fixed wage (which is especially appropriate in the case of house-property).[11] According to Yawah v. Masïeno,[12] if the caretaker is a relative he is not entitled to a share in the rent of land if leased or sold, but only to reasonable remuneration from the owner. A relative

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9. "It is general custom of Buoyem /Wenchi/ persons to give their cocoa farms to labourers to pluck without receiving any rum from the caretakers. The labourers are also not forced to make new forest farm for the owner of the cocoa farm as other people of Ashanti do to the caretakers of cocoa farms." (From a statement by the Buoyemhene recorded in Bekwai District Complaints File for 22.10.49).
10. "In every village of /my/ own there is a different laws /sic/ in respect of caretakers for cocoa farms." (Buoyemhene).
11. "He is entitled to a remuneration of 1/3, or whatever sum is agreed on between him and the farm-owner": N.Juaben. "Whether relative or labourer, and for an economic or cash crop, the recompense is invariably one-third, unless special conditions are attached.": Akim Abuakwa. Other proportions are found (e.g., ½); but informants said a caretaker would be lucky to get so much.
12. (1930) 1 W.A.C.A. 87. But this was a Ga case.

seems equally entitled to receive a third share (compare the statement from Akim Abuakwa in footnote 11); in Abena Donkor v. Kwaku Nusin & ors,[13] a criminal case in a Native Court - but really involving only civil claims - we find that a woman appointed her younger brother as caretaker of a cocoa farm, he to take half the proceeds, and she the other half. This case is interesting as showing some of the complications which may arise. The full facts were:

> A.D. (the plaintiff) acquired the cocoa farm as a gift from her brother K.J. by will. She went away for three years with her husband, and left the farm in the care of her younger brother K.N. (the first defendant). A.D. said in evidence:
>
> "I handed the said cocoa farm to him to take care of it, and it was agreed that in every season he should take or use half the proceeds and the remaining half of it to me to pay debts left to my care by my said brother /K.J. deceased/."
>
> K.N. then disposed of the property (it was contested whether by gift or sale) to K.O. (fourth defendant), £12 being paid by K.O. either as stamping fee (if a gift) or consideration (if a sale). When A.D. returned, she begged through the Odikro to K.O. for the return of her farm; the terms offered were the refund of the £12, and payment of £15 for expenses. This offer was refused. Hence the instant case, a criminal prosecution, in which the defendants were variously accused of stealing land, receiving it, or aiding and abetting.

Where a caretaker is expected to clear a portion of the virgin forest each year, then customarily he is entitled to a one-third share of the land so cleared and planted with cocoa. The most popular practice appears to be for the farm to be

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13. Heard at Dadiasi: 10.1.1950.

physically divided, two-thirds becoming the absolute property of the landowner; and one-third going to the caretaker absolutely. The caretaker is entitled to sell the portion he thus acquires.[14] Where the land is fallow (farmstead or secondary bush), then the farm is not physically divided, although the caretaker is entitled to one-third of the proceeds of the farm. A fortiori, if there is a cocoa-farm already in existence, he is entitled only to 1/3 of the proceeds.

Is the one-third calculated on the net or the gross yield of the property? If the caretaker himself employs labourers, does their reward come out of the caretaker's one-third, or are such expenses deductible? No very clear answer emerged; but the conclusion seemed to be favourable to the caretaker.

At the present time in Akwapim and Akim Abuakwa I was told that cocoa caretakers are remunerated by one-third share, or by so much per load of cocoa produced (the present rate being about 5/- to 10/- per load). Payment per load will apply only where the caretaker did not plant the cocoa.

If there is an abusa tenant, A, growing cocoa on land held from B on the abusa system, and if A employs a caretaker C to look after the farm for him, I was told that the division of proceeds might be as follows:

B, the landlord, would still get his 1/3;

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14. But the information (from a different source) given ante in Chapter VII, p.485, n.52 should be compared, as the rules vary.

A would still receive his 2/3, out of which
he would pay something to C:
C would thus get, e.g., 1/3 of 2/3 = 2/9.

3. POWERS AND DUTIES OF CARETAKERS.

(a) Control of the Property:

First of all we had better consider the question whether the caretaker has an interest in the property. The Privy Council found in Essell v. Davies[15] that:

> "The caretaker of land, according to the law or custom of the Colony, appears to be not a mere rent collector, but to be entitled to the possession or receipt of the rents and profits of the land in his own right as against third persons, though, of course, he has to account to the real owner."

There are really three questions: the rights of the caretaker as against third parties; the rights of third parties as against the caretaker; and the relation of the owner and caretaker inter se.

The caretaker is entitled to exclude trespassers from the property being looked after; and to take all normal steps in defence of his employer's right. He is not normally allowed to enter litigation about the property, but should instead report the matter to his employer. In case of necessity, where the employer is not available, he can take legal steps of his own initiative in defence of the property.[16]

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15. (1929) P.C. 2 W.A.C.A. 5, at p. 7.
16. It was stated in Essell v. Davies that the appellant as caretaker had on several occasions successfully brought actions for trespass in defence of the property.

The caretaker of a house is entitled to collect rents from the house, of which he must make account to his employer. He is empowered to perform necessary minor repairs, and otherwise do all things for the proper upkeep of the premises.

The caretaker of a farm may be permitted to sell the cocoa or other produce, merely rendering the cash received to the owner of the farm; or else the owner may sell the cocoa and receive the money therefor: which system is adopted depends on the parties. In any case, the caretaker must pay over all proceeds to the owner, who will pay back the agreed amount to the caretaker; i.e., a caretaker is not allowed to deduct his own pay before paying over the cash. A caretaker additionally himself growing, or allowing wife or child to grow, foodstuffs on a cocoa-farm entrusted to him, is not obliged to account for the foodstuffs, but he will customarily send some portion of the foodstuffs grown to the owner of the farm - on his own initiative - or when requested, as a matter of politeness.

A caretaker of a farm may himself employ labourers if this is necessary for cultivation or picking.

The caretaker of a house may be expressly empowered to admit monthly tenants of his own accord.

Although custom seems to recognize that a caretaker has only custody, and not possession, and that he is not entitled

to sell his interest (as he has none to sell) or his master's (as this would be outside the scope of his authority), it will be seen that his powers are considerable; and that in some cases he will appear to the outside world like an owner dealing with his own property. Whilst customary law is not familiar with exotic concepts such as that of "ostensible owner", it appears that Native and other courts are prepared sometimes to invoke some such doctrine. To take an example, in Yaw Anto v. Kwaku Anto[17] the brief relevant facts were:

Three brothers acquired a cocoa-farm jointly. They eventually died in turn, and were finally succeeded, as to the cocoa farm, by K.K. K.K. appointed one K.B. as caretaker of the farm. K.B. fell into debt; and his creditor, J.S.A., took action against him for this debt. K.B.'s property was taken in execution (including the farm of which he was caretaker). At the judicial auction, the farm in dispute was bought by the same J.S.A. The sale took place in 1929. In 1949 the present action was brought by the family of K.K. to recover the farm, which they claimed was not liable to execution for the private debt of its caretaker. They claimed that they were unaware of the sale at the time (thus resisting a decision that they had approbated the sale by laches). The court held that the family should have disputed the sale at the time; and that it was now too late (twenty years after)

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17. (Unreported) New Juaben A Court: Suit No.20/49: 12.7.1949.

to try to upset it.

Again, in the case of Donkor v. Nusin (which has already been referred to above),[18] the caretaker K.N. was brother to A.D., the rightful owner of the farm in question. K.N. - during A.D.'s absence - disposed of the farm by sale in an apparently valid manner with the presence of some of the members of his family as witness. As such, the "sale" was obviously void. Nevertheless, in accordance with traditional practice, A.D. begged for the land back when she returned and discovered the dealings with it; and made a very fair offer to the "purchaser". The remedy she sought when the latter refused to return the land, was not (apparently) to set aside the sale as such, but to bring a quasi-criminal action, alleging "theft" of the land.

Third parties may, therefore, acquire rights in the land where the caretaker is authorized to dispose of them; or where, though unauthorized, the disposal receives tacit approval (through lapse of time) of the true owner.

(b) Use of the property:

House: the caretaker is resident there free, together with his wife and children.

Farm: although - if it is a cocoa-farm - all the cocoa is for the farm-owner, the caretaker may interplant foodstuffs in between the young cocoa; and use unwanted portions of the

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18. See page 507 ante.

land in the same way. Where the caretaker clears the virgin forest and plants cocoa, he will be entitled to a physical one-third of the farm thus made. He is thenceforth sole owner of the portion he thus receives. A caretaker may allow his brother, wife or children to grow foodstuffs on an unwanted piece of the land.

(c) Disposal of the property:

A caretaker may not sell or pledge or mortgage the property unless expressly authorized to do so by the owner. He may sell freely the portion of a cocoa farm made out of forest and allotted to him, since this becomes his self-acquired property.

A caretaker has no power to lease the property unless authorized.

Permissive tenancies: a caretaker may freely allow his wife, child, close relative, or even friend, to cultivate foodstuffs on a portion of the land; but in no case can this endure beyond the period of his caretakership. When the caretaker is himself a brother or other close relative of the owner, he has wider powers, although even so he cannot dispose of or injure the owner's interest permanently. One finds cases where such a caretaker has pledged a portion of the land, the act being permitted by the close relationship.[19]

19. A cocoa-farmer may appoint his brother as temporary caretaker whilst he himself is away, allowing the brother to behave as owner - except for lack of the power of disposal - and to take the proceeds of the farm for himself, perhaps reserving a portion for the owner.

4. ANALOGIES WITH AGENT AND TRUSTEE.

It will be seen from this brief exposition that the position of caretaker, equivalent to that of a steward, factor, or farm-bailiff in the United Kingdom, presents many analogies with both an English agent and an English trustee.

(a) Agent:

The caretaker is an employee if he is of the ordinary, labourer, type; but where a brother acts as caretaker he is not thought of as an employee or servant. It would be far from the facts to compare a subordinate stool with either an agent or a trustee; the position of the domestic-caretaker (A.3.above) resembles trustee rather than agent; relationship A.4. above (that of successor) it would again be incorrect to compare to either, though one might say that a successor is trustee of the reversion for the family; but he is not an agent, since he acts in his own interests. A mortgagor in possession (custody) for the mortgagee is an agent for the mortgagee in the management of the land, and a trustee as regards his duty to preserve it and its products.

An ordinary caretaker is thus a servant with certain limited powers tacitly and necessarily given to him by his employer; his scope of authority may be extended if other powers are expressly given to him.

(b) Trustee:

The caretaker's position is one of trust, since he must do all in his power for the efficient working and preservation of the property, and must render an account of his stewardship and of any monies which come into his hands. But he is not like an English trustee, since he does not hold the property in his name, subject to a trust in favour of another. In popular speech the relationship A.3. (domestic-child) is not infrequently called "trustee-beneficiary". The position of a successor again resembles that of a trustee (or that of a tenant for life in English law); he is not usually described as trustee for the family, but sometimes as a caretaker for the family. A successor holding property for some specific purpose, e.g., to pay off debts of deceased, to maintain children of deceased, to keep and hand over the property to the ultimate beneficiaries, may be - and is - called a trustee.

CHAPTER IX.

GIFT.

A. TYPES OF GIFT.

One of the ways by which title to property may be transferred according to customary law is that of gift.[1] The essential formalities with which a gift may be made are much the same whatever the personalities of donor and donee, or the nature of the property given, or the class of interest given in the property. But one must distinguish certain special types of gift, about which - although it is said that A has "given" such and such to B, yet one cannot say that they are really within the main class of gift, as it is known to English law. (In particular, a political or tribal superior may make a "gift" of land to its servants; and this is the way in which many of the subordinate stools are said to have acquired their lands.)

At first sight a gift is a voluntary transfer of an interest, that is, it is made for no consideration. A vexed point of jurisprudence or terminology is whether the gift, to be properly so called, must be outright; and whether it must be of the whole interest in that subject-matter. One must distinguish so-called "gifts of land", where an individual or

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1. Cf. Sarbah, F.C.L., 81 et seq.

family grants the use of land to another (which perhaps should more properly be called "tenancy"); and an outright gift of an interest in land, which will be irrevocable by the donor; and irreclamable by the family of the donor. Quayson v. Abba,[2] where defendant, a concubine of deceased, was installed in the occupation of the house in question by deceased during his lifetime, perhaps illustrates this point. Michelin, J., found that she had not received an outright gift of the house, but only a voluntary tenancy.

Jurisprudentially, an interest in land is a bundle of rights, which it is theoretically possible for the holder to transfer separately or together. He could abstract a certain number from that bundle, and transfer them for no consideration. For example, a family owning a plot might voluntarily transfer their whole interest; or they might reserve some of the rights (the ultimate reversion), granting a tenancy of indefinite duration. Perhaps one should speak of the gift of the whole interest, and the grant of a tenancy, holding that the latter cannot be called "gift". Nevertheless, in African speech it will usually be said that the family has "given" the land to X; on what terms will emerge from a consideration of the intentions of the parties. Perhaps, then, the distinction is linguistic; and terminologically, when we call either giving land or creating a tenancy a gift, we look to the absence of

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2. (1934) D. Ct '31-'37, 50.

consideration, and the consequent requirements with regard to form and consents, etc., which should be present. The gift may create a continuing relationship (a tenancy) between the parties; under the head of tenancy we can examine the implications of such a relationship. Or it may be outright; and no continuing relationship is set up. Certainly in African terminology there is no need for a transfer to be outright before it can be called a gift: some even go so far as to say that a gift cannot be outright.

One cannot entirely agree with Sarbah's statement[3] that:

> "In this country gifts invariably clothe themselves with the semblance of a sale, and therefore, where formal acceptance is wanting, the owner can take back the gift.
>
> Gifts, in the European sense of the term, as far as regards immovables, seem to be unknown here..."

Gifts and sales are not analogous in their form - the giving of aseda in return for a gift bears no juristic resemblance to the giving of the purchase-price in the case of sale. There are certain points in common (e.g., the presence of witnesses); but to suggest that gifts are made by means of a mock-sale is far from the facts.[4]

1. INDIVIDUAL TO INDIVIDUAL.

The first class of gift is that made by one person to

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3. F.C.L., p. 81.
4. Danquah, A.L.C. 219, also says that "gift is a modified form of sale"; but the reasons for this statement are not given.

another, there being no family or political relationship existing between them. Although to English lawyers such a type of gift would seem an appropriate one with which to begin the consideration of the institution of gift, it is by no means typical of all gifts in customary law, many of which are made where there already exists some bond or relationship between the parties, and by reason of that bond; gifts where there is no such relationship are an exception.

An individual's power of dealing with his property is more restricted in the case of gift than in that of sale. The requirements are more severe for gift, especially as regards consents. Even if a man is dealing with his self-acquired property, the effect of a gift made without the consent and concurrence of his family will last only for his lifetime; the family's consent is required to make the gift absolute. The contrast in the rules for gift and sale of self-acquired property were explained to me as follows:

In a <u>sale</u> the family's ultimate right to succeed to the property is not frustrated. Conversion of the property into cash takes place, and they still have the purchase-price (or that which is bought with it) to succeed to after the vendor's death. (It is true that a man might freely spend the cash, so that the family might receive nothing.)

But in a <u>gift</u> the donor receives nothing in return to which his family could succeed - hence the family's ultimate

right of succession is frustrated. They therefore jealously scrutinize gifts to outsiders, and would refuse their consent except in special circumstances.

What exactly is needed in the way of permission or prior notice to the family, or the presence of the family as witnesses, before a man may lawfully give away his self-acquired property to outsiders, is not rigorously laid down. It seems likely that at least one of these requirements is needed. We shall consider them in turn:

(a) Permission from the family: a considerable number of informants (principally from Ashanti) said that this was essential.[5]

(b) Prior notice to the family:) these can be
(c) Family members as witnesses:) taken together.

It was frequently stated that the family must be informed of the proposed gift; this requirement can be satisfied by calling one or two members of the family (responsible ones) as witnesses. In fact, it is perhaps dubious whether it is possible to do without the presence of family witnesses. Informing the family serves to bar the claim which the family would otherwise make on the death of the donor. Whether notice is essential or optional it is at least a wise safeguard to prevent future disputes. A donor should always have members of the family to witness his gift, since their presence will afterwards prove

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5. E.g., in Bekwai, Essumegya, Adansi, New Juaben.

that the gift is valid (although their absence does not mean irrefutably that the gift is invalid). Such members should preferably include either the head of the family or the obaa-panin, or at least the elder of the donor's sub-lineage, and the person who is the potential successor to the property.

It seems likely that the statement that only notice is required to the family instead of consent is a watering-down of the rule of customary law (observable in other connexions) that the family should join in transfers, and that their concurrence is essential. Custom varies from family to family; but it should be presumed that the family must consent to a gift, in default of proof that notice alone is sufficient.[6]

(d) Disinterested witnesses: In some places it was stated that it is the presence of disinterested witnesses which makes a gift valid. I do not agree that this is Akan custom. The family should witness the gift, otherwise they may raise a future claim to the property. Disinterested witnesses should also be present, because their evidence may be necessary in the future to prove the gift. It should be noted that their presence is evidentiary, and does not go to the validity of the gift itself. Hence it is customary, especially in the case of gifts of land, for the Odikro or other political authority

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6. And perhaps through their right to refuse the aseda, the family can actually withhold efficacy from a gift, even where it is stated that only notice to them is required.

to witness the gift. It should be noted that the Odikro is not entirely disinterested, since he should be aware of any changes which are made in the ownership or use of land within his domain.

The superior courts seem frequently to allege that it is the publicity of the gift (i.e., the presence of outside witnesses) that counts. The publicity that is required is in fact of a somewhat different kind, namely that the family of the donor should witness the transaction.[7]

There is no need to satisfy the requirements for either kind of witness:

(1) in those areas where a man is held to be able to dispose of his self-acquired property without restriction;

(2) semble, where the gift is made by deed.

Gifts within the family: gifts within the family (e.g., between brother and brother) create no problem about the destination of the reversion; and therefore for the gift of self-acquired property from one member of the family to another, it seems likely that no formal consent is required. It is suggested that the potential successor - if a third party to the transaction - should be informed; otherwise he might create

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7. Cf. Quayson v. Abba: (1934) D.Ct. '31-'37, 50.
Basel Mission Factory v. Suapim: (1911) D. & F. '11-'16, 13:
- for a gift to be valid, the donee must have a witness.
Kwakuwah v. Nayenna: (1938) 4 W.A.C.A. 165:
- the gift must be before witnesses, some of whom should not be of the families of donor and donee.

trouble. In practice, as with samansew, members of the family will probably be present and express their agreement with the gift.

Inherited property: it is very rarely that a family will give its consent to the gift of inherited property by its holder to someone outside the family; such consent (or, more appropriately, authorization) is naturally essential, since the ultimate title is with the family.

2. INDIVIDUAL TO HIS WIFE.

It is a common custom for a man to make presents to his wife, and also to alienate temporarily and informally part of the rights in property which he owns or controls to her. Although there is no community of goods existing between husband and wife, there is often community of enterprise and labour.

(a) Farming Rights:

A man is usually assisted in farming by his wife and children. He may be assisted by them in clearing the forest, and cultivating and maintaining the farm made there. Whilst a cocoa farm has not reached the bearing stage a wife may interplant food-stuffs between the young trees. In recognition of his wife's labour, a man may grant his whole right of farming over a portion of his land to his wife. Where the land is self-acquired, or the farm is self-made, no permission is needed from the family; but unless the family ratify the

arrangement, it ceases with the death of the husband. This ratification may be made at any time; as regards family land, a man should not assign or attempt to assign permanent rights to his wife, but he may and frequently does allow his wife to farm a portion of the land for her own purposes. No outright gift will be valid without the consent of the family.[8]

(b) Residential rights:

These are granted to a wife as a necessary concomitant of the marriage. So long as a man does not try to give such rights to his wife permanently (that is, to endure beyond his own life-time), no permission or notice to the family is required at all, even if the house has been inherited.

(c) Money, cloth, chattels.

A man is expected to clothe his wife, but any cloths he gives to the wife are customarily reclaimable on divorce. He will also give her money with which to trade: this is recoverable as well. It should be noted that a man may often meet his duty of maintenance of his wife by giving her money or

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8. An informant gave the rules succinctly as follows:
   Self-acquired property: the husband needs the family's permission for an absolute grant; but not for a limited grant.
   Inherited property: an absolute grant would be rare - it would require the family's authorization; a limited grant for growing cocoa needs the family's permission; for foodstuffs the family raise no objection, provided its title is secure.
   According to other informants, it is the general rule that the husband should notify the family (i.e., his family) if he permits his wife to farm on a portion of the family lands.

chattels (for instance, a sewing machine) which the wife uses for trade so as to earn her living expenses. Such gifts are not intended to be outright, but are recoverable when the marriage comes to an end. If a gift is not made for this special purpose, it can take effect absolutely.

One observes that the contrary case, that of gifts by a wife to her husband, also arises, as - for instance, to quote a case - where a man assisted his wife in the cultivation of a farm which she had inherited, and a portion of the farm was given by the wife to her husband in recognition of his services, the gift was upheld by the native court.[9]

3. INDIVIDUAL TO HIS CHILDREN.

Similar rules apply to gifts made by a man to his children, as to those he makes to his wife. All information agrees that the children are treated much more leniently by their father's family; and gifts to them would frequently be ratified by the family, or enforced by the courts.[10]

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9. In Akua Asantewa, etc. v. Okyeame Kwaku Boanyire, etc.: (Unreported) (1948) New Juaben A Court, No.8/48.

10. A son may cultivate on his father's land. The head of the family should know about it, but he cannot object.
And see Rattray, A.L.C. 15: a father could either give the use of a farm to his son (which would revert to the father's family), or he might give the trees outright as well, which would require the family's consent, witnesses, and aseda.
(Cf. also ibid., pp. 338-9, 353).

4. INDIVIDUAL TO DOMESTIC.

By ancient native custom a gift made by a man to his slave reverted to the donor after the death of the slave or if the slave misbehaved.[11] The status of slavery has been abolished by law, but the status of "domestic" continues in native custom. The English courts have laid down that the rule just quoted no longer exists, since it is an incident of slavery, and therefore contrary both to enacted law and to natural justice:[12] the law is the Slaves Emancipation Ordinance of 1874. Some of the cases are concerned with the position of servants of a stool (which is considered below). The rulings of the superior courts are not followed in custom in this matter. Gifts to domestics go with gifts to wife and children: they are all examples of gifts made by a man to his dependents (to those who are quasi-members of his family). Similar rules (for example, with regard to revocation) apply to them all.

5. GIFTS BY A FAMILY.

This heading is inserted merely for the sake of completeness, and to emphasize that the rules regarding family consents (as for an individual member) cannot of course apply to this

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11. Cf. Ratt. Ash. 230.
12. See: Kodieh v. Affram: (1930) 1 W.A.C.A. 12 (involving the ahinkwa of a stool);
Ambradu v. Mansah: (1947) Unreported: Land Court, Sekondi, Appeal No. 1/47 (involving the precedence of those of the true blood in succession).

case. A family making an outright gift or a temporary grant to a stranger are - ignoring the question of consents - on the same footing with regard to revocation, etc., as an individual.[13] The gifts must have been authorized by the family council in the usual way.

6. SUPERIOR STOOL TO SUBORDINATE STOOL.

Such gifts are really outside the scope of gift in the normal sense, since they resemble rather the granting of a feud or fee. Distinction is made between grants of land "to eat on", and grants of land outright. Like other types of gift, however, they are ratified by the giving of aseda.

7. STOOL TO INDIVIDUAL CITIZEN.

Such a gift may be either outright or conditional; and (where it is not a means of circumventing rules relating to sales) will be as a reward for good services to the stool. If the gift is conditional, then the donee cannot dispose of it without informing the stool; and the stool may be entitled to succeed to him. Absolute gifts are recognised; but they are usually made by Deed of Gift.[14] It appears likely that even

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13. Such gifts are naturally rare where the absolute interest is conveyed; quite the reverse if only a temporary grant of a site for farming or building, in return for a nominal payment, is involved.
14. "Subject to the payment of a thankoffering - aseda [note its presence even where a deed is used], a nominal sum of about 4/- to £2.8.0 sometimes £5.5.0 - for a plot."
- Akim Abuakwa.

apparently outright gifts, made by deed, may remain subject to various limitations.[15] The presumption is probably against the absolute title passing.

8. STOOL TO ITS SERVANTS.

A servant may be either free-born or a domestic. Whichever he is, gifts made to him are intended as a rule to be conditioned by his continuing to serve the stool (or for his successors to do so); and they must be confirmed to his successors. The W.A.C.A. in Kodieh v. Affram[16] found the custom contrary to ordinance, the servant having been a slave. But in Nana Juaben Serwah v. Fordjour[17] Jackson, J., stigmatized the use of the term "gift" in describing a similar situation as unfortunate and inaccurate. "It appears to me to have been rather a grant of land, as a reward for past services to the stool and in anticipation of the continuance of the services in the future", said the learned judge. "The right", he continued

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15. Abrobah v. Moubarak: (1935) D.Ct '31-'37, at 103, is a case in point. The stool involved was that of Dutch Sekondi. Plaintiff maintained he acquired the land in dispute from A.L. by conveyance approved by the stool; defendant said that he acquired the land by deed of gift from the stool. Barton, J., put the argument of the Dutch Sekondi Stool (the second defendant) as follows:
"...the land belongs to the Stool of /D.S./ and that the deed of gift to the first defendant was according to native custom, the ownership not passing entirely to the first defendant, and as regards the alleged deed of conveyance to the plaintiff, the second defendant alleges that this also was only a deed of gift according to native custom, and that as the
/over

16. & 17. See next page.

"to occupy the land and to enjoy its fruits was one limited by the condition that the occupier would continue to render those customary services." And he found nothing unreasonable, or contrary to the dictates of natural humanity or justice, in this. He upheld the claim of the stool in question to the recovery of the land.

9. CITIZEN TO HIS STOOL.

If a gift is made to a stool, it becomes stool property. Such gifts are not infrequently met with.

10. CITIZEN TO CHIEF.

This paragraph should be taken with the preceding one. It need merely be remarked here that formerly all gifts to a chief were acquired for his stool, that today this no longer

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15. (cont. from previous page) -
plaintiff failed to comply with the conditions upon which the gift was made,he, the second defendant, revoked the gift, as he was entitled to do under native customary law."
And further, that "...as the land was Stool land its occupancy was governed by native customary law; the occupier for the time being was under an obligation to recognise the suzerainty of the Stool, he had no right to build on the land without the Stool's permission and was obliged to contribute towards the payment of the Stool debts when called upon to do so."
These claims, some of which are dubious (leading one to suppose a confusion with a mere permission to farm or to occupy a house-site), were not tested, as the learned judge found for the conveyance, and for the plaintiff.

16. (1930) 1 W.A.C.A. 12.

17. (1948) Unreported: Land Ct, Accra, Civil Appeal No. 45/48, 15/7/48.

applies, but it is a question of fact whether the gift is intended for the chief himself or for the stool which he occupies. It may be prudent for the chief to inform his elders of such a gift; but this is no longer legally essential.[18]

11. CHIEF TO HIS STOOL.

In many areas it is customary that a chief on ascending his stool should bring some of his properties to the stool. The likeliest objectors are his successors and family, so he should naturally inform them of what he proposes to do.

12. GIFTS TO CONCUBINES.

It seems necessary to make a special class here, since Sarbah[19] and the Courts[20] imply that there is a rule of law that gifts made by a man to his concubine are irrevocable. I must confess that in my investigations I discovered no such rule as this in these terms. The fact that there exists the relationship of concubinage between a male donor and a female donee is not of itself significant in ascertaining the effect of gifts made between them. Such gifts, and their validity and revocability, must be judged, it is submitted, by the same tests as apply in all other categories of gift. It is possible that the "rule" really means no more than that the right of a

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18. See THE STOOL, under Chief's Private Property, for a fuller account.
19. F.C.L. 50, where he calles the custom "sarwie".
20. Cf. Morris v. Monrovia: (1930) 1 W.A.C.A. 70;
Ansa v. Sackey : (1923) F.Ct '23-'25, 113;
Quayson v. Abba : (1934) D.Ct '31-'37, 50.

husband to claim back on death or divorce certain types of gift made to his wife does not extend to a lover claiming back such gifts on those grounds from his concubine. The "rule" then becomes no more than a statement that a concubine is not a wife, and that the special exceptions existing in the case of gifts to wives do not apply to their case. A gift made to a concubine has thus to be judged by the general standard or test, and will be recoverable on the same terms (e.g., where aseda has not been given).

The Courts (perhaps unfortunately) state this fact in the contrary way; but if the gift to a concubine involves rights of residence, a tenancy-at-will may have been created instead of an outright gift; and this is freely determinable.[21] If a gift is proved so as to disprove a tenancy-at-will, then it would not be recoverable.[22] According to Hughes v. Davies[23] where sarwie was considered, the custom must be specially pleaded, or it does not operate.[24]

B. FORM OF GIFT.

We now turn to a consideration of the form in which all gifts should be made. Whatever kind of property is given,

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21. Njie v. Hall: (1931) 1 W.A.C.A. 100.
22. Quayson v. Abba.
23. (1909) Ren. 550; see the discussion of sarwie at p. 551.
24. "Concubine" is in Twi mpena.

this form should be followed. Where it is not followed, then the intention of the donor may be frustrated and the gift will be either reclaimable, revocable, conditional or temporary. The requirements are as follows:-

1. Subject-matter ascertained:

As with any type of alienation of property the subject-matter of the transaction must be certain or ascertainable. In many cases no difficulty arises, and this is specially true of gifts of chattels. Where land is the subject of gift, it is necessary that either its boundaries and extent are already known, or are described to the donee at the time of the gift, or can be discovered without difficulty. In the special category of death-bed gifts - samansew - there is often no opportunity to describe the land more fully than by expressions such as "my farm at so-and-so I give to you". Not only should the physical subject-matter be certain, but the extent of the interest given should also be made clear, since (juridically speaking) it is not land, but interests in land, which are the subject of gift. A man may donate only a part of his interest. The size of interest given is ascertained partly from the express or implied intentions of the parties, and partly from limitations imposed by customary law.

2. Witnesses, consents, etc:

The secret gift is of no effect.[25] Where a man must inform

25. There should be no secret gifts of land: Quayson v. Abba: (1934) D.Ct. '31-'37, 50.

his family before making a gift (especially of land) this rule applies because the family should witness the gift. Where notice to them is not required the rule applies because the donee will not be able to produce satisfactory proof of the gift sufficient to defeat the claim of the donor's family. But this rule does not necessarily apply to gifts made outright, if they are made by deed. Where consent of the family is needed for a gift the presence of the right and responsible members of the family as witnesses and their sharing in the aseda paid by the donee are sufficient evidence of their consent to the gift. Where the gift is in writing they should subscribe as witnesses. Where notice to the family is required their presence as witnesses is sufficient for this purpose also. Some of the information which I collected in regard to the necessity for family consent is given below.[26] This refers, of course, to the case of an individual who wishes to give away his self-acquired property.

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26. Family consent is needed for outright gifts of:
all property - Bekwai,
a farm - Essumegya, Adansi, New Juaben, Mankessim, and other informants.
Notice to the family, family witnesses, essential:
Family witnesses must be present - an Ashanti informant.
A gift of self-acquired property can be made without the family's consent; "it is better however, for the gift to be testified by some members of the family, otherwise upon the death (of the donor) the family may dispute the gift, and the onus is upon the donee to prove it." - Akim Abuakwa.

It is advisable for there to be disinterested witnesses also, who may give independent evidence of the gift.

The necessity for witnesses is recognized by the superior courts: Smyly, J., said in Basel Mission Factory v. Suapim[27] that:

> "...for a gift to be valid the donee must have a witness: in the present case there is no evidence of the gift except that of the donees, and it is quite evident, if there ever had been any such gift, that they could have been got, as they allege they were able to bring rum for thanks..."

And in Quayson v. Abba[28] Michelin, J. said:

> "To establish such a gift, however, it must be proved beyond any reasonable doubt. It is a well-recognized principle of native customary law, which has been adopted by this Court on numerous previous occasions, that the acceptance of a gift consisting of immovable property must be made invariably with as much publicity as possible."

With all respect this states the requirement too strongly; it is not the publicity that counts, but the presence of the necessary witnesses (some of whom are there as interested parties, some as evidence of the gift taking place).

3. Presence of donor and donee:

This is also required by the customary law. If the donee is absent it is dubious how far the gift takes effect. (In the special case of death-bed gifts, the donee who is not

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27. (1911) D. & F. '11-'16, 13; in the Supreme Court. (But was this a non-Akan case?)
28. (1934) D. Ct. '31-'37, 50.

present when the testator announces his intention of making the bequest will be hastily summoned, so that he may purchase the drink for aseda, and produce it for the donor and witnesses.) It is possible that modern customary law is less strict about this requirement now.

4. Aseda:

This is a most important requirement, since in the African phrase it "stamps" the gift, and makes it perfect. The first question therefore that any native court will put in regard to an alleged gift is whether aseda was paid.[29] "Aseda"means "thank-offering"; its primary function is therefore the thanking of the donor for his gift.[30] But it serves many purposes:

(i) it signifies the acceptance by the donee of the gift;

(ii) it makes the gift irrevocable (except in special circumstances) between donor and donee;

(iii) it binds the family who are present as witnesses, and destroys their claim (if they share in it);

(iv) it serves as evidence of the transaction, both by

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29. In a case in Adansi B Native Court, K.W. "in the presence of responsible witnesses and some of the members of his family made a gift of this cocoa farm to the plaintiff. The plaintiff accepted this honest gift and paid the usual customary Aseda in the sum of 24/- and one bottle of gin to K.W. to seal this gift of cocoa farm as one legal in native law and custom. This thanksgiving (aseda) of the sum of 24/- and a bottle of gin were fairly distributed among the witnesses including the members of the family in the usual procedure obtainable in Native Custom in Ashanti."
Thus the Native Court's judgement.

30. Cf. Ratt. A.L.C. 24.

itself, and by binding the memories of the disinterested witnesses. I am unable to say whether there is a standard aseda, but from the cases which I have perused it appears that its amount varies considerably. If the aseda is too small in proportion to the value of the property given, it is possible that it might be refused.[31] I am also unable to say whether it must take the form of drink, or whether cash payments may be substituted; both forms are met with in the cases. Money-payments may sometimes be expressed in "bottles".

Aseda is a common feature of African life, and is found to be obligatory in most cases where one person has received some benefit which he wishes to acknowledge and "stamp", even though that which he receives is not the kind of gift discussed here. It is, for instance, payable to arbitrators when they have made their award, to the family by a successor on his appointment, to the parents of a betrothed girl, and so on.

Sarbah[32] also mentions other methods of acceptance of a gift:

> "(i) by rendering thanks with a thank-offering or presents, alone or coupled with an utterance or expression of appropriating the gift; or
> (ii) corporeal acceptance, as by touching; or

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31. £12 was the alleged "stamping fee" in the criminal case of Donkor v. Nusim & ors (Dadiasi Native Court: 10.1.50). The size of the amount led the native court to the conclusion that the transaction was a sale and not a gift.
32. F.C.L. 81.

(iii) using or enjoying the gift; or
(iv) exercising rights of ownership over the gift."

This is perhaps a too-refined analysis, since informants when questioned only give the first method as that by which acceptance is made and the donor is bound. It is the most important; and one might think that the last two methods (even though they imply acceptance) are rather evidence of the gift having been made if this fact is later disputed.

C. DEED OF GIFT, OR OTHER WRITING.

It is to be noted that gifts (especially between father and children, and between different members of a family) are increasingly made in writing, and often by deed. As with written wills, the object of using writing is often two-fold: first, to guarantee the validity of the gift; secondly, to preserve secrecy. The donor who makes a gift by deed to his children avoids the attacks of his family during his lifetime, and passes them on to be endured by the donees after his death. It need not be emphasised that the donor's secret dispositions of property are contrary to custom; but this fact does not now seem to impede either their use or their enforcement, where a gift is recorded in writing. But in gift by deed, it is submitted that the customary formalities as outlined above should be observed. In practice they appear to be sometimes omitted or curtailed. In several places, not geographically or

ethnically related, I was told that even if a man was required by custom to notify his family before disposing of his self-acquired property by oral gift, yet he could avoid this by making the gift by deed, and notice to the family would not then be required. Other informants maintained the contrary, that the rules regarding consent are not affected (and cannot be evaded) by use of a deed. The use of a deed may also have another effect, viz., in regard to the right of a donor to revoke his gift: some informants maintained that by use of a Deed of Gift the Donor forfeited all rights in the subject-matter, and could not subsequently revoke or claim back his gift. Others maintained that his powers were not affected by use of a deed.[33]

It seems reasonable that a man should not be allowed to acquire powers by choice of this method of making gifts which he would otherwise not possess. African law knows nothing of consideration as such, and aseda is not consideration (whose place could be taken by use of a deed). An African should not, it is submitted, be able to dispense with the customary formalities necessary for the validity of a gift. As far as the consent of the family is concerned, this may be considered a defect of capacity in the donor, or a power in his family to

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33. The deeds are in form absolute; if English law governs, then the donor cannot obviously revoke for ingratitude. It is still an open question what law should govern such transactions.

reclaim the gift made without their consent. Such a power cannot be abrogated by the unilateral act of the person subject to it.

I therefore consider that members of the family must sign the deed of gift as witnesses to make the disposition final (and this was stated to me by some informants).

Stools sometimes use deeds of gift when presenting property to their subjects. This is not essential; but it seems frequently adopted, perhaps to make the gift certain and indisputable (whether by way of enlargement by the donee, or diminution by the donor). A gift by a stool to its subject by deed may be:

(i) merely a record in writing of a customary allocation of land by a stool to one of its citizens;[34]

(ii) a special reward for services rendered;

(iii) a device to avoid a law, or custom, or prejudice, against a stool selling land direct to a non-native or stranger purchaser.

In the case of (i), the rights of the parties are not affected by the use of a deed.

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34. Such a deed of gift was alleged in Abrobah v. Moubarak: (1935) D.Ct '31-'37, 103; where the grantor was the stool of Dutch Sekondi. Into which of the three categories it fell is uncertain.
This type of gift is also commonly reported from Accra (which is not, of course, in the Akan area). The intention here seems to be principally that mentioned in (iii) in the text.

In the case of (ii), the gift may be outright or conditional; and one must scrutinize the terms of the deed and the intention of the parties to discover which it is.

In the case of (iii), the intention of the donor is to pass the whole interest in the property given to the donee; and such interest therefore passes, so that the donor cannot in the future either claim to revoke the gift, or allege that a subsequent purchaser from the donee holds the property subject to a superior interest in the stool.

D. EFFECTS OF THE GIFT.

1. Whether Absolute or Qualified.

Gifts may be either of the whole interest which the donor enjoys in the property the subject of the gift, or of the whole interest subject to conditions, or of a partial interest. (If the limitation is only one of time, the effect is considered at D.2. below). Determination of which category a particular gift falls under is partly a question of the intention of the parties, and partly a rule of law. The main contentions are:

(i) that a gift is not presumed outright;

(ii) that it is of surface-rights only (when the donor is entitled to the absolute interest in the land);

(iii) that absence of aseda makes a gift a qualified one only;

(iv) that absence of family consent limits the duration of the gift.

Individual to individual: if the requisite consents from the family are obtained, and the correct form followed, the gift may be absolute if so intended. But certain informants maintained that the presumption is that a gift is not absolute in regard to the extent of the interest granted, and would not, for instance, extend to minerals.[35] A man can "give land" to another for one purpose, and to a third for another purpose.[36] If a man merely grants an interest of use (whether over land or in a house) the situation becomes that of a permissive tenancy for no, or a nominal, consideration;[37] and the boundary-line between gift and tenancy might be said to disappear (subject to what was said at the beginning of this chapter at p. 517).

Individual to his wife: will not normally be absolute unless specifically so stated. A gift to a wife is usually conditional on the continuance of the marriage. A gift of land or a house (or rights of residence therein) to a wife is a gift of use only, and there is a presumption to that effect. Such a gift is of itself conditional and temporary.

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35. Although, where the party is competent, all rights in and over the subject-matter may be donated, a gift is usually of surface-rights only; so that, unless otherwise provided, the right to minerals, etc., remains in the grantor. - Ajumako.
    An absolute gift is not customary - land given reverts to the donor if abandoned by the donee. - Essiam.
36. Asikuma.
37. Adai v. Darku: (1905) Red. 231, Ren. 417.

Individual to children: similar considerations apply to gifts to children, except that they are not conditioned by the continuance of any marriage.[38]

Individual to domestic: are usually conditional and temporary.

Stool to citizen: as already noted, these may be either conditional or temporary, or absolute. The stool's designation of a particular piece of land as one upon which the citizen may farm or build a house is not a gift of this class at all.

Stool to its servants: are always conditional.

Citizen to stool: usually such a gift implies the surrender of all the citizen's rights in the property to his stool, and the position of Citizen to Chief is similar.

2. Whether permanent or temporary:

Gifts can be either temporary, indefinite or permanent in duration.

Gifts which lack the consent of the family, where this is needed, do not last beyond the life of the donor, unless affirmed by the family subsequently.

Gifts to a wife endure for the time during which the marriage is in existence.

Gifts to a domestic are for the life of the domestic, and must be re-affirmed to his successor before they will endure.

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38. Cf. Sarbah, F.C.L. 81: "... gifts between parent and child...can be recalled or exchanged at any time by the parent in his or her lifetime, or by his will or dying declarations."

Gifts made without aseda are at will only, and determinable by the donor.

Those gifts which are not intended to be absolute (even where necessary consents, aseda, etc., are present) are really grants of tenancies of indefinite duration.

Absolute gifts revocable for good reason are absolute and permanent until revoked.

3. Revocation by the donor:

It is alleged in some quarters that a gift once made - not subject to express conditions - is irrevocable by the donor if aseda has been paid by the donee.[39] It is also stated that all gifts are revocable for good reason;[40] or that certain types of gift are revocable for good reason.[41] The rules appears to be as follows:

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39. If aseda is not paid, the gift may be taken back. If aseda is paid, the gift is irrevocable. - Ajumako.
If aseda is paid, and there are witnesses, the gift is irrevocable. - Adansi.

40. A gift may be taken back for ingratitude. - Essiam.
A customary oral gift can be revoked by the donor, even if Aseda has been paid, for such reasons as insult or ingratitude to the donor. - Aburi, Akwapim.
"It is quite clear in Native Custom that a gift is revocable for good cause": judgement of N. Juaben Native Court in Nana Juaben Serwah v. Fordjour, as recorded in the appeal record (Land Court, Accra (1948) Appeal 45/48). (But, as this was the special case of a gift by a stool to a stool-servant, it is doubtful how far the native court's dictum was intended to apply to all kinds of gift).
Once aseda is paid, the donor may revoke only for good reason. - New Juaben.

41. A gift within the family, i.e., between father and child, is revocable for ingratitude and bad behaviour towards the donor. - Ajumako.
A gift may be revoked, if it is on a friendly basis. - Akwapim.

(a) If no aseda has been paid, and there are no witnesses: the gift is freely revocable, without reason.

(b) If no aseda is paid, but there are witnesses present, then the gift is revocable.[42]

(c) If aseda is paid, but there are no witnesses: if a gift of land, then it is revocable; if of cash or chattels, then it is not revocable.

(d) If aseda is paid, and there are witnesses: then the gift is not revocable unless either it is not an outright gift, but a temporary gift of use (when the rules relating to tenancies apply):[43] or else the gift was in consideration of natural love and affection, e.g., to a wife; to children; to servants; to friends or relatives.

4. Reclamation by the family:

The family have a future "interest" in property which may be owned or controlled by one of its members; and their rights must be safeguarded. The safeguard consists of their right to be consulted before gifts of a member's property are made, and

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42. One set of informants said that in such a case the gift is no[illegible] the owner [of the property given] can take back the gift. Cf. [illegible]s explains Adai v. Darku: (1905) F.Ct. Ren. 417, where the owner [of the property given] can take back the gift.

43. This explains Adai v. Darku: (1905) F.Ct. Ren. 417, where Smith, J., said: "No gifts of land would be made by the natives if such gifts are to be taken as absolute gifts", and it was held that all gifts are revocable for good cause, which includes an assertion of ownership by the donee! The facts in this case disclose the grant of a tenancy only here.

their right of reclamation if this requirement is not met.

If a gift is made outright, and family consent thereto has been obtained (viz. by their accepting a portion of the aseda or otherwise), then they may not claim back the gift on the death of the donor.

Gifts of self-acquired property: where the consent of the family is not required (e.g., in certain areas, especially the coastal ones, and where there is a deed, according to some informants), then, if there is an outright gift, the family have no claim. But such a gift must be strictly proved.[44] If a gift is only temporary in intention and effect, then it comes to an end on the death of the donor, unless renewed by the family. In the majority of cases customary law demands that the family join in the gift to make it perfect; if this is not met, the family have the right to claim back the gift. Normally this right is exercisable only on the death of the donor. The effect of the transaction then is that the donee acquires only a temporary right, but one which the family cannot disturb during the donor's lifetime.[45] It is open to the family to continue the gift on the same terms (i.e., as a permissive tenancy of indefinite duration), to make the gift absolute, or to reject it. It is not necessary for the family to take any overt

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44. Cf. Larkai v. Amorkor: (1933) 1 W.A.C.A. 323.
45. Cf. Ratt. A.L.C. 355: "If one gives a man a present, and he does not return Aseda, one's heirs can claim the thing given from the donee or his heirs, and they will not have any witnesses." (quoting an informant).

action to repudiate the gift (though they will usually do so); but, if they leave it for too long, they may be taken to have recognised the continuation of the gift, or to have impliedly adopted it. It is probable that in such a case the donee does not acquire absolutely; his rights are no larger than when the donor was alive. It is mainly in connexion with gifts by a member to his wife, child or servant that the question of such gifts come up.[46]

Gifts over inherited property:

(i) if notified to the head of the family, they continue till the death of the donor;

(ii) if the donor is authorized by the family to give the whole interest, the gift is not reclaimable;

(iii) if the gift is not notified to the family, quaere whether the family could demand the ejection or dispossession of the recipient during the lifetime of the donor. If the gift is such as to put the family's title in jeopardy (e.g., by being a gift of the whole of a farm, or by being to a stranger, with no acknowledgement of title - such as an annual payment) the family probably has the right to eject the donee. If the recipient is the wife or child of the member, the family would probably not insist on their strict rights; and in the case of a son who is grantee, it is doubtful if they

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46. The matter is dealt with under TENANCIES AND LEASES (q.v.).

have any power to evict him during the life of his father. The case of Okyeame Apenteng II v. Ama Nfum[47] is of interest in this connexion.

The facts were as follows:

> 1. A held the farms in dispute as self-acquired property.
> 2. A died intestate.
> 3. O.A. (the plaintiff) claimed as successor.
> 4. A.N. (the defendant) based her claim on the facts that (a) K.A. (an elderly member of the family) "was in his lifetime given possessory rights in those farms by reason of his great age." (b) "The defendant claims her interest as being one of unlimited ownership derived from a gift of the farms by /K.A./ to her predecessor in title."

It was held that her claim failed.

> "Quite clearly /K.A./ could not convey a larger interest in the farms than the one which he possessed, namely, a life interest, and to suggest that a gift of ancestral property can be made by a single member of the family, even were he the successor, is impossible in law for that same reason."

The fact that K.A.'s successor in title had remained in undisturbed possession of the farms for ten years was considered irrelevant.[48] There is unfortunately no evidence in the report to show what interest K.A. possessed, by whom he was given "possessory rights"; whether the gift to A.N.'s predecessor by K.A. was with the consent of the family; whether the gift to K.A. or the gift by K.A. was after the decease of A; all

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47. (1949) Land Court, Cape Coast: 23.3.49; coram Jackson, J.
48. But it might show acquiescence or consent by the family.

these facts are of importance in weighing the validity and effects of the dispositions recorded above.[49]

Gifts of cash: do not require the consent of the family - hence they cannot be reclaimed by the family.[50] The same probably applies to at least the less valuable chattels.

5. Death of a party: It should have emerged from the foregoing discussion that several types of gift are conditioned to the lifetime of one or other of the parties. If a gift is absolute and perfect, then death makes no difference: the effect of the gift is to take the property outside the previous line of succession completely.[51] A gift which is imperfect through want of due form, e.g., for lacking the consent of the family, will not endure beyond the lifetime of the donor. Gifts by a stool to its servant are conditioned by the life of the donee, to be re-affirmed by the stool to the successors of the deceased servant.

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49. One must respectfully note once again that neither a successor in general, or K.A. in particular, could have a "life interest", this concept being unknown to customary law.
50. Information from New Juaben.
51. In a case from Adansi Native Court, defendant succeeded to the donor. The Court said:
"He took undue advantage by means of his succession to the deceased's estates to revoke the honest gift of this cocoa farm made by his deceased uncle. This matter was placed before the members of the family. They were disagreeable with defendant and strongly laid stress that a gift made by a deceased person was irrevocable in native law and custom."

6. Gift and other Relations:

A gift which is intended to be temporary in effect, is imperfect because of some lack in form etc., bears a close relation to free tenancy; as already remarked, one can call the grant of the tenancy the gift, and consider it as such; and the continuing relation can be considered under the head of tenancy. This implies that in such circumstances the rights of the holder or grantee in regard to his control and disposal of the property may be limited: some of the limitations are set out in the chapter on TENANCIES AND LEASES.

There is also the relationship between gift and samansew. Although one informant maintained that an enforceable gift for which aseda has been given, to take effect after the death of the donor, is not samansew but gift if the family consent during the donor's lifetime, I maintain that one can distinguish the two types of gift. Samansew is discussed under SUCCESSION (q.v.).

CHAPTER X.

SUCCESSION.

A. INTESTATE SUCCESSION.

1. HISTORY.

In primitive African societies all succession is originally intestate, and one must conclude that wills and bequests of property are a later innovation, to begin with nothing more than the dying wish of a person expressed with regard to the destination of certain articles essentially personal to him - his spear, hoe, and other minor chattels and belongings. As we shall see later, however, the Akan peoples have developed a customary form of testate succession, which itself is now in process of supersession by testamentary dispositions in writing based on English Law.

The development of the idea of any form of succession, testate or intestate, was obviously dependent upon there being something to succeed to. Whilst the Akan peoples were mobile hunters, there was no real property for them to inherit; the personal property would have been divided - as in other parts of Africa - into "man's property" and "woman's property"; and it was appropriate that men should succeed to man's property - weapons, etc. (elsewhere cattle), and women to woman's property - cooking pots and the like. Today it is a principle which is

not so widely recognised, as will be seen below. There is a suggestion (nothing more) that certain male property may now be inherited by a man's son and not his nephew. Certainly, this applies with regard to certain occupations, posts and crafts (e.g., smiths; and in the Fante towns company membership goes by the male line - from father to son).

When the hunters settled down, and undertook rudimentary farming, the emphasis shifts to the family: the individual has the use for life of the land which he farms, but such property comes from and reverts to the family pool. On the death of the individual, the land reverts to the family; the question then arises of the disposal of its use. It is not difficult to see how the idea that land should revert to the family may have arisen. The task of clearing the bush in the first place usually calls for reinforcement of labour, which would come from close relatives, even though the subsequent agriculture could be performed by an individual or a unit (a man with his wives and children). It is now basic to Akan custom that whilst ownership of the title to land is vested in the family as a whole, there is little or no communal exploitation by the family of the use of such land. Where the land cultivated by the deceased member was allocated to him by the family, it is easy to follow the theory which states that on the one hand, such title is in the family; and on the other, that it should be allotted to an individual member by the

family. But where an individual member has of his own initiative cleared a portion of the virgin forest and made a farm thereon, it is less easy to see why, on his death, the property should fall into the general family holding. The probable reason is given above, that the task is too large for an individual, unless aided by other members of the family; but today the rule applies whether relatives have assisted in the clearing or not. Later rationalisations,met with in some reports and elsewhere, which state that the land reverts to the head of the family, who revests the use only in the successor, perhaps reveal how this situation has come about.[1]

Be this how it may, it is the family's task to re-allocate the use of the property of deceased, and it is this function which is comprehended within the customary law of succession.

2. NATURE AND BASIS OF INTESTATE SUCCESSION.

The nature and basis of customary succession can be simply stated:

(a) Succession[2] is not automatic but elective.

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1. But, as is pointed out in the Chapter on THE FAMILY (q.v.), the head of a family does not acquire family property in trust for the family: title is with the family itself.
2. Christaller gives di ade ("to eat the things (of deceased)") for the verb "to succeed"; adedi for "succession"; and odedifo for the "heir" or "successor".
   Rattray gives another term for inheritance - awunyadie. He says (A.L.C. 109): "This term, I think, means the inheritance of property by the legal heir." He also (at A.L.C. 333) gives an expression for "successor" or "the actual next of kin", as he terms him: he calls the successor "the die odi n'adie...(he who 'eats', i.e.,succeeds to his things)".

(b) The family are the proper elective body.

(c) Self-acquired property of deceased, unless otherwise disposed of in his lifetime, becomes on his death one of the different kinds of family property.

(d) Although succession is not automatic, there are preferential candidates, preference being ascertained by degree of relationship to the de cujus.

(e) This relationship is normally traced matrilineally, i.e., through the female line.

(f) Succession is, or was, total: i.e., the successor steps into the shoes of the deceased.

(g) The interest acquired by the successor is a dependent one only, the ultimate title remaining with the family.

Let us examine these principles.

(a) Succession is not automatic in Akan customary law; there is no-one who is entitled to come to court for an order empowering him to succeed, unless he has already been chosen by the family as successor. If the reverse is stated or presumed to exist in any locality, it should be treated with great suspicion. As was said in evidence from Akim Abuakwa: "Right to inherit does not inhere in any individual except by appointment of the family." One does, however, find in the Court records cases where individuals have gone to court to establish their succession, even against the word of the family; they have claimed to succeed as of right, and not by virtue of

appointment by the family. The Court has no power to make an order in such terms, although it may by order recognise that the appointment of the successor has been validly carried out by the family, or that he has been dismissed from his appointment in due form by the family.

For this reason the term "succession" has been preferred to that of "inheritance", since inheritance implies that there are heirs/entitled to succeed, whose existence can be ascertained in the lifetime of the de cujus; which is not the case in Akan Law, although there are the preferential successors already mentioned.

Succession is elective: by this is not implied that a regular election takes place in the family, with each member having a vote of equal importance. Nevertheless, there is canvassing of opinion, and the appointment of a successor consequent upon such canvass. A similar principle is to be found reiterated through the whole of Akan custom, from the election of a chief, through the appointment of a head of a family, to the appointment of a successor to an individual. In all cases there is a large body of electors, and a smaller body within that body who have a special interest and whose voice has special weight in the nomination or choice of a candidate.

(b) In accordance with this principle, in the appointment of a successor we are told that the family are the proper body to decide on the person to succeed. But what is meant by

the family here, and how are they guided in their choice? Usually, as will be shown at (d) below, there are preferential candidates, occupying the closest degree of relationship to the deceased, through common membership of a sub-lineage within the family. The sub-lineage of the deceased has the greatest interest in the choice of a successor, as have the members of the house or section of the family to which deceased belonged; and it seems to be frequently the case that choice of a successor is agreed on among the members of this section, their choice being perhaps referred to the rest of the family - as represented by the elders - for approval. It cannot be too strongly stressed that custom varies as between different families; and although all have a common basis, the superstructures of custom erected thereon differ in various ways. No single procedure can therefore be identified as the standard one. Whether the successor succeeds semi-automatically, or is nominated by his sub-lineage or section, or the choice is left to the family as a whole, a family meeting generally takes place when the formal appointment is made.

The position when a head of a family is being chosen, or family property in the wide sense is being disposed of, is somewhat different, since such matters are the concern of the family as a whole. Here, on the other hand, the choice of successor concerns only the sub-lineage of the deceased intimately, and the rest of the family more remotely.

(c) It is a basic principle of custom that all property of deceased becomes family-property on the death of the de cujus, unless otherwise disposed of during his lifetime. A man cannot dispose of any of the kinds of family-property outright except with the consent of the family; so that all property to which deceased himself has succeeded forms part of the estate for disposal at his death. During his life he may have temporarily alienated the use of such inherited property - usually by gift to his wife or children; whether such a gift is maintained at the death of the donor depends on the family.

Self-acquired property also becomes family property at the death of the owner thereof; but during his lifetime he may freely dispose of it outright to whom he pleases (certainly if the transaction is a sale, and perhaps if it is a gift also). He may also indicate on his deathbed by customary declaration, or before his death by written will, which way he wishes the property to go after his death. It is incorrect to represent that no man can have under customary law more than a life-interest in property, even where it is self-acquired; this would require one to hold that if a man disposed of self-acquired property the grantee would receive only an "estate pur autre vie", an idea unknown in customary law. Yet one must admit that his power of disposition even over self-acquired property is subject to certain limitations, which are discussed elsewhere.[3]

3. See SALE, pp. 324-6; GIFT, pp. 545-6, etc.

A man's property becomes "family property" on his death: what is this family property, and who acquires the interests therein?

The title to the property vests in the family as a whole, so that disposition is dependent thenceforth on the consent of the family. If the title of the de cujus was not qualified, i.e., dependent on the larger absolute interest of a stool or other person, then his absolute interest vests in the family. If the title of the de cujus was qualified, this similarly vests in the family as a whole.[4]

The interest of use which the de cujus possessed vests in his sub-lineage at his death. Such an interest is a qualified one, dependent upon the larger interest in the family as a whole; but it is immediate and exclusive, so that only for grave reason could the family divert the course of succession from that sub-lineage. Out of the sub-lineage's qualified interest is created by the family the interest of the successor, which thereupon itself becomes exclusive and immediate (if only temporarily), so that the successor, whilst he continues to

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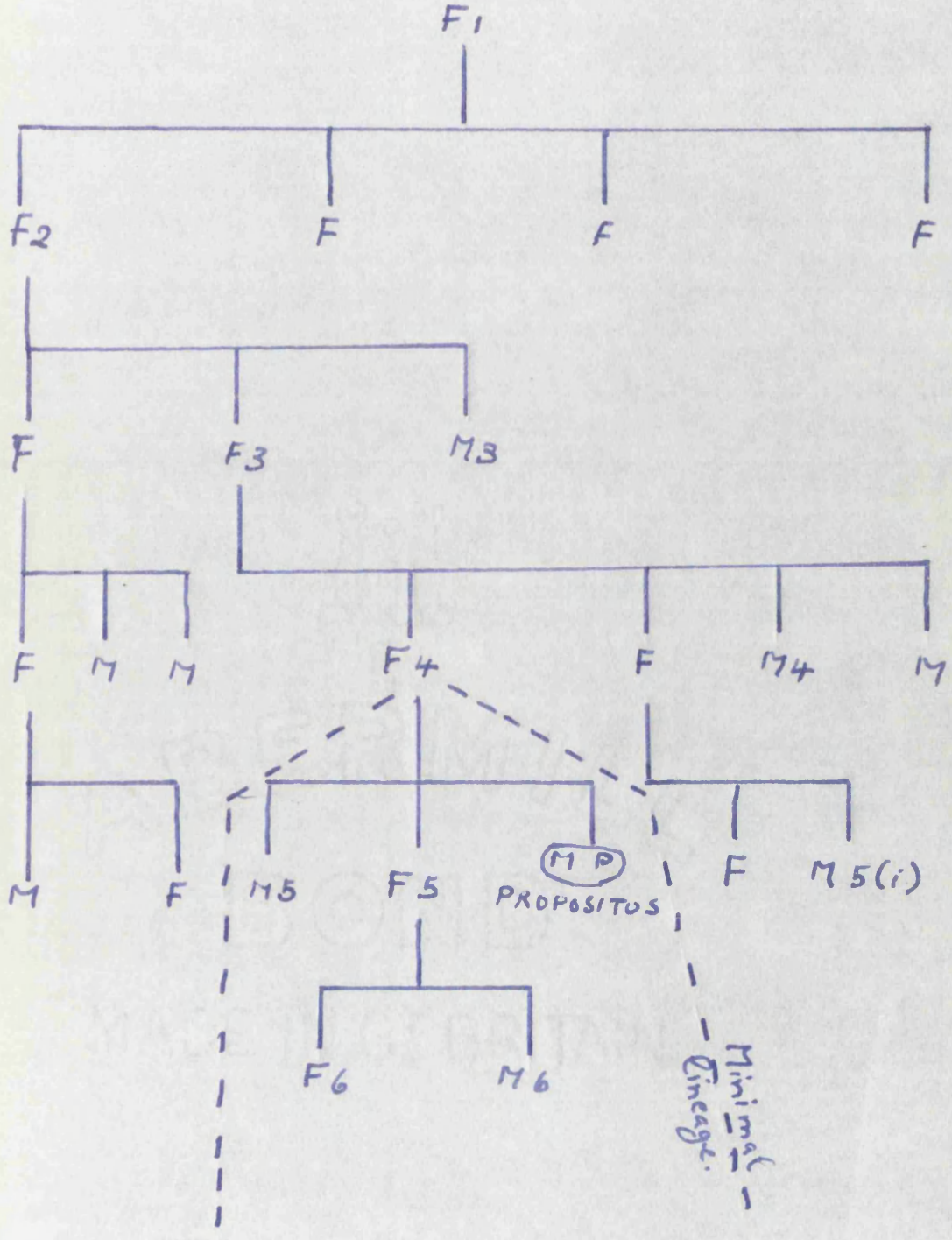
4. Rattray maintains (A.L.C. 333) that the former rule was that all deceased's property went to the abusuahene (not personally, but as head of the family); and that gradually the "next of kin" asserted his right. This is a reversal of the historical development which appeals to the present writer. And in Ash. 41 he maintains that the maternal uncle ("the head of his family") "has an absolute and undisputed right to succeed", which he usually waives in practice; but this appears a rationalization.

hold this position, has the right to exclusive use and occupation (even against other members of the family, but subject to the rights of certain privileged persons). It is possible for other views of the law to be put forward[5] but whilst recognising that the formal appointment of the successor comes only from the family, one must concede that the sub-lineage have claims that the successor should be chosen out of their number, and also certain residential claims in the case of houses. Where the successor is under a duty to pay over a portion of the profits from inherited property to the head of the family, as sometimes happens in the case of houses, and also to make contributions to family funds, it is a question whether such payments have a direct connection or not with the family's root-title to the property, or only an incidental one.

(d) Succession at customary law is not automatic; there is a list of preferential candidates: see, for instance, that contained in Sarbah's Fanti Customary Laws.[6] The general principle is to take the most restricted lineage which includes the deceased, look therein for potential successors, and only when there is no suitable successor within that lineage, to take the next larger lineage as the source of a successor. The following shows a typical family tree, tracing from a common female ancestor through the female line, the ancestress in this case being F 1, the great-great-grandmother of MP, the propositus.

5. See p. 557, n.4.
6. at pp. 101-105. And for an account of succession generally, see Ratt. Ash. 35-44, A.L.C. 333 et seq.


F1
F2
F
F
F
F
F3
M3
F
M
M
F4
F
M4
M
M
F
M5
F5
MP
PROPOSITOS
F
M5(i)
F6
M6
Minimal Lineage

The smallest sub-lineage is ascertained by proceeding back to the nearest female ancestor, and thence downwards in the female line. In this case, MP's sub-lineage contains F 4, his mother, and her descendants in the M 5 and F 5 generation, and thence to the F 6 generation. Degrees of relationship are to be ascertained by counting up to the nearest common female ancestor and thence down. From this it is evident that the typical feature of Akan succession is NOT merely succession by nephews, as the table below shows.[7]

MP to F 4	one step	Mother ✱
to F 3	two steps	Grandmother
to M 5)		(Brother ✱
F 5)	two steps	(Sister ✱
to M 6	three steps	Nephew ✱
to M 4	three steps	Maternal Uncle
to M 5(i)	four steps	First cousin

It will be observed that MP to F 4, succession by the mother, comes first in the table. As Sarbah remarks, succession by the mother is not common, her claim usually being waived in favour of others in the line of succession.

Next comes the brother or sister, and thereafter the uncle or nephew. Nephews are usually preferred to uncles;[8] it will be noted that M 6 is within MP's minimal lineage (marked ✱), whilst M 4 is not. There also seems to be a dislike of taking the successor from ascendants.

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7. Cf. Rattray, A.L.C. 333, and Ratt. Ash. 1-2.
8. Ratt. Ash. 41 says that the maternal uncle has "an absolute and undisputed right to succeed"; nevertheless in practice - to my knowledge - he rarely if ever succeeds (except in the case of deceased minors).

That the brother is the preferential successor to the deceased is shown more clearly by the fact that besides his succeeding to the property of deceased, it is also customary that he should succeed to the wives of deceased. The funds for their maintenance then come naturally from the property to which he has succeeded. The gradual obstruction of this uniformity of succession, as where the brother refuses to marry the widow, but succeeds to the property of deceased; or where he fulfils his customary duty of maintaining the widow and children, but the property was left elsewhere by will, causes great difficulty. It is inevitable that finally a nephew should succeed; in our instance, when MP's brothers are exhausted, the property will have to pass to the next generation. But first cousins also frequently succeed to a deceased, though not in the same order of frequency as brothers and nephews.[9]

This table is for a deceased male: this prompts certain questions:

9. Rattray (Ash. 42) puts the cousin before the nephew; Danquah (A.L.C. 83) also gives them a high place in the order of succession. On the classificatory system a first cousin is nua or "brother"; the nephew is not. For this reason, in fact another way of putting the principle that successors of the same generation as deceased are selected before dropping a generation, they do - as noted in the text - often succeed. But (without having attempted a statistical analysis) I did not get the general impression either in the cases or in oral information that their position was preponderant.
(And cf. the maxim quoted by Ratt. A.L.C. 333: "Nnuanom nsae a, wofase nni adie": a nephew [or uncle] does not succeed provided there are brothers.)

A man may not succeed to a female stool nor a female to a male stool.

The tendency nowadays is for the line of inheritance to be restricted to the issue of a man's own mother or sister.

(1) Is it customary for men to succeed to men, and women to women?

There is no absolute rule which makes such provision;[10] informants said, for instance:

> "succession is normally from males to males, and from females to females. But a man's mother may succeed, and also his sister."[11]

And again:

> "The family appoints a man to succeed a man, and a woman to succeed a woman, but sometimes a woman succeeds a man." (12)

Rattray stated originally that a woman succeeds a woman,[13] but later qualified this statement.[14]

There is more than an inkling of such a rule, and normally men would be preferred as successors to a man when they stand in equal relationship with a woman with the deceased.[15] And where a woman dies, the property she leaves which is specifically female property will be taken by female members of the family. I have personally encountered frequent instances of women succeeding men, and vice versa.

(2) Is succession to a deceased woman on a different basis from succession to a man?

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10. Danquah, A.L.C. 184, does not go as far as Rattray originally did in stressing this principle; he says: "...the successor to a female relative's property is usually a woman".
11. Akropong.
12. Akim Abuakwa.
13. Ash. 40.
14. A.L.C. 337.
15. Cf. Sarbah, F.C.L. 102: "a man is invariably preferred to a woman."

This question arises partially from the last. It must be remembered that women in Akan law are, unlike in some other parts of Africa, equally capable with men of owning and enjoying property. Apart from obvious points (such as that there are no widows to inherit), the following may apply:

(a) a woman's property is usually smaller in size, since she has less chance of individual acquisition;

(b) "woman to woman" will generally operate;

(c) but men are often preferred to women as managers of property;

(d) a woman may step down in favour of her son;

(e) but a woman is theoretically first candidate for succession to her son;

(f) succession to a woman is on a different basis in one sense, in that her children can succeed her, whilst a man's children cannot succeed him.

One informant stated that:

> "The normal successors to a woman are her children, both male and female. But if the woman has a sister, then the property will go to the sister first." (16)

(3) What is the position of: the father; the children; the spouse; in regard to customary succession?

If a child dies, it seems probable that the parents will

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16. Akropong.

take such property as it possesses. According to Rattray,[17] a father used to have power over his child's property; but this power was not always fully exercised. A mother is theoretically first in line of succession; hence she might be entitled to take her deceased child's property. According to one informant, if the child is young, its brothers (and sisters) may share its property; none will be taken by its father. If the child is not young, then the normal rules operate.[18]

The children of deceased, apart from their being confirmed in the enjoyment of any gift which deceased may have given them during his lifetime, and apart also from any deathbed donations, or testamentary dispositions, may be given a portion of the cash, if any, of deceased by the family. This is a reciprocal recognition of their duty to pay for the coffin of their parent.[19] Apart from paying for the coffin, children do not usually contribute to the funeral expenses of a deceased father.

Children are of course entitled to succeed to property of their deceased mother. It should be remembered that children of a deceased male have certain rights of residence in their late father's house, even where it has passed as family property to the successor.

There are certain duties of a religious and ritualistic nature which the spouse of deceased is expected to perform.

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17. Cf. A.L.C. 9 et seq.
18. Acc. to Akropong.
19. Cf. Danquah, A.L.C. 187.

It is unusual for a wife to be given anything of her late husband's estate: if she marries his successor, then, of course, her position is not altered for the worse. She also may be confirmed in temporary gifts made by her deceased husband.

(e) It is said that relationship for the purpose of ascertaining a successor is normally traced matrilineally. This statement covers the exceptional case where there is only a fictitious or quasi-relation, e.g., between a slave and the person and family whom he serves; and between a "domestic" (as slaves emancipated under the Ordinance and their descendants are usually termed) and his former masters.

In former times a slave was entitled to succeed by virtue of his adoptive relationship in various circumstances.[20] The first was when all other members of the family of the true blood entitled to succeed were exhausted. Next, when persons entitled to succeed were too young to succeed and manage the property, a slave might be appointed as temporary manager and "trustee" of the property until the rightful successor came of age. Such appointment was not necessarily contingent upon there being no other members of the family left.

The relationship of master and slave was not an entirely one-sided affair in the old days. It is true that a slave was liable to be cut off to celebrate the funeral of a notable or chief; but apart from that he benefited by possessing a family,

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20. Cf. Ratt. Ash. 43-4.

which he would not otherwise have done; of having somewhere to look for subsistence and protection; and then he had this real right of succession. The right was dual: a slave might succeed his master, the master might succeed his slave. It cannot have been the intention of the Ordinance - whatever may have been said subsequently on the matter - not merely to give the slave his liberty, but also to deprive him of these benefits; and one must therefore hold that domestics are still entitled to succeed at law, as they do succeed in custom. The domestic has a right, which he would not have, except for his slave-relationship, to succeed. If his relation is to be ignored, he is not a member of the family, and therefore not entitled to succeed. But as a corollary domestics are postponed to persons of the free blood; and it is unreasonable to concede the right without the qualification.[21] The domestic succeeds, not by virtue of his servitude, but by virtue of his adoptive relation of a special character with the family which he serves (in theory).

If the members of one line or section are exhausted, would

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21. The rule was rejected by Hooper, J. in the unreported case of Ambradu v. Mansah (1947): Land Appeal 1/47, Sek., because it was based on slavery, and was therefore contrary to the Slaves Emancipation Ord., 1874, and the Re-affirmation of the Abolition of Slavery Ord., 1930.
But the rule was affirmed in Nelson v. Ammah: (1940) 6 W.A.C.A. 134.
And, despite the abolition of slavery, the rights of children of a slave-mother are preserved: Santeng v. Darkwa: (1940) 6 W.A.C.A. 52.

the domestics of that line succeed to the property of a member of that line before blood-members of the family belonging to another line? Although it is open to the family in such circumstances to appoint a domestic if they so choose, a domestic could not claim to succeed of right whilst any relations of the blood survive.

(f) Succession in customary law was total: that is, the successor stepped into the shoes of deceased, succeeding to all the property of deceased. This included his wives, slaves and debts. On entering his succession, the successor thereupon became liable for the debts of deceased; if he failed, the family of deceased had to meet these debts. If the debts were more than the assets, and especially where deceased left debts and no assets, and/no-one was willing to be appointed successor to a "damnosa hereditas", then the only solution (it has been suggested) was not to hold the funeral custom of the deceased, thus declaring him an outcast from the family. More modern information stressed that a successor must always be appointed, since there must be someone to look after the wives and children of deceased. But another principle has operated to make succession less onerous, namely, the acceptance of the equitable principle that a successor should be liable for debts only so far as these do not exceed the assets. This was initiated by the Supreme Court; and the attitude of the more sophisticated Native Courts today is that it is useless to enforce the

old rule, as it would be reversed on appeal. It is worth noting the statement given me by one informant, which would seem to cover the point today; (1) debts contracted by deceased and not brought to the notice of the family bind the family in honour only, i.e., if the family pay them, it is to avoid disgrace and not because of a duty to pay;
(2) debts notified to the family bind the family; the liability is thus based, not on succession, but on guarantee. The family have allowed the debts to bind family property, which is what the self-acquired property of deceased has become on his death. It will be seen that this statement partly answers our question, but that it also concerns a different point, the liability of the family and the family property; it does little to clear up the liability of the successor personally. It can be said that the whole law relating to liability for debts of deceased persons, and especially the questions: on whom does the liability fall? to what extent? does the debt (if secured) affect the land? what is the effect of notification or consent or guarantee? - is in a state of confusion today. Modern native custom may work out a unified and satisfactory answer to these questions eventually: it has not done so yet.

3. THE CHOICE OF THE SUCCESSOR.

Something has already been said at 2.(b) about the choice of the successor; it was indicated there that the successor is appointed by the family of the deceased, and from the members of that family.

(a) Time of appointment:

The burial of deceased, which for obvious reasons must take place as quickly as possible, must be distinguished from his funeral. The body may be carried to the ancestral house, and from there to the family burial-ground. The funeral takes place several days thereafter. Usually on the eighth day after death there is a family meeting after the funeral. At this time the properties of deceased are described and an inventory taken. The debts of deceased are also calculated; and it is at this time that a creditor of deceased should put in evidence of the debts owed to him by deceased.

(b) Persons eligible for appointment:

The reader is referred to the table at 2.(d), and also to the works of Sarbah[22] and Rattray.[23] Sarbah's terminology - "Real, Proper, Ordinary, and Extraordinary" - is unduly complicated. Only (i) persons of the blood; (ii) domestics, may be appointed successor. A person not of the blood, e.g., the spouse; a child of male deceased, cannot be appointed

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22. F.C.L. 101 et seq., especially at p. 102.
23. Ash. 41 et seq; A.L.C. 40-2 (slaves).

successor. The task of the successor is religious as well as civil; the religious part of his functions can be performed only by a member of the family. (The question of who can succeed by testament is postponed until later.)

(c) Mode of appointment:

This has also been dealt with: normally the deliberation and choice take place within a confined circle - of the deceased's sub-lineage, of the elders of the family. Their decision is submitted to the rest of the family for approval. The successor signifies whether he is willing to accept the appointment or not. If he is so willing then he will give aseda or drink to the family (to the head of the family?) to signify his acceptance, and seal the appointment.[24] The properties he is then going to receive are exactly described to him, together with any special provisions about the repayment of debts, or the devotion of a portion of the proceeds to any special purpose (e.g., the education of the children of deceased). The question of succession to the widows is gone into; and portions of the property may be divided between different members of the family.

It is not compulsory for the successor to be appointed at this time; or, if he is so appointed, for him to accept and give aseda at that particular time. The war produced some elaborations of custom, as where the person who was preferential

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24. Cf. Danquah A.L.C. 184.

successor (perhaps the brother of deceased) was absent on war service. In such cases, either the appointment is postponed until the potential successor can return; or else he is appointed and signifies his acceptance as soon as he can.

4. THE SUCCESSOR: HIS DUTIES.

Consideration of the duties of the successor is placed before that of his rights, partly in order to combat the growing tendency to treat succession as a valuable right, whilst ignoring the fact that it also implies corresponding duties.

(a) Funeral Debts:

The successor has to pay a portion of the funeral debts and expenses. As a member of deceased's family, and more especially as a member of deceased's restricted lineage, he is liable to contribute; and as successor he is liable to contribute a larger share. Warrington[25] states that

> "The heir is responsible for the expenses of the funeral custom, but...if the deceased leaves no property the family will come to his assistance."

How far this is an accurate statement of the custom is doubtful when set against other information, personally obtained, that the successor pays one part, and the family two parts, of the funeral expenses.[26]

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25. p. 39.
26. From Akwapim; and, in Matson's edition of Warrington, this passage was amended by the Committee to read: "The funeral expenses of a deceased person have to be paid by members of the Family equally before electing one to the Stool, or to the vacant room of the deceased." (Digest, p. 74.)

But is deceased head of a lineage or merely of a household? Or merely a member of a household?

(b) Other debts of deceased:

As noted previously, this is a vexed question. There can be no doubt that formerly the successor was liable to pay all the debts of deceased, even where they exceeded the assets;[27] and in certain instances this was still quoted to me as the rule.[28] This principle is being whittled down, and now in many cases he refuses - and the native courts may uphold his refusal - to pay more than the assets.[29,30]

What of the liability of the family in regard to the debts of deceased? If the successor refuses or is unable to pay deceased's debts, then the responsibility comes on the family to pay them. Once having paid them, the family may exact the amount from the successor, or remove him from the position, if the refusal was unreasonable. But - to indicate the conflict

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27. E.g., Akim Abuakwa.
    Cf. Danquah, A.L.C. 184; Sarbah F.C.L. 108.
28. E.g., Bekwai, New Juaben, Mankessim; Warrington (p. 38).
29. E.g., evidence from New Juaben, Akim Abuakwa, etc.
30. According to one set of informants, the successor was formerly liable to pay -
    "all debts, but the British Courts (C.J. Sir George Campbell Deane, Kt) have ruled that the successor must not be compelled to pay more than the estate can cover, unless the debt was secured. This rule has been warmly welcomed.
    The debts whether known or not (to the family) must be announced and declared to the family by the creditor at the time funeral expenses are being reckoned, or at some convenient time during the funeral. A secured creditor may not do this, but his right cannot thereby be wholly defeated. All debts are, subject to the above, payable whether known to or approved by the family before death or not."

of evidence in regard to this point - I cannot do better than give some of the opinions collected verbatim:

> "(the successor) becomes personally responsible for all the liabilities of deceased; if the deceased is in debt the heir may apply to the family for assistance and this will probably be forthcoming, but the family has no legal responsibility in the matter." (31)

> "A man's debts are inherited by the family, and the family must pay them, even if they exceed the assets. The successor is solely responsible for the debts of deceased, although usually aided by other members of the family where they are onerous." (32)

> "The deceased's debts are the responsibility of the family on his death; but payment of them falls on the person who succeeds to the deceased's property." (33)

> "The family is liable to pay deceased's debts, provided there are family members as witnesses, and the creditor puts in his claim in due form. But the family transfer the liability to the successor when he is appointed." (34)

It appears from the evidence that the primary liability to pay the debts of deceased rested on the family of deceased. This is in line with the former rule of liability, by which the family was liable both for the debts and torts of its members. It appears to be generally agreed that the liability is transferred to the successor at the time of his appointment; but that he has a dual remedy if the debts are onerous: either to

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31. Warrington, 38.
32. Mankessim.
33. Bekwai.
34. N. Juaben.

refuse the appointment, or else to ask for assistance from other members of the family.[35]

The question of guarantee by the family enters in here, however. If payment of a debt owed by deceased is guaranteed by the family, then on his death the debt probably becomes a family debt, and not the debt of the successor. It was stated that if deceased leaves a debt guaranteed by the family, and the family refuse to pay it, then the successor may himself sell a farm inherited from the deceased to pay off the debt.[36] Such a statement serves to show that in such a case the primary liability is with the family, and not with the successor. The creditor may, however, come against the successor for the debt; and the rule quoted (not verified elsewhere) supports the successor's recouping himself out of the family property.

A guarantee must, however, be distinguished from mere witnessing by the family or some of its members. Many informants stated that there was no liability to pay debts of the deceased, unless members of the family had witnessed them.

And again, it was the original rule that the creditor must put his debts in proof timously, i.e., within eight days after the death of deceased.[37] But owing to the difficulty for creditors of attending from distant parts or of being

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35. So: Danquah, A.L.C., 184.
36. Bekwai.
37. Confirmed in Warrington, 38-9; and see also Matson, Digest, p. 27, para. 110, and Ratt. A.L.C. 370, R.A.A. 159.

immediately advised of the decease, this rule is now being broadened in practice by the courts to allow payment of debts declared within a reasonable time.[38]

(c) Maintenance of dependants of deceased.

Formerly it was one of the prior duties of the successor to maintain the wife or wives and children of the deceased; and it is still his duty, although today sometimes not observed in practice. This duty to maintain dependants was strongly affirmed from several quarters, especially in regard to the children.[39] It was said that he might inherit the wives of deceased; but this must not be taken to mean that wives are or were treated as chattels. By the custom of "levirate", the successor is married to the widow (without the need for fresh payments of head-money, etc.) and the step-children also come within his care. This is not so much a new marriage, as the continuation of the existing marriage. However, children born to him belong to him, and not to his deceased brother.

This custom was by no means harmful to the interests of the widow and orphaned children. It in fact served the same function as the contributions to Widows and Orphans Funds do

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38. And also of better modes of proof, e.g., by writing. Although by English Law the Statutes of Limitation do not operate over transactions governed by native customary law, native law had thus a kind of limitation; and in any case where there is a writing English law may apply.
39. E.g., Akwapim, New Juaben, Mankessim, Ratt. A.L.C. 28-30.

for some civil servants today. The custom is now becoming somewhat less common; at the same time some successors are endeavouring to avoid their duties of maintenance. It is inequitable that the wife or wives (sometimes with their children) should be left destitute, or maintainable by their own family, especially if it is true (as was given by one informant) that the head-money is not returned, whether the widow stays or is sent back to her own family.[40] It should not be forgotten that the children have a limited right of residence in their deceased father's house, a right which is enforceable against the successor in the first place, and then against the family. Widows have a similar right, but it is a weaker one, and is stated by some to be conditional on her marrying the successor.[41]

Contrariwise, a testator now endeavours to provide for his widows and children after his own decease by means of written and other wills - one breach of custom has provoked another.[42,43]

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40. According to New Juaben.
41. The successor must maintain deceased's children:
Akwapim, New Juaben;
- and the widow, "unless he refuses to marry her":
New Juaben.
42. Tawiah v. Addo: (N. Juaben A Ct: Suit 272/46) illustrates the duty of maintenance, and also the right of residence for the children. Defendant was successor to Y.K., who left a house. "According to the plaintiffs the defendant was appointed to inherit the estates of their brother late Y.K. on condition that he should maintain the plaintiffs and children and not only his sisters." In this case the immediate sub-lineage of deceased were already resident in the house which was inherited.
43. (See next page).

The reader may also refer to Danquah[44] for a description of the rights of children, and the duties of a successor.

(d) Duties in the use of inherited property:

The successor is bound to use the inherited property wisely, since such property is now - if it was not before - family property and not his own. If the property is land, or buildings, he must not commit waste; but must maintain it in reasonable condition. There is less supervision over his use of movable property.[45]

(e) His liability to be divested:

The successor is appointed by the family; and although he normally keeps the inherited property until his own death, he is liable to be divested by the family for good reason.[46] Such reasons include:

(i) Denying the family's title to the property.

(ii) Attempting to dispose of the property without the authorisation of the family.

(iii) Committing waste; although it is doubtful

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43. (From previous page) -
And both the Ashanti Confederacy Council (as reported in Matson, Digest, pp. 26-7) and the Joint Provincial Council in the Colony are endeavouring to modify the traditional rules of succession.
44. A.L.C. 208-9.
45. But it was stated that if he inherits a house together with furniture, then the family will make sure that he does not lose or dispose of the inherited furniture. If he does so, he may be deposed.
46. "The successor...appointed may at any time be dispossessed by the Family if he is found to be wasting the property." (Warrington: 38).

whether the family would divest him for failing to devote his full energies to the property.[47]

(iv) Non-use perhaps.

(v) Bad behaviour to the family, perhaps. This might cover such things as failure to contribute to proper family debts; failure to pay any portion of the proceeds to the family where this is required by the custom of the family, or the terms of his appointment; failure to observe the terms of any "trust" impressed on his use of the property; insolence, turbulence, and the like; failure to maintain widows and children of deceased; failure to allow other members of the family use of portion of the inherited property, where he does not require this for his own use; etc.

(vi) Failure to pay the debts of deceased, or share in the funeral custom(?).

5. THE SUCCESSOR: HIS RIGHTS AND POWERS.

The successor, unless this is varied by the will of deceased, or by the family, succeeds to the whole property of deceased. This property may be various, and includes both rights over persons:

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47. An instance of waste was that alleged in Tawiah v. Addo (see above), where it was alleged that the successor had
(1) demolished the upper story of an inherited house;
(2) disposed of cement blocks lying on the site, but not yet used for the building.
The waste was proved, but the plaintiff non-suited on another ground.

(i) wives;

(ii) patria potestas over children of deceased;

(iii) slaves: this is now replaced by rights over the property of domestics attached to deceased;

(iv) persons in pawn to deceased: this no longer applies;

and rights over property:

(v) interests in land of various kinds: farms,etc;

(vi) houses;

(vii) chattels of deceased: some of these do not go to the successor;

(viii) cash of deceased;

(ix) "choses in action": the benefit of debts due to the deceased, etc.

The rights over persons to which the successor succeeds require little mention: the first two have already been discussed. The fourth is no longer of legal importance, the pawning of persons having been officially abolished. There is however a modern practice - unrecognised at law - similar to pawning of persons. I cannot say whether the successor succeeds to the benefit of any such contract of service or not since the courts are officially debarred from discussing the point.

As to the third, although slavery is abolished, the position of "domestic" remains, and the reciprocal rights in

property which exist between a master and his domestic enure for the benefit of the successor. The deceased may have allowed the domestic to cultivate land; on the death of the domestic the land would revert to the deceased. Now, it will revert to his successor.

The successor takes over the rights of deceased in his property, but not in toto. Self-acquired property of deceased is now inherited property in his hands, and he cannot deal with it freely. The successor succeeds both to the self-acquired and to the inherited properties of the deceased: these are now on an equal footing.[48]

(a) Successor's right of use:

If the successor succeeds to farms he is entitled to use them freely; and the product of the farms will belong to him absolutely, apart from any portion which he may have to contribute to the family.[49] In some families it seems to be the custom for the proceeds of such farms (especially cocoa-farms) to be collected by the head of the family or his representatives; they are then paid back to the successor holding the

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48. The position of the successor in relation to property which he inherits was frequently described as that of "caretaker" for the family. In the sense that he is a "trustee" of the property, and has no personal power of disposal over it, this is so. It will be noted that he is not like a normal caretaker, since for one thing he pockets all the proceeds of the property as a rule.
49. E.g., for the celebration of the yearly festival.

farm after deduction of a portion for family revenue - this I consider unusual. Customarily, it is the successor's duty either to pay over a portion of what he realizes from the land (which payment is then a charge against the land); or to contribute as required (the payment then being a charge against himself). The latter case - which I consider the normal - means that his liability to contribute to joint family expenses is not a condition or a consequence of his holding the inherited land; although his affluence or otherwise will be taken into account in assessing what contribution he should make.[50]

In practice, it would be impossible to tell whether a farm which a person was working came to him by way of succession or was self-acquired, merely by a physical examination of the property and his mode of working; since during his lifetime he will treat it and cultivate it exactly the same as other properties of his.

The successor's use of inherited properties - if these are

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50. "The successor does not have to pay over any portion of the proceeds from his inherited property to the family. He may freely use all the proceeds from, e.g., cocoa farms or letting of rooms in an inherited house." - New Juaben.
But if the successor refuses to contribute to family funds at all, then the family might dispossess him, on the ground of his failure to meet family obligations.
A successor refusing for no good reason to assist another member of the family who wanted land, and had begged a portion of the inherited property to "eat from", would be taken before a family arbitration; and would be liable to be divested if found at fault. - Akwapim.

farms - is exclusive; other members of the family have no right to use the property or a portion of it without the permission of the holder, or of the head of the family. The successor's right of use is unlimited, although his title is qualified or derivative. His right over inherited farm-property therefore differs from his right over inherited house-property. Of course, there may be lesser rights already in existence over a farm to which he succeeds, the rights of relatives, widows of deceased, or children of the same, rights which are preserved despite the change in control.

Where houses have been inherited, then, although the primary right is with the successor, other rights may also be in existence, or later come to exist:

wives of deceased have a continued right to reside in their late husband's house at the will of the family;[51] children of deceased have a continued right to reside in their late father's house. This right is not at the will of the family, although they may be evicted for various reasons - bad behaviour, and so on. This right does not extend to the children's children, except by grace of the family. (We refer now of course to the case of male children of a male deceased.)

The successor acquires a right to reside in the inherited house, together with his dependants.

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51. The successor may send her back to her family if she is of bad behaviour.

The house, if already an inherited one, may have other members of the family already residing there: at the lowest, members of the sub-lineage of deceased; in time, members of a larger circle. These members normally have the right to continue their residence in the inherited house.

Apart from these persons, there is a moral duty - in some areas perhaps a legal duty - to permit other members of a family to reside in such an inherited house, if they are homeless. This is quite apart from the rights of family-members in the principal family house. To refuse to put up members of the family when possible would be considered a very disgraceful procedure. It also seems to be the rule that once a member of the family has been allowed to reside on a semi-permanent basis in a portion of such a house, he has a legal right to continue his occupation on the same terms as children of deceased.

The profits received from an inherited house usually belong to the successor, and he does not receive them as agent for the family, nor is he accountable for them. In particular, it was stated that the profit made from letting rooms belongs to the successor absolutely. He is bound to use such money for the maintenance of the house, since he is under a duty to maintain the inherited property in reasonable condition; and he could not be heard to say, where he has made such profits, that he could not or would not maintain the property in good condition.

Movable chattels received by the successor are usually treated by him as his private property, and he is not accountable for them; but there are exceptions to this rule - one has already been given in regard to furniture in an inherited house. Another may be - though I have been unable to check this point - in the case of lorries, and other large capital goods.

Cash inherited by a successor (and also by any other members of the family amongstwhom it may have been divided) is expendable at the discretion of the successor. The family are not bound to hand over all the cash of deceased to the successor, and they have a right to withhold it, or divide it up amongst the family-members. There is, however, a presumption that the successor is entitled to take for his own use such assets as deposits in Post Office Savings Banks. Frequently, the cash of deceased will be divided up amongst the members of the family (including the successor, and also perhaps the children of deceased - even the widow may get something) by the family when they meet after the funeral. It should be stressed that the successor has only got a right to such money as the family decide to give him; and although there is a presumption (as stated above) that he is entitled to claim P.O.S.B. deposits of deceased, Cocoa Rehabilitation grants, etc., it is open to the family to show that the successor was authorized to claim these benefits in his own name, but only as agent for the family. In the particular case of C.R. grants, African custom seems to

be working out a doctrine of conversion: the land of deceased being converted into cash, the successor inherits the cash as land; and the family usually insist (as they have a right to do) that he convert back the cash into land at the first opportunity; or alternatively, that he use it in rehabilitating deceased's devastated farm.[52]

(b) Successor's rights of control and disposal:

The successor, whilst he so continues to be, occupies a dual capacity, as he acts for himself and for the family. He controls the property in the family interest, and uses it in his own. If he is delinquent in his control of the property, as for instance by:

(i) allowing a title alien or adverse to that of the family to be set up;

(ii) failing to control receipts and expenditure, where these are for the family (e.g., by failing to collect rent, or to pay it over to the family);

(iii) wasting the property, including failing to secure benefits which might have come to the property (e.g., C.R. grants - compare the English law relating to a mortgagee in possession);

(iv) not allowing other landless members of the

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52. I have heard frequent complaints about the difficulties which occur through having P.O.S.B. deposits, especially the danger that a person, not even yet appointed successor, may go and claim the deposit as "heir" of deceased. The procedure might well be overhauled.

family - if the property is land (or homeless, if it is a house) the use of part of the inherited property;

(v) setting up an absolute claim to the property;

(vi) disposing of the property without the family's authorization; etc., etc.,

then he is liable to forfeit in whole or in part - at the discretion of the family - the rights of use and control delegated to him by the family. This forfeiture can only take place as the result of the solemn act of the family, usually as the result of a family "arbitration"; and there is no such thing as automatic forfeiture.

Apart from this, the successor controls and manages the property as though it were his own self-acquired property. His rights of control, however, do not extend to cover disposal of the property.

Rights of disposal: in general the successor may dispose of temporary and partial interests without the prior authorization of the family.

If the property is a house, he can - and does - permit his wife and children to reside there. He permits the dependants of deceased to reside there also. He can permit members of the family to reside there freely. He can allow friends to stay there; but in some cases he is not permitted to let out rooms, lease part or the whole of the house, without the family's authority. There is, however, conflicting evidence on this

point.[53]

If the property is house-land, he may allow a friend to build there free. In such cases, it is safer all round for the successor to notify the family - if he is wise; and also to charge the house builder something (e.g., sheep or drink) annually; otherwise the family may object that the security of their title is being impaired.

If the property is farm-land, then the successor will work it in company with his wife and children and servants as if it were his own property; and he may - as is customary - reward their services by giving them temporary use of a portion of the land for their own benefit. Unless the family were present and consenting at the time of the gift, or have subsequently given their approval for the gift to be permanent, such a gift does not bind the family after the successor's death; and the family may withdraw the gift.

The successor may appoint a caretaker, and often does, to look after the property. He may also admit a stranger as tenant, either on the abusa system, or for an annual fixed payment; sometimes he needs the permission of the family before doing so; and it is always wise to inform the family to avoid trouble.

In some parts of Akan country a successor may pledge

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53. E.g., not without the family's consent: Akwapim; without the family's knowledge or consent: New Juaben.

inherited property without the previous consent of the family. In other parts he may not do so.[54]

If the successor incurs personal debts, the creditor will attempt to obtain execution by order of the court against the property of the debtor. Family property cannot be attached for the private debt of one of its members. Frequently, however, it happens in practice that inherited farms are so attached under Writ of Fi.Fa. and then sold at public auction. Such a sale is in theory invalid and of null effect. In practice complications arise: families were by ancient custom liable for the debts and torts of their members. This applies only in part today; but if the family have notice of such a sale, and do not interplead, or the sale has taken place and comes later to their notice, but they allow the purchaser to remain in possession undisturbed for a long time, then some courts will uphold the purchaser (on the grounds of estoppel or equity) and the claim of the family for recovery of the property will be rejected.[55,56]

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54. A pledge of inherited property is not enforceable against the property unless the family have signed as witnesses: New Juaben.
"The heir is allowed to pledge Family Property in order to raise a loan." - Warrington, 38.
He has no power, but consent of his section may be enough if the property is unimportant: Akim Abuakwa.

55. Jackson, J., discussed this question at some length in the unreported case of Appreku v. Kwakyi: (1950): Land Court, Kumasi, 6/3/50; he rejected the idea that family land could be thus attached for the private debt of one of its members; the judge went on, however, to put for-
/over

56. (See next page)

Sales: No successor can sell inherited property without the authorization of the family. A successor cannot "make title", since title is in the family as a whole. Two cases must be distinguished:

(1) the successor sells his inherited property, with the authorization of the family or members thereof; the proceeds are taken by him for his own use, perhaps giving a portion of them to the family;

(2) (the older and stricter custom) the successor receives authority to sell the property from the family. The successor acts as agent of the family. The proceeds belong to the family; but the family may allow the successor to keep the whole or part thereof. According to Warrington[57] the successor "is allowed to sell inherited property in order to pay the debts of the deceased"; but usually either he should work the property in order to pay off the debts; receive a loan from the family

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55. (cont. from previous page) -
ward the theory that the judgement creditor (or the purchaser at the public auction) could take the life interest of the judgement debtor in the family property, since "his rights in this case to enjoy the usufruct of the land is one which he can convey to another without that family consent and to that extent and to that extent alone his interest in the land may be sold"; and on this ground could grant a kind of "estate pur autre vie" to the purchaser. The theory is attractive, but it is submitted with great respect that it is untenable.

56. The matter is considered more fully in the Chapter on SALE, at pp. 375 et seq.
See also LONG POSSESSION, at pp. 717-722.

57. p. 38.

(on the security of the property); or failing all else, sell with the family's authorization.

6. THE FAMILY AND SUCCESSION.

Various matters will be discussed under this head, principally concerning variations in the normal custom of succession, or cases where the successor or deceased person is other than an ordinary member or "young man" of the family.

(a) The Head of the Family as successor:

When a member of the family dies, it is inaccurate to say that the head succeeds to the properties, and then allocates them to the successor appointed by the family. It is even inaccurate to say that the head so succeeds as official head, as "trustee" for the family. The head does not succeed in this case in any sense at all. The property of deceased falls into or reverts to the pool of family property, whence its use is temporarily shared out by the family. It might be truer to say that the family succeeds to the deceased man.

It is not customary for the head of the family to succeed to the private properties of deceased "young men" of the family.[58]

When a new head of the family is appointed, if it is on the decease of the previous head then he will usually succeed to his private properties also. If on deposition of the previous head, then the inherited properties of the previous head

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58. Sed quaere whether the same applies to a section-elder or head of a house?

may be left in his hands and not transferred to the new head of the family; (though of course family property in the wide sense managed by the head will pass into the control of the new head).

(b) The family's liability for the debts of deceased:

Formerly the custom was that the family was ultimately liable for the private debts of a member; and they are still so liable by law if they have guaranteed the debt, or the debt was contracted for family purposes with the consent of the family. Where the deceased contracts a debt secured on his farm, or a successor with the consent of the family raises a loan on the security of an inherited farm, the case is somewhat different. Here the liability of the family is a liability only insofar as it affects the particular portion of family property; if an inherited farm is thus given as security, then the creditor will be able to take it in execution; but this does not entitle him to proceed against the family as a whole, or against the rest of the family property.

The family usually transfer their liability to pay the debts of deceased to the successor appointed. But if no successor is appointed the family's liability remains primary; some informants said that this would equal a repudiation of both the deceased and his debts. Others said it would not be done because of the great disgrace it involved.[59]

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59. And see ante, pp. 567 et seq.

(c) Succession to a stool-holder:

If a stool-occupant dies, then one person may be appointed to succeed him on the stool; another to succeed to his private properties.

(d) Succession to head of family:

The new head of the family usually succeeds, I believe, to the deceased head's private property also.

(e) Non-appointment of successor:

Not to appoint a successor more or less declares the deceased as an outcast from the family; and it must be extremely rare (but there are instances). One instance is where no-one is willing to accept the appointment. It is a question whether the family would remain liable for the deceased's debts in such a case.[60] Such action would only be taken where either deceased had cut himself, or been cut, off from the family (as by the old method of "cutting ekar"); or else where he left debts and no assets. Usually someone would be appointed, at least to look after the widow and children.

(f) Succession to slaves, domestics, stool-servants:

Slaves: the master succeeded formerly to all his slave's

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60. If there is no successor "the Head of the Family must take on the position and any debts of the deceased will be the debts of the family as a whole": Warrington, 38.
Deane, C.J., rejected the liability of the family in Asiedu v. Ofori: 97/1932, because, inter alia, he held it to be incompatible with Rule 8 Order 44 of old cap. 158. In this case the deceased left debts and no assets: no successor was appointed.

property. But now "a claim to the administration of a deceased native which is based on slavery is unenforceable".[61]

Domestics: in custom, but perhaps not in law recognised by the Supreme Court, the master succeeds to the property of his deceased domestics (or descendants of former slaves of the house). He certainly has the right to take back all property given by him to the domestic during his lifetime.

Stool-servants: the successor to a stool servant is appointed by the stool-occupant, with the presence and/or concurrence of the relatives of deceased. The stool occupant may take back gifts made to the servant by the present or a previous occupant of the stool.[62] Other cases in the British courts have recognised the validity of the custom, even today.[63]

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61. In re Damptey, Kodieh v. Affram: (1930) 1 W.A.C.A. 12; and in Wood v. Thompson: (1909) Earn. 15, succession to a slave by his master's family was declared repugnant.
62. Warrington agrees that it is the Ashanti custom that the property of domestics, if they are "fienipa", or even if they were not slaves, reverts to the Stool on their death (p. 42); the rule was considered in Kodieh v. Affram: (1930) 1 W.A.C.A. 12, but was rejected as being based on slavery. See, however, Ambah v. Libra: (1927) F.Ct. '26-'29, 241.
63. E.g., in Nana Juaben Serwah v. Fordjour: (1948) (Unreported Civil Appeal 45/1948, Land Court, Accra, 15/7/48; coram Jackson, J.). This was an appeal from New Juaben Native Court, upholding the right of the Queen-Mother to take back a grant of land made by a predecessor to a servant in exchange for customary services. The learned appeal judge described this transaction as:
    "It appears to me to have been rather a grant of land as a reward for past services to the stool and in anticipation of the continuance of the services in the future. The right to occupy the land and enjoy its fruits was one limited by the condition that the

(over)

(g) Succession to church members:

Increasingly today deceased may be a member of one of the Christian Churches: these churches have rules governing the intestate succession to their members, which, although binding on the members, cannot legally take effect so as to bar the rights of non-members, e.g., the family of deceased.

Such Church rules usually provide that 2/3 of a member's self-acquired property should go to his widow and children, and the remaining 1/3 to his family (i.e., to be handed on to the successor customarily appointed).

The following points are worthy of notice:

(i) In many cases, especially where most of the family are members of the church in question, the family do not object to this distribution.

(ii) A successor is still appointed to deceased according to custom.

(iii) Elders of the Church, or ministers, may be present at the time of the distribution of deceased's estate (i.e.,

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63. (cont. from previous page) -
occupier would continue to render those customary services.

There is nothing in the record to suggest that the nature of the services were so unreasonable as to offend against the dictates of natural humanity or justice; on the contrary, I am of opinion that it would be an injustice for the appellant to accept and enjoy the benefit of the land without at the same time shouldering its burdens."

after the funeral) in order to safeguard the rights of widow and children.

(iv) The successor will still give customary assistance to (and still retains customary powers over) the children of deceased.

(v) The 2/3 for the widow and children is theoretically divided: 1/3 goes to the widow, 1/3 to the children. But in practice the mother keeps the property as a whole, looking after the children's share on behalf of the children.

(vi) If the deceased leaves only one self-acquired house, then the widow and children acquire this as of right; but the successor also has a right to reside there. The children's children will also have a right to reside in the house. The widow and children's right is therefore larger than that which they possess by custom, since, first, it is not permissive or subject to good behaviour, as with customary rights; secondly, it is transmissible; thirdly, it is apparently vendible if all, including the successor, agree.

It may appear surprising that a man's unilateral act - joining a church - can affect other persons' customary rights and interests; and that a pagan family accepts the situation. This is to be explained by the urge towards compulsory provision for widow and children on the death of intestates, an urge shared by members and non-members of churches alike. It must

be stressed that members of the family of deceased who do not belong to the church in question are not obliged to allow these rules to operate; if they feel so inclined, they may oppose the arrangement. Where the majority of the family do not belong to the church, I am informed that difficulty arises, and they will object to the application of the church rules. Nevertheless, the head of the family will still give something to the wife and children of deceased, since the fact that by the rules the widow and children are entitled to a 1/3 share each will have been known by the family for some time. Apparently, until individual persons began to accumulate wealth, families of pagans were quite willing to allow the rules to operate; and some still do today.

(vii) The Native Courts are sometimes willing to uphold the operation of these rules in whole or in part. Often today they reach a compromise solution. I am indebted to Matson's invaluable paper on "Custom in the Courts"[64] for references to two Ashanti cases, which exemplify the attitude of the native courts. In an Agona case of 1942, Darkowa v. Poku, the division mentioned above was made by the Native Court in accordance with mission rules. In a later case from Juaben (mentioned by Matson at p. 7 of his paper) a judgement in similar terms was apparently reversed by a magistrate on appeal. Native Court members and registrars to whom I have spoken

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64. Unpublished

realize now that these rules are not of legal effect; but nevertheless they are willing to operate them where possible. Various Native Authorities have drafted rules of their own, or influenced the attitude of the Native Courts, to cover intestate succession cases (even where pagans are involved). Akim Abuakwa's Declaration of Native Customary Law on the subject, issued as a Proclamation in 1943,[65] is administered in practice by the Native Courts, though suspect law. A ruling by the Ashanti Confederacy Council in 1948 that 1/3 of a man's property, if he dies intestate, should go to the widow(s) and children, is being applied by Native Courts under the guise of equity.[66] In one case, where a successor refused to give the widow and children of deceased anything from deceased's estate, he was ordered by the native court to make provision for them as a matter of "equity".

A further interesting feature of modified custom was reported. In several towns where the old Basel Mission was established (viz., in Aburi and other Akwapim towns) a special quarter for church members was established a little way out of the existing town. The land was acquired by the mission from the local chief free in return for drink. On the land acquired (often large in area) mission members built their houses. In several of the towns this area is called "Salem". It was

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65. See Gold Coast Gazette, 1943, p. 377.
66. Cf. Matson, Digest, pp. 26-7.

stated that only Christians may live in Salem; the owner of a house cannot sell it, his wife and children inheriting it for a joint estate. The pagan family of the owner have no claim to such a house.[67] As an instance of the extent to which a "centre extra-coutumier" was established, it was stated that formerly gong-gong could not be beaten in Salem, unless the local chief obtained the consent of the pastor. Where deceased owns a house in Salem, then there is today a tendency for his family outside to refuse to satisfy the third shares laid down in the Mission Rules for the widow and children. My informant said: "This is the beginning of patrilineal inheritance."

(h) Succession to Mohammedans:

It must be emphasised that converts to Islam, unlike converts to Christianity, occupy a special position in regard to inheritance. It is strange that members of a religion numerically small in the Gold Coast, governed by a Christian state, should enjoy privileges not shared by members of Christian churches. Whilst the claim of persons not customarily entitled on the intestacy of a Christian is based on moral grounds and influence and customary law cannot be varied in their favour as of right, succession to a convert to Mohammedanism is governed by the Marriage of Mohammedans Ordinance,[68] under which

67. Cf. Danquah A.L.C. 184-5, especially at p. 185 for an account of similar rules in Akim Abuakwa.
68. S. 10, provided he has made a Mohammedan marriage registered under the Ordinance.

But in practice Muhammadans follow the customary laws?

Islamic Law alone is applied. There are not many cases of conversion to Islam among the Akans; but in one case encountered at Obuasi, Ashanti, succession to a convert to Islam was ordered by the local native court in accordance with Mohammedan Law, and not by Akan custom.

B. TESTATE SUCCESSION: BY CUSTOM: SAMANSEW.

Apart from dying intestate, a man has the power by native custom to make a customary will, and by English (Gold Coast) Law a written will also. Re Anaman[69] lays down that "intestacy" means dying without making an English will; so that a person who dies after making a customary will still dies intestate by Gold Coast law. It is to be hoped that this attitude may be modified by the courts or the law in future years; since the time of this decision, customary wills have become much more rigid, less a wish than a will in fact; and since the intention is to develop customary wills, perhaps in written form, it seems obvious that it will not do to call a man who makes one an intestate. It is with this hope that I include consideration of the customary will under the head of "testate succession".

The native customary form of oral will is variously called "samansiw", "samansew", "samanse", "nsamansie", "sammansiew",

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69. (1894) F.C.L. 221.

according to district or author. I use here "samansew", which is apparently phonetically preferable to "samansiw", the most usually-found form in the literature. The word means "what the ghost said";[70] or "what the ghost set aside":[71] it is the dying remark, wish or provision of deceased. It has long afforded in custom a method by which the customary devolution of property at the death of the holder might be varied by that holder in his lifetime.

The history of samansew has passed through various stages. In its earliest, as the name indicates, it was the expression of a wish by a person on his deathbed as to the destination to which he wished his property to go; and it was left to the family, out of a respect and fear for the spirit of the departed man, to carry out his wishes to the best of their ability. The carrying out of such wishes was not mandatory, there being only a moral and religious obligation. The wishes were probably expressed only with regard to the destination of his few personal belongings, and their bequest could operate only within the family, and perhaps to his wives, children and slaves.[72]

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70. Akim and other informants.
71. Ratt. A.L.C. 15.
"That which is left by the spirits" - Samansie: Ratt. Ash. 238. Matson, in his article Testate Succession in Ashanti, Africa, July 1953, 224, spells the word "saman-nse" in Asante, and doubts Rattray's etymology.
72. There is a distinct analogy with Charles II's famous death-bed wish: "Don't let poor Nellie starve!"

In the second stage the custom developed before English law had had the chance to interfere. The Akan people were now settled farmers, and the obligation was now gradually shifting from morality to law.

In the third stage, that which the custom has reached today, the oral will has become rigid and extended; so that property may be left outside the family altogether to strangers in blood; and the powers of the family are being correspondingly reduced.

1. THE NATURE OF SAMANSEW:

In its original form samansew was a species of death-bed wish; from that it developed to become a member of the larger genus of GIFT (q.v.); and the analogies and confusion with gift today are close.[73] Samansew can, however, be distinguished from gift just as in Roman Law "donatio inter vivos" was distinct from "donatio mortis causa". Samansew, which now resembles donatio mortis causa, was not so originally. Being only a wish, there could be no gift.

The original features of samansew thus were that it was oral, made in contemplation of death, was a wish, was subject to the family's consent, and was in fact made on the death-bed of the testator.

There are some who deny even today the enforceable

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73. Matson, op. cit., 224, in fact calls it an "inchoate gift".

character of samansew, and who say that where it is legally enforceable it is a gift inter vivos. One informant said:

> "The family are not bound to carry out the wish or will of the deceased relative, for, upon his death, the property is no longer his, but the family's. The family may however respect his will or wish and allow the beneficiary to take upon paying an aseda."[74]

The Akim Abuakwa Declaration[75] does not seem to imply that samansew takes effect as a wish only.[76]

Where aseda is paid by the beneficiary, is this gift and not samansew? Aseda is an almost invariable feature of those customary wills that are reported; but there may be a confusion here. One informant said that if aseda is paid during the deceased's lifetime to the family, then the transaction is gift and not samansew.[77] The aseda to which we commonly refer in this connexion, however, is paid to the testator: it is this which makes the gift irrevocable by the testator. Aseda is also commonly paid to the family by the beneficiary when he accepts the thing bequeathed (i.e., at the time of the funeral and after).

There are some forms of gift which cannot truly be called

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74. Akim Abuakwa.
75. State of Akyem Abuakwa (Declaration of Native Customary Law) Proclamation, 1943: Gazette Notice No. 769, p.377, 1943.
76. And cf. Rattray, A.L.C. 338-9.
77. But Danquah, A.L.C. 198, seems clearly to distinguish between samansew and gift inter vivos; the criterion is that "the donee must be given an opportunity of possessing and owning that estate during the donor's lifetime".

wills. Sometimes a temporary gift of usufruct is made by a man during his lifetime to his wife or children. This may subsequently be ratified in the presence of members of the donor's family as a bequest operative on the death of the testator; the gift is made absolute, the family forfeiting by their presence and consent any future claim to take the property back on the demise of the donor. This is the type of perfected gift inter vivos to which the informant probably refers.[78]

Time of making: the bequest was usually made when in contemplation of death, and in the grip of mortal sickness. Custom now allows a bequest of this kind to be made at any time, though this is not yet an invariable rule.[79] It is true that

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78. Cf. GIFT, p. 545.

79. At any time : Akwapim.
Deathbed, preferably; but a gift with family witnesses is fully operative if made at any time: New Juaben.
Deathbed : Bekwai.
Deathbed : Ajumako.
In sickness : Akwapim.
Not necessarily on the deathbed, but made in contemplation of death : New Juaben.
In expectation of death from illness however caused : Akim Abuakwa Declaration, 1943.
Deathbed : Ratt., A.L.C. 15.
Prior to his death: Ratt., Ash. 238.
"It is not only on his death-bed that a man can make testamentary disposition. A person can make his testamentary disposition while enjoying perfect health; but at the time it is made, the witnesses must be distinctly told by him his words are his Samansiw, to take effect after his death." : Sar., F.C.L. 99.

the likeliest time for its making is still on the testator's death-bed, when he will hurriedly call (or the donee will do so) members of the family to hear his dying wishes. But it is not essential that the testator should be on the point of death, in grave sickness, or even in fear of death in the near future.

Since it is a common thing for a man to work his farms with the assistance of his wife and children, and to reward them with portions of the land so farmed (an arrangement which needs no family ratification), if the family are called to witness the gift at any time, the only effect is to prolong the period of its operation indefinitely. The wife and children continue working the farms allocated to them; but retain them after the death of their husband/father, without further authorization from the family of deceased. Samansew has the effect of prolonging the operation of a gift after the testator's death, or of postponing its operation till then: it is a point of scientific legal terminology whether one can or should apply the term to an absolute gift, not made in contemplation of death, which is nevertheless absolute as against the donor's family, even after the donor's death.

2. TO WHOM SAMANSEW MAY BE MADE.

One is principally interested in the power (or the attempts) of the family to recover property of deceased given

by him to other persons, once deceased has met his end. If no gifts were made by the testator, all his property, inherited and self-acquired, would fall into the hands of the family at his death, and would then be available for distribution, once his successor has been appointed. The persons most jealous of such gifts will be the potential successor, the sub-lineage, and the family generally, in that order. Their jealousy increases as the degree of relation - by blood or otherwise - between the testator and donee becomes less close. Hence gifts to members of the family will require the least form and occasion least scrutiny; thereafter, gifts to deceased's wives, children, servants, and other dependants will not be too jealously scrutinised, unless excessive, or if the recipients are in ill favour; while lastly, gifts to complete strangers will be most rigorously attacked. Gifts to take effect after death may thus occasion hard feeling and action by the family; the procedure of samansew is used to forestall such feeling by informing the family of the gift, and securing their consent to it; whereupon they can no longer object to it.

(a) Bequests to members of the family:

Since the ultimate title to the property remains in the family, these will require little or no form. The recipient should pay aseda, call one or two of the family to witness the gift (or inform them of it subsequently).

(b) Bequests to Dependants: wives, children, servants:

This is the most important class of bequests, since samansew or written wills are used at the present day principally to avoid the harsh consequences of the Akan matrilineal custom of succession, by which wives and children of deceased would otherwise receive nothing. I think it undoubted that the earliest form of will was in fact to the son of deceased.[80] The restricted - "European" - family idea is growing; and pressure for an alteration, whole or partial, from matrilineal to patrilineal succession is becoming increasingly evident. Hence the spate of attempts to avoid the normal consequences of the customary law of succession.[81]

As already noticed, the family are willing to tolerate temporary gifts or alienations of usufruct made to wives or children of members; and if a member dies without receiving permanent family sanction for the arrangement, the family are nevertheless usually prepared to permit it to continue, if they have no objection against the character or behaviour of the donees.

Nevertheless, if a person leaves a major part of his self-acquired property away from the family, it is practically certain that the family will oppose such a state of affairs; and

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80. Cf. Ratt. A.L.C. 15-16, and Ash. 237, et seq.
81. Vide the resolutions of the J.P.C. and the Ashanti C.C. on the subject, the Akim Abuakwa Declaration, mission rules for members, the effects of the Marriage Ordinance, etc.

it is doubtful whether such a bequest is valid without more.[82]

(c) Bequests to strangers:

These are always more carefully scrutinised and criticised by the family, who will probably try to upset them if possible. This is in line with the general provision that gifts which have the effect of taking property outside the family absolutely and permanently may not as a rule be made unless the family express their consent to the gift.

3. PROPERTY WHICH MAY BE GIVEN.

(a) Self-acquired property:

The principal application of samansew is in connexion with the testator's self-acquired property. This remains true, even though in some areas a person is allowed to specify the direction in which he wishes his inherited property to go. All types of self-acquired property may be given by will; but it is usually only in the case of land, and the things thereon - farms, houses, etc. - that it is essential to observe the formalities strictly. The family sentiment is strongest in regard to land, so that chattels and cash may be bequeathed more freely. (Normally, these last may be given away freely during the donor's lifetime without the consent of the family.)

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82. According to Rattray, A.L.C. 338, there was moral suasion by the family against his making such a bequest. Some informants held it would be valid; but those who insisted on the family's consent to the gift held that the family had thus complete power to prevent it.

(b) Inherited property:

In the case of self-acquired property, the testator has the whole interest and title; devise thereof is therefore not illogical. But in the case of inherited property, the family have the title, and the testator only a limited interest. If inherited property is given away with the consent and authorization of the family, they lose their whole interest, and not merely testator's interest. Such a devise would therefore not be welcome to the family.

Hence it was frequently stated that a man has no power to devise inherited property. This is true; but he may be given the power by the act of his family. This explains cases met with where a man did bequeath inherited farms. Several cases are cited by Matson from Ashanti which illustrate this point. In general, on examination it will be found that the gift was to a member of the family, or at least to a son of deceased.

The family are entitled to permit such a bequest if they choose; and if the bequest is to another member of the family, then the title remains in the family, and there is little objection to this. The case is slightly different where a man nominates his successor, as he is entitled to do.[83]

If the bequest is to wife or child, then they may permit

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83. "A man may nominate his successor, but the decision as to who is to succeed to any property lies with the Head of the Family". - Warrington, 38.
(See also: Brobbey v. Kyere: (1936) 3 W.A.C.A. 106.)

this, although the effect of the family's consent is to take the property out of the family for good. Such a gift may often only be in confirmation of a de facto gift made inter vivos.

If the bequest is to a stranger, then in general the family would not authorize it.

The Akim Abuakwa Declaration limits the operation of samansew to "personal property and real property which might have been disposed of by will or by gift"; but then the requirements of the Declaration are laxer with regard to family consent than those normally given.[84]

4. THE FORM OF THE GIFT.

(a) Presence of donor and donee:

The general rule is that the donee must attend in person, if not at the time when the donor makes the declaration, so soon thereafter as he can. He must accept the gift in the presence of the donor and witnesses, and give the drink as aseda.[85]

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84. Para. 2: "The disposition of property by Samansew is valid if it is made voluntarily and orally in the presence of two responsible and disinterested witnesses, by a person of sound mind in expectation of death from illness however caused." It will be noted that the necessity for the consent of the family is not mentioned.

85. According to oral information from Akim Abuakwa, the testator announces his intention of making a declaration; witnesses (baguafo) are summoned; he makes his declaration, and then places religious sanction on it by the pouring of libation. The named beneficiary is summoned

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But the recent war has brought examples of change in the custom; in one case a man, dying, bequeathed property to his son in the presence of the customary witnesses. The son was a soldier absent in Burma. Aseda was given on his behalf at the time; the gift was notified by letter to the son, who, when he returned two years later, was handed by the family of his father the property bequeathed to him.

(b) Witnesses:

There must be witnesses present at the declaration; they must also be present when aseda is paid by the donee, and share in its division. The witnesses are of two kinds:

(i) family;

(ii) independent.

(i) Family Witnesses: There is no firm rule as to which members of the family should be present; but the more there are, the better. At the least there should be a person of responsibility in the family, e.g., the abusuapanin, the obaapanin, or an elder of the family. If possible, there should be members of the testator's sub-lineage present, including preferably the potential successor. The number and

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85. (cont. from previous page) -
if not already present, and gives sheep and a drink. The drink is distributed by the testator among those present. The gift is to the effect: "Upon my death my nephew, or son, or wife, So-and-So must be given the farm or the house at So-and-So." This account agrees generally with those given in other states.

The aseda consists of "a small offering of gold dust and rum", according to Ratt. Ash. 238.

quality of witnesses desirable vary according to the urgency of the case - if the testator is near to death, there may only be time to call two or three witnesses. (It may be wondered why so frequently the declaration is left to the last possible moment; often the family will have been previously aware of at least the rough nature of the testator's intentions. There are at least two reasons: first, an African does not like to disclose the extent of his property, and only the death-bed may be sufficient to over-come his reluctance; secondly, the gifts he makes are frequently conditioned by the behaviour of potential beneficiaries towards him, and more especially by the care they devote to him in his last illness.)

(ii) Independent Witnesses: These are not, as far as I know, essential by custom; but they are certainly advisable. There is a movement now afoot to make only this kind of witness essential for the validity of a death-bed gift, and that the family witnesses should no longer be required.[86] The matter is of some importance, since the two types of witness serve different functions - the independent witnesses go to prove the gift, the family witnesses also serve to bind the family by their consenting presence. But the evidence conflicts.[87] The

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86. Matson, op. cit., 225, says that "this seems to be confusing the legally necessary with the practically necessary"

87. Family witnesses are the only essential ones. - New Juaben; Family witnesses are not essential. - Akwapim; Rattray, A.L.C. 15, only mentions family witnesses; A will must be witnessed by the family, otherwise it is

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main difficulty with the custom is that if there are only family witnesses present, they may later deny the gift's ever having been made; the presence of independent witnesses limits the possibility of the family witnesses later denying the bequests. Very frequently the Odikro or some of his elders or councillors, or other prominent men in the village, will attend.[88] Sometimes the leader or minister of the church to which testator belongs will be there. In one case, 2/- out of the aseda paid by the donee was sent to the chief of the town, even though he was not present as a witness.

In general, there are two courses which are usually followed in regard to witnesses: sometimes the intended

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87. (cont. from previous page) -

not legally enforceable. - Another informant from New Juaben; the presence of elders and church-leaders from the town is sufficient evidence of the gift. - Akwapim; the J.P.C. of the Colony passed in 1940 a resolution that "only disinterested witnesses are needed for valid oral disposition", and the A.C.C. in 1946 passed a similar resolution that the relatives of the donor need not give their consent, provided there are accredited witnesses. (Cf. the Akim Abuakwa Declaration referred to ante, at p. 609, note 84.)

Actual cases in the native courts, and especially the evidence therein, support overwhelmingly the need for family witnesses, and the fact that they were in fact present. Independent witnesses are less commonly recorded.

And see Danquah, A.L.C. 198: "...the will of a deceased member is subject to the approval of the senior surviving members /of the family/."

Matson, op.cit., 224-5: "it is also clear that the lineage normally did consent"; though he doubts whether this consent is necessary today.

88. Cf. Ratt. Ash. 239.

beneficiary is told by the testator of his desire to make a bequest, and he then hurries to buy drink and call witnesses; conversely, sometimes the testator declare his intention to witnesses, who then hurriedly summon the named beneficiary. It does not matter which procedure is followed.

(c) Aseda:

As with the recipient of any other benefit in Akan custom, the donee must give aseda or "thanksgiving". This may be actual drink, or "drink" expressed as money.[89] There appears to be no fixed amount, but 24/- may be taken as an average.[90]

The original binding force of a samansew rests, as we have said, on superstitious reverence for the wish of the testator, and fear of the consequences of disregard. This may be reinforced by the drinking of fetish;[91] the swearing of an "oath"; and the payment of aseda, which acts as a stamp or seal of the arrangement. The giving of aseda is most important:

(i) it signifies the acceptance of the gift by the donee; (ii) it makes the gift irrevocable as between donor and donee, except for good reason; (iii) it binds the family, indicating, first, their consent to and knowledge of the gift,

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89. Sheep were mentioned by some informants, it being said that the donee gives thanks with a sheep and drink. The sheep is the important element, since it "stamps" the bequest. - Akwapim.
90. The amount varies, being influenced by the value of the property given. If it is insufficient, it might be refused.
91. And by the pouring of libations: Ratt. Ash. 238; and Akim Abuakwa.

and secondly the relinquishment of their right to the property;[92] (iv) it is evidentiary.

The aseda is paid by the donee to the donor, who distributes it, or part of it, among the witnesses, thus binding their memories.

Failure to pay aseda MAY make the gift unenforceable as between donor and donee, unenforceable as against the family, or incapable of proof.

5. EFFECT OF THE GIFT.

(a) When it takes effect:

Samansew is designed to operate on the death of the testator; and, once it has been made, the beneficiary acquires a vested interest subject to a condition precedent (namely, the death of the testator). It is true that the beneficiary (B) acquires no present rights of control or disposal: his interest vests in possession only on testator's death. But, once the gift is made, testator's powers over the property are conditioned by B's interest; and it was stated that the testator is not allowed to do anything with or to the property which would have the effect of injuring or destroying B's interest, except with B's permission. Hence the testator cannot sell

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92. But it was stated by Akim Abuakwa informants that acceptance by the family of aseda before the testator's death makes the bequest a gift, and not samansew: sed dubito; one must distinguish between the share of the family in the aseda paid to testator, and the aseda the donee pays when he claims his bequest.

the property, unless B consents thereto; and, if the property is sold, B has a claim to a portion of the proceeds;[93] and he can maintain an action against testator in the courts (quaere for revocation of the sale, or for damages?).

Apart from this, the testator during his lifetime may use the property as he pleases, and all profits therefrom accrue to him. Samansew is thus distinguishable from an ordinary gift outright inter vivos, when the donor receives an immediate interest in possession.

(b) Revocation by testator:

As between testator and B, testator is bound by B's acceptance of the gift, and his payment of aseda to "stamp" the gift. Where the gift was made on testator's death-bed, it is not revoked by his recovery.[94] It was stated that in no case can testator revoke his gift except for good reason.[95] If he wishes to revoke, or to change the beneficiary, then an arbitration must be called, composed of representatives of testator's and B's families; testator will put before the arbitration the reasons for revocation: if these are found to be acceptable, then the gift is revoked. Acceptable reasons include:

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93. This information is from New Juaben, and may not be generally applicable.
94. But see the Akim Abuakwa Declaration:
"3. Save where a person disposing of his property by Samansew recovers from the illness in the course of which the disposition was made, any disposition of property by Samansew is irrevocable."
95. Cf. Matson, op.cit., 226.

(1) ingratitude; (2) bad behaviour of B in other ways.

(c) Reclamation by the family of testator:

Once the family representatives have accepted their share of the aseda, they are bound; and cannot subsequently withdraw their consent, or declare that there was no valid bequest. If they accept the aseda, change their mind, and endeavour to return it, they remain bound by the terms of the bequest.[96] The family of a testator will frequently contest, however, his will or alleged will. The chief grounds which they usually bring forward for objection are:

(1) Denial of the existence of the will: i.e., that it was never made. (The absence of independent witnesses facilitates this contention.)

(2) Denial of the sufficiency of witnesses: i.e., that the presence of certain members of the family was essential to the validity of the bequest, and that they were not present.

(3) Denial of their acceptance of the will: i.e., that aseda was never offered to them, and accepted by them; sometimes, though not frequently as far as one can gather, the family may maintain that a samansew has moral, but not legal, sanction.

(4) Uncertainty: as to the property bequeathed.

(5) Denial of the title of testator to the property: i.e., that it was really family property, and therefore not testator's to dispose of.

96. A samansew was enforced by action in Brobbey v. Kyere: (1936) 3 W.A.C.A. 106.

If aseda is not paid, then the bequest is a wish, which may be complied with by the family if they choose. There is doubt whether the family-witnesses are bound to accept either the bequest, or the aseda. There are contrary views:

(1) They need not accept, and have an unqualified right to refuse.[97]

(2) They must accept, except there is a good and sufficient reason for refusal,[98] such as that no or too little property is left for the family;[99] or on account of the character of the beneficiary, and especially his behaviour towards the rest of the family.[100]

If no or insufficient witnesses are present, the bequest is inoperative, or perhaps it is better to say that it lies dormant; since - until testator's death - this defect (and the non-payment of aseda) can be cured by action on the part of the beneficiary.

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97. According to oral information from Akim Abuakwa: contra the Declaration from the same state.
98. Cf. Brobbey v. Kyere, cited above.
99. Above cit.
100. Normally, the beneficiary enters his succession after the death of testator, at the time of the settling of accounts of deceased; the claim is acknowledged by the family, the beneficiary gives them drink, and receives his bequest. It is at such a time that the family might raise the question of his behaviour or character.

6. SOME MODERN DEVELOPMENTS.

One fairly common feature of present Akan customary wills is "trusts" - property is given for different purposes; if the purpose is not carried out, the gift lapses, and the property given falls into the residue. Examples of such trusts actually encountered in the reports of cases in the Native Courts include:

(a) Trusts for children:

Formerly, where there were persons entitled to succeed, but it was considered that they were too young to succeed immediately, it used to be the custom for a slave or domestic to be entrusted with the property, which he was obliged to look after until the persons entitled came of age. At the present time, one finds that testator gives certain property to, for instance, M, the mother of C_1 and C_2. M is to hold the property in trust for C_1 and C_2, devoting the proceeds to their maintenance and education. When the children attain full age, the property is to be handed over to them by M, and it will then become the joint property of C_1 and C_2 absolutely.

(b) Trust to pay off debts:

This occurs specially in the case of pledged land. Testator gives one or more farms to B, to use the proceeds of the farms to pay off certain debts named by the testator; when the debts are paid off, the property is to go absolutely to B or some other person. Or B may be given a farm which has

been pledged; when B has paid off the pledge, the farm is to become B's absolute property. In some cases gifts over are made in case the beneficiary or "trustee" fails in his trust.

One also sometimes finds that, even where there is no such bequest by the deceased, the family, when dividing up his property, will indicate to the recipient or recipients that the property must be used for some particular purpose.

(c) Writing:

Although it is said that customary wills are now sometimes recorded in writing, I have not myself met instances of this. In this connexion, the case of Brobbey v. Yaw Kyere[101] is worth considering. This was a case from Kumasi, in which the defendant, who alleged that he had been given certain property by samansew, entered a caveat to the grant of letters of administration to plaintiff. It was said by Webber, C.J.:

> "The native Court found that the defendant had inherited the properties in question in accordance with a death-bed declaration made by Adu Yaw in the presence of accredited witnesses, including some members of the family, and that the declaration so made was confirmed with 'great oath' by the deceased before his death. It is the usual native declaration known by native law and custom by which the declarer names the person or persons to whom the inheritance is to be distributed; the declaration was put into writing and attested in the usual native way prior to the death of the deceased."

The native tribunal had held that defendant was entitled as against the plaintiff (who was claiming on behalf of the family

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101 (1936) 3 W.A.C.A. 106.

of deceased). The West African Court of Appeal upheld this decision, on the ground that plaintiff was barred by estoppel per rem judicatam (i.e., by the decision of the native tribunal).

This case also raises the whole question of the admission of native wills to probate. Matson,[102] quoting Redwar, (Comments on some Ordinances of the Gold Coast, p. 19), who was referring to what is now s. 16 of cap. 4, thinks that the Supreme Court has power to admit native wills to probate. A contrary view is given obiter by Francis Smith, J. in Re Anaman;[103] but this decision is suspect. In this case it was decided, inter alia, that "dying intestate" means dying without having made an English-form will, and that a person who dies having made a samansew dies intestate. My view is strengthened by the decision of Michelin, Acting C.J., in Re Otoo,[104] in which he rejected a samansew because the testator had been married under the Marriage Ordinance, and therefore could not make a will except in English form. Had it not been for the marriage under the Ordinance, then, said the Chief Justice:

> "If these death-bed wishes of the deceased could be construed to amount to a "samansiw" or nuncupative will, the court, on sufficient proof, would no doubt give effect to such wishes, on an application being made

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102. Cf. op. cit., p. 227.
103. (1894) F.C.L. 221.
104. (1927) D.Ct '26-'29, 84.

> for the probate of such will in solemn form." (105, 106)

(d) Enforcement of oral wills:

In Brobbey v. Kyere, already referred to, a caveator produced a judgement of a native court that he was entitled by samansew; the judgement estopped (by res judicata) the claimant for letters of administration, the Court was bound to refuse the grant of letters to the claimant, and the samansew was thus enforced by action. There is a tendency observable in the superior courts to enforce samansew without reference to the wishes of the deceased's family, i.e., without considering whether the family consented to the bequest in the customary fashion or not, or whether there were family witnesses to the gift. Secrecy, especially as against the parties principally interested - the family, is contrary to well-established principles of the customary law. Hence arises the great change of atmosphere when we consider the enforceability of English wills made by Africans.

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105. Ibid., at p. 85.
106. But the Courts Ordinance, cap.4, lays down in s.16 that:
> "The jurisdiction hereby conferred upon the Supreme Court in Probate, Divorce and Matrimonial causes and proceedings may, subject to this Ordinance and to Rules of Court, he exercised by the Supreme Court in conformity with the law and practice for the time being in force in England."

How can the Supreme Court, following "the law and practice" of the English courts, grant probate of a nuncupative will, since the Wills Act, 1837, debars English courts from doing so (except in the case of servicemen's wills)?

C. TESTATE SUCCESSION: WRITTEN WILLS: ENGLISH FORM.

It has already been noted that (a) an African will is dependent upon the consent of testator's family; (b) it is rarely, if ever, recorded in writing. Hence, where a written will is desired, English form is used. It is reported that English wills are frequently employed today, especially to avoid some of the consequences which customarily follow from an attempt to leave property by customary law. It should be emphasised that the use of writing to make a will is different from that when customary pledges are recorded in a memorandum. The writing in this latter case purports to record only a customary transaction, but a written will purports to embody the exercise of powers not known to custom. Hence a memorandum of pledge is evidentiary, but a will in writing is of a different nature and effect from an oral will.

It is therefore necessary to ask what power Africans have to make wills in English form. First, however, one must consider the form in which such wills are cast.

1. FORM.

Practically any writing which purports to be the last will and testament of the testator, and which is signed by him and attested by two witnesses, will be admitted to probate. There is no need for legal language, nor for the use of a special form or legal advice, though all these are advisable. In the

Gold Coast, such wills are drawn up impartially by lawyers, ministers of a church, letter-writers, etc. The witnesses who sign the will in English law testify to its being the testator's will, and they are not interested parties. In the Gold Coast, as is familiar to students of the customary law, witnesses are often themselves interested parties, who by their attestation may bar their interest in some way.

2. VALIDITY. One must distinguish two stages:

(i) When a will is admitted to probate, nothing more is determined than that the will is on its face good in form, that it is the testator's last will and not void on account of incapacity or undue influence. Proving a will does not establish the validity of the dispositions which it contains; and unless a Court of Probate has incidentally determined a point of construction, it is probably open to a Court of construction to differ later from its interpretation.

(ii) After probate it is therefore necessary to decide in case of dispute whether the dispositions of testator are ones which he has power to make, and so on.

Two questions have therefore in fact to be asked:

(a) Have Africans power to make wills in English form, and should such wills be admitted to probate?

(b) Are the gifts which such wills contain good in law?

(a) It is submitted that Africans have power to make

wills in English form.[107] Such wills are in fact constantly admitted to probate in the courts of the Gold Coast.[108] It may be objected that the provision in section 74 of the Courts Ordinance that no-one is to be deprived of the benefit of any existing customary law operates to deprive testators of the power of making English-form wills. This view is untenable. So long as the will does not make any disposition adverse to others (e.g., the family) which the testator could not make by pure customary law, then the will does not operate to deprive any person of a benefit under native custom.[109] Where it does make such a disposition, then proof of the will does not affect the rights of third parties; and the difficulty goes to our second question, rather than the first. There is an analogy with the option allowed to an African to sell his land either by native law and custom, or by a conveyance in English form.

(b) The validity of the dispositions: Unfortunately, the African mind frequently does not appreciate the distinction we have made above, and so it follows that he and his courts sometimes come to the conclusion that admission to probate makes the dispositions in the will unchallengeable; and that grant of letters of administration to any person establishes the sole and

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107. This is, for instance, admitted in Akim Abuakwa.
108. Cf. for example, Acquah v. Acquah & Tsetsewa: (1941) 7 W.A.C.A. 222, where an English will of a farm was held valid; and Weah v. Mensah: (1876) Ren. 28.
109. According to information from New Juaben, the use of writing does not affect the customary law which governs wills, and the customary limitations still apply to such testaments.

personal right of that person to deceased's property.

As regards a customary will, it is obligatory that:

(i) some of deceased's self-acquired property should be left for the family;

(ii) the family should consent to the bequest of the remainder outside the family. The most important requirement of custom is that the family should consent; since, by withholding their consent, which they have a right to do, they can prevent bequests of which they do not approve.

Can a testator by written will leave property without his family's consent? As to this, very various answers were given.

In the coastal areas, the answer seemed to be that he has the right and power so to do.

In Akwapim, I was told he had no such power.

In New Juaben, I was told that strictly he had no such power to leave property by written will without the consent of his family; but that the native courts are debarred from trying the case, and in the Supreme Court the will would be upheld; thus the Africans have accepted this state of affairs.[110]

Thanks to the sanctity which Africans attach to written documents, the ordinary man accepts the will as valid; this attitude is sufficiently demonstrated by the efforts of a

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110. It was stated that a written will must be witnessed by the family, otherwise it is not enforceable. But other informants stated that a written will does not need the consent of the family.

deceased's family to find and destroy his will, if he is known to have made one. There is no reason why inquiry into written wills should be confined to the Supreme Court (apart from formalities); but the Native Courts, if the point comes before them, do not raise the question of the family's consent, because to them the paper overrides this requirement. And the Supreme Court does not consider the question of family-consent, because this - being foreign to English legal ideas - does not occur to them. In theory, then, the testator cannot deprive his family of the major part of his property by making a will; and the dispositions should be invalid unless consented to by his family. In practice, consent is not required, and the testator may do as he pleases with his property.[111]

3. EFFECTS OF A WRITTEN WILL.

(a) Between testator and his family:

The will binds, without the family's consent, and even without notice to them. The testator, of course, often attempts to conceal the existence of a will, otherwise the family would make his life unbearable. But the testator cannot bequeath or devise property which he could not dispose of by customary law, i.e., inherited property.

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111. But Balogun v. Balogun: (1935) 2 W.A.C.A. 290, a Nigerian case, prescribed that an intention to make dispositions in accordance with customary law will be implied as far as possible when an African makes a will.

(b) Between testator and beneficiary:

Under a customary will the beneficiary acquires a right which he may enforce during the lifetime of the testator, possession alone not coming to him until the latter's death. Under an English will the beneficiary acquires no right until the death of the testator.

Under customary law testator cannot dispose of property already left to B, without B's consent. Under English law (in the absence of contract) he may freely do so: the will is effective only on property in testator's possession at his death.

By custom testator can revoke the disposition only for good reason; and it may be that subsequent recovery operates as an automatic revocation. By English law testator can revoke freely.

It is uncertain what is the effect of customary features in a will in English form. Testator may obtain the consent of the family before or after the will is made; the beneficiary may give aseda to the testator after testator has told him that he has made a will in B's favour - can the testator then still revoke freely? Testator may give property by native oral will to B, B paying aseda and testator's family consenting. Testator later, in order to make the will indisputable, executes a will in English form with the same gift in favour of B. Can testator then revoke such a gift? This case is somewhat

different from that where a samansew is later recorded in writing, as in the case of Brobbey v. Kyere;[112] for in this case the writing operates only as a memorandum of the bequest, and it is not the intention to introduce English law, but rather to reinforce customary law.

4. FUTURE POLICY IN REGARD TO WILLS IN THE GOLD COAST.

As will have been gathered from what has gone before, the present law in regard both to the enforceability and proof of customary wills, and the powers of African testators when English wills are used, is a matter of some uncertainty. Mr. A.J. Loveridge, former Senior Judicial Adviser, has considered in an article[113] some of the problems which arise, and a possible solution for them; the reader is referred to this article for a further discussion. It may, however, be said here that this should be a field for early legislation. The particular points which especially need regulation are:

(1) Letters of Administration: clarifying legislation is required to make clear to courts and parties that grant of letters to one person does not bar or estop the rights which others may have over the property of a deceased.

(2) English wills: it should be made necessary for wills in English form to adhere to at least some of the requirements

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112. (1936) 3 W.A.C.A. 106; facts at p. 619 ante.
113. "Wills and the Customary Law in the Gold Coast" - Journal of African Administration, October 1950, p. 24.

of customary wills - e.g., family consent, the presence of witnesses, the major portion of the property not to be left away from the family without the latter's consent, etc.[114]

(3) Samansew: a simple form of recording or proof of customary wills is required. Native Courts should be empowered to grant "probate" of such wills. It might then be necessary to provide that there should be a memorandum in writing of such wills, unless circumstances prevent (e.g., when it is really a "death-bed" declaration), and in such cases adequate proof of the will and its terms would be required.

D. SUCCESSION TO STRANGERS.

Although colour is no bar to succession under the customary law,[115] the Full Court held in Herminah Weytingh v. Bessaburo[116] that the descendants of a non-native could not lay claim to land originally acquired by that non-native, if they base their claim on the native law and custom of succession. (This was a case from Elmina, where succession is matrilineal; hence the unlikelihood of there being relatives - in the matrilineal sense - of a male non-native who would be entitled to succeed.)

Apart from this, it is usually stated that the stool has

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114. Cf. Matson, Testate Succession in Ashanti, 227.
115. Hutton v. Kuta: (1878) F.C.L. 211.
116. (1906) Ren. 427.

a right of succession to all property; in the case of citizens this is exercisable only if no relatives, however remote, of deceased remain, and there are no domestics in the family. This is a state of affairs which does not occur in practice: the stool's reversion therefore remains purely theoretical. Families are large enough to ensure that there will always be someone left to inherit.

In the case of strangers, however, they may quite likely have relatives, but not ones capable of succeeding to the particular property which the strangers enjoyed. In such cases native customary law has evolved certain rules, by which a stool can succeed to a stranger's property. Such a succession is of a different nature from the types of succession previously considered: since the succession is based not on some relationship between the parties; but on the stool's control of the area within which the stranger's property is situate: i.e., the stool's right is a real and not a personal one.

The rule regarding the stool's succession to strangers has steadily become less harsh over the course of years. In an area where the stool owned the ultimate title to land - Akim, Ashanti - if a stranger built or cultivated on stool land with permission, then when he died the stool succeeded and took all the property. If a successor from the stranger's family put in an appearance he would be forced to obtain fresh permission to occupy the stool land; if this were refused, he might

forfeit the farm or building, or be allowed to take the crops or materials away.

Today the stool still succeeds if no successor puts in an appearance; but the stool does not succeed in competition with the customary successor. Which stool succeeds? In general, the stool which owns the land; although it was stated in New Juaben that whilst the Paramount Stool succeeded to strangers' farms made out of the forest, the Odikro of the village succeeds to farms made on fallow-land belonging to members of the village; and also to houses and house-plots in the village. And the Odikro would thenceforth hold them for the benefit of the whole village.

Where the stool does not own the land, the private or family landowner will succeed if the stranger's interest was carved out of the landowner's interest. But where the land was owned absolutely by the stranger, then it is submitted that the stool controlling the area within which the land is situated holds the land in case a successor puts in an appearance (being liable to render up the land to the successor if he appears); but I have little evidence regarding this point. And if no successor appears, the property is taken over as stool property in the narrow sense (as happened in one case in the Cape Coast district).[117]

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117. See also THE INDIVIDUAL AND PROPERTY, pp. 186-7.

E. THE MARRIAGE ORDINANCE AND SUCCESSION.

The Marriage Ordinance[118] has the effect of altering the normal mode of succession for

(a) spouses married under the Ordinance;

(b) the lawful issue of such a marriage.

The radical changes in status brought about by such a marriage for an African normally subject to customary law are well brought out by some judgements and dicta of judges of the Gold Coast. In regard to the general effect of such a marriage Crampton Smyly, C.J., said in Sackey v. Okantah[119] that:

> "The Native Law says that by a Sammansiew or statement a Native can deal with his self-acquired property as he likes during his lifetime; the Marriage Ordinance No. 14 1884 S. 47 provides that in the case of a Native who contracts a Marriage under the Ordinance or the issue of such marriage in the case of intestacy two thirds follow the provisions of the Law of England relating to the distribution of the personal estate of intestacy on the 13th day of November, 1884 and one third in accordance with the provisions of the Native customary law which would have obtained if such person had not

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118. The Marriage Ordinance started as Ordinance No. 14 of 1884. It has been principally amended by the Amendment Ordinances of 1903, 1909 (revised for the 1936 Revision of the Laws, in which it appears as cap. 105), and 1951. The amendments as they affect intestate succession are considered in the text at pp. 633 et seq. S. 48 of the present Ordinance was s. 41 in the original ordinance of 1884, and s. 39 in the ordinance of 1903, and s. 47 in the ordinance of 1909.
119. (1916) D & F '11-'16, 88, at p. 92.

married under this Ordinance. Marrying under the Ordinance with the knowledge that the doing so affects the succession is in my opinion a rather pronounced form of Sammansiew." (120)

This is certainly an original way of looking at the effect on a person's status of marrying under the Ordinance.

Section 48 of the Marriage Ordinance provides that:

"(1) Subject to the provisions of the succeeding subsection where any person who is subject to native law or custom contracts a marriage, whether within or without the Gold Coast, in accordance with the provisions of this Ordinance or of any other enactment relating to marriage, or has contracted a marriage prior to the passing of this Ordinance which marriage is validated hereby, and such person dies intestate on or after the 15th day of February, 1909, leaving a widow or husband or any issue of such marriage;

"Effect of marriage in case of natives."

And also where any person who is issue of any such marriage dies intestate on or after the said 15th day of February, 1909, the personal property of such intestate, and also any real property of which the said intestate might have disposed by will, shall be distributed or descend in manner following, viz:-

"Succession in case of intestacy."

Two-thirds in accordance with the provisions of the law of England relating to the distribution of the personal estates of intestates in force on the 19th day of November, 1884, any native law or custom to the contrary notwithstanding; and one-third in accordance with the provisions of the native customary law which would have obtained if such person had not been married under this Ordinance: Provided:

(1) That where by the law of England, any portion of the estate of such intestate would become a portion of the casual hereditary

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120. This dictum was obiter to the instant case, since it was the defendant who had married under the Ordinance, and not the deceased person to whom succession was claimed.

revenues of the Crown, such portion shall be distributed in accordance with the provisions of the native customary law, and shall not become a portion of the said casual hereditary revenues;

(2) That real property, the succession to which cannot by native customary law be affected by testamentary disposition, shall descend in accordance with the provisions of such native customary law, anything herein to the contrary notwithstanding.

(2) Where such a person dies in the circumstances mentioned in the preceding subsection on or after the 1st day of December, 1950, property therein mentioned shall devolve upon the administrator of such deceased person's estate upon trust to sell the same and divide the proceeds of the sale thereof in the manner provided in the preceding subsection.

"Provisions to be explained." (3) Before the registrar or a marriage officer issues his certificate in the case of an intended marriage, either party to which is a person subject to native law or custom, he shall explain to both parties the effect of these provisions as to the succession to property as affected by marriage."

Those portions of the section which are underlined by the present author were inserted in the Ordinance by section 2 of the Marriage (Amendment) Ordinance, No. 13 of 1951, which came into force on the 15th September, 1951. This Ordinance also repealed (s. 2 (2)) section 7 of the abortive Marriage Amendment Ordinance, No. 34 of 1950, which had also amended section 48 of the principal Ordinance.

The Marriage Ordinance as it now stands has undergone continual change. Except for the amendments to s. 48, it represents, as cap. 105, the text of the 1935 revision, which

itself represents the changes made in 1909. The Ordinance of 1903, s. 39, provided that succession should be in accordance with the rules given when a person

> "contracts a marriage in accordance with the provisions of this or any other Ordinance relating to marriage."

And it also provided that the property of the intestate "shall be distributed", instead of the present wording "shall be distributed or descend";[121] whilst the new subsection (2), applying to persons dying after 1st December, 1950, makes the intestate's property "devolve" on the administrator, only the proceeds of the sale thereof being distributed.

The section is still unsatisfactory: one may take the following points of draftsmanship and interpretation:-

(1) What is the meaning (subsection (1)) of "any other enactment relating to marriage"? Does this mean Marriage Ordinances of other colonies, laws of England, laws of foreign countries? Without more, one would take "enactment" to refer only to enactments of the Gold Coast - a submission which the pre-1909 wording supports. Should not also the wording "if such person had not been married under this Ordinance" in the

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121. It was explained In re Gorleku, G. v. G.: (1934) 2 W.A.C.A. 82, that under s. 47 of the Ordinance grant of letters of administration applies to personalty only; and also that no real property vests in the person to whom letters are granted - Odonkor v. Akoshia: (1929) F. Ct '26-'29, 322, was distinguished as an obiter dictum.

third paragraph be altered consequentially?

(2) The wording of the first sidenote - "Effect of marriage in case of natives" - is absurdly loose.

(3) It will be noted that the provisions of thesection only apply, in the case of persons married under the Ordinance, if they leave a widow or husband or issue of the marriage surviving; but when the de cujus is the issue of such a marriage, then apparently the qualification does not apply. If one takes the contractual view of the method by which the change in succession is brought about, then succession to a person who contracts a marriage under the Ordinance is under the qualification, whilst succession to the issue of such a marriage (perhaps not married under the Ordinance and with only customary wives or children) is not - quod est absurdum.

(4) Paragraph (2) of subsection (1) mentions only real property, the succession to which cannot be affected by testamentary disposition in customary law (sc. family property in land or the things thereon); it was perhaps not brought to the notice of the original legislators that personal property (movables) may also become family property, of which the holder for the time being cannot dispose outright, whether by will, gift, sale, or otherwise. (An example is that where a person inherits a house, together with furniture therein, or perhaps with cement blocks to be used for its repair.) The family interest in such movables is presumably barred by the Ordinance.

(5) Paragraph (2) of subsection (1) speaks of "any real property of which the said intestate might have disposed by will" as that which is open to distribution in the manner provided; but paragraph (2) of the proviso to the subsection reserves to the customary successors real property "the succession to which cannot by native customary law be affected by testamentary disposition; one must surely equate "will" and "testamentary disposition" in these complementary provisions. It seems inconsistent to recognise a disability imposed by customary law on the testamentary powers of the intestate, and not recognise capacity similarly bestowed by the customary law; for it has been held that a person married under the Marriage Ordinance who endeavours to make a customary will dies intestate.[122]

It will be appreciated that the Ordinance sometimes works injustice, especially in those cases where there are persons who would otherwise be entitled by custom to succeed to the whole or part of the deceased's estate. In the Gold Coast, and especially in Akan districts, this will principally occur where deceased is a woman, previously married by native custom, and subsequently divorced and married under the Marriage Ordinance to a second husband. In that case, she leaves children customarily entitled to her estate, but apparently not entitled under the Ordinance (except as to 1/3). The position of a man previously married by native custom (and later divorced) who

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122. Re Otoo: (1927) D.Ct '26-'29, 84.

marries a second wife under the Ordinance[123] is somewhat different, since generally his customary children will not be entitled to succeed in customary law (although they often have valuable rights such as that of residence in their late father's house). A different position arose in the Nigerian case of In re Somefun,[124] where A, the issue of a marriage under the Marriage Ordinance of Nigeria, died intestate and was survived by (i) a customary widow and children, married by native law and custom;

(ii) other issue of his parents' marriage under the Marriage Ordinance.

This is a position which may well arise in the Gold Coast too, since there is no provision that the issue of a marriage under the Marriage Ordinance, although succession to him is governed by the terms of the Ordinance, must himself marry in Christian or civil form; his marriage by custom is perfectly valid.

It was held by W.A.C.A. that, by the terms of the Marriage Ordinance, the customary widow was excluded from the succession, since: first, succession to A must go in accordance with English law; and secondly, his widow was a person whose right depended on native law and custom, and not on English law;

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123. By s. 42 of the Ordinance, a marriage under the Ordinance by a person already married by customary law to another is invalid: but the position described in the text might easily occur if the man had previously divorced his customary wife.

124. (1941) 7 W.A.C.A. 156.

hence she could not be entitled to succeed. The Court expressed regret that it could not find otherwise. As far as the Gold Coast is concerned, legislation appears to be called for, since, when judges express regret at having to make a certain decision, it is a fair sign that the law, in their opinion, ought to be amended.

How far it is possible to carry this theory of the election which an African makes by choosing to marry under the Ordinance and not by custom is illustrated by the case of Akwapim v. Budu.[125] In this case A was married under the Ordinance. A person who committed adultery with A's wife was prosecuted under s. 46 (15) of the old Native Administration Ordinance for adultery. It was given in evidence that A and his wife had originally married by native custom, and had later married under the Ordinance. It was held that in such a case the rights of the parties arising out of the marriage were to be governed solely by English law; and there could therefore be no prosecution for adultery. If the prosecution had instead been a civil action, in which the husband sought to enforce his rights, there might be strength in this argument. But in a criminal case, surely the right defended is the State's notion of public policy, and not a private right.

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125. (1935) D.Ct '31-'37, 89.

Not only, apparently, is the husband of a marriage under the Ordinance deprived of his customary right of suing an adulterer for an "adultery fee", but he is also deprived of some of his testamentary powers: in Re Otoo[126] it was held that a person who marries under the Marriage Ordinance cannot make a customary oral will, or samansew.

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126. (1927) D.Ct '26-'29, 84; (and see ante, p. 620).

CHAPTER XI.

WRITING.

"By immemorial custom written documents are always used for transfers of land in Jamestown."

- from a newspaper report of an Accra land case - judgement of the Native Court.

1. PREVALENCE OF THE USE OF WRITING.

No-one can doubt the prevalence of the use of written documents and memoranda in modern African customary law. Such use has been general for some time in two cases:

(i) in dealings between Africans and non-natives;

(ii) in the more sophisticated areas, the coast region and the larger towns - even between Africans;

and (iii) every African party to a dealing relating to land will endeavour to secure at least some record of the transaction in writing.

The use of writing (foreign originally to the concepts of the customary law, and foreign even to the local languages until the Europeans came on the scene) poses certain questions:

(i) Does the writing serve as a memorandum only of the agreement or transaction; or does it bind - like an English deed, excluding (subject to equity) all other evidence of the transaction between the parties?

(ii) Does the use of writing or of any particular form of writing indicate a desire on the part of the parties to be bound exclusively, or substantially, by the rules of English law?

(iii) Does the use of conveyances mean that thenceforth land is held not under native tenure, but under English real property law?

(iv) Does the use of writing in the transfer of land mean that thenceforth subsidiary interests created over the land are subject to English law?

(v) Does the use of writing take consideration of any matter concerning the transaction out of the jurisdiction of the Native Courts, and into the original and exclusive jurisdiction of the Supreme Court?

These questions will be considered and an answer attempted below; here it is sufficient to notice that in most fields of modern customary law two alternatives present themselves to an African dealing with an interest in land: he may use an African method of conveyance or an English method. There is also a <u>via media</u> of use of customary African form accompanied by a memorandum in writing. For example:

(i) If he sells land, he may do so customarily by the cutting of <u>guaha</u> or the payment of <u>tramma</u>; or he may use an English conveyance.

(ii) If he wishes to charge his land for a debt or

loan, he may do so either by customary pledge, or by English mortgage.

(iii) If he wishes to grant a tenancy, he may do so either by executing an English lease, or by admitting a tenant on customary terms (abusa or otherwise).

(iv) If he wishes to give any property, he can do so by English deed of gift, or by using the customary form for making a gift, with payment of aseda.

(v) And finally, if he wishes to leave his property by will, he can either make an oral declaration in front of witnesses (samansew) according to native customary law, or make a written will in English form.

2. THE SANCTITY ATTACHING TO WRITTEN DOCUMENTS.

In native custom, practically every agreement, appointment, settlement or other transaction has to be customarily "stamped" or "sealed". The "stamp" usually takes the form of:

(i) some valuable thing given by the grantee or person benefited to the grantor, which is often sheep, drink, or their value in money. Such a stamp is often termed "aseda" or "thank-offering". Stamping goes to the enforceability or irrevocability of the act stamped.

(ii) Most transactions in native customary law must also be carried out in the presence of the witnesses: and such witnesses share in the aseda given. The presence of witnesses

is a most important element in the subsequent proof of the transaction. Witnesses are of two kinds, impartial and partial. Impartial witnesses merely testify to the transaction having taken place.

(iii) Partial witnesses are those who are themselves interested in the res of the transaction; they are thus subsidiary parties in the transaction, whose interest is bound by their presence and acceptance of part of the aseda, which signify their consent to the transaction, where this is required.

A written document plays a multiple function in native customary law. It goes to enforceability, since frequently it was stated that native "stamping" is not required if writing is used.

It goes also to proof, since a document signed by witnesses is accepted as strong - if not conclusive - evidence by the native courts.

It also binds those described above as partial witnesses: expressly, where they have subscribed the document as witnesses; impliedly, where use of documents is held to abrogate the necessity for their evidence and at the same time their right of consenting or not consenting.

Writing can thus be seen to be a most important element in modern customary law; and it is no wonder that great importance is attached by Africans to possessing some writing formal or informal, especially in reference to title to prop-

erty and transactions concerned therewith. In fact, one of the first questions frequently put by a native court to a person seeking to establish some transaction in connexion with, or his title to, property is: "Have you some paper to substantiate your claim?" And claims, apparently and prima facie maintainable, have been rejected solely for want of documentary evidence. In one such case, a claim to title by purchase at public auction was rejected, even though the fi.fa. of the property was proved, the receipt proved as given by the auctioneer, the sale itself proved, because the claimant failed to produce the certificate of purchase.[1]

Whether this attitude of the courts is the cause or the effect of the sanctity which the African proprietor attaches to writings referring to his interest it is impossible to determine; and it is perhaps immaterial, since each attitude has contributed to the other.

Written proof of title or an act is sought not merely in the normal instruments by which interests are transferred or created, but also in any memorandum of a transaction, copies of letters, copies of court judgements (even irrelevant ones), certificates of purchase, letters of administration, wills admitted to probate, etc. In one instance, the claim of an

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1. See: Bruku v. Amoa Panin II: (Unrep: Native Court A, New Juaben, 28.9.1950); quite contrary to the ruling in Bodukuma v. Abaca: (1928) D.Ct '26-'29, 124, that the absence of a certificate of purchase does not affect the title of the purchaser.

Odikro to certain timber trees was supported by a copy of a Supreme Court judgement given in the first years of this century, and having, alas, no bearing on the question of ownership. The Odikro was illiterate. In another case the claim to a tract of cocoa-land was substantiated by a faded receipt, given over fifty years ago, which was written on a page torn from an exercise-book with the exercises still on the other side.

3. THE TWO TYPES OF DOCUMENT: MEMORANDUM AND INSTRUMENT.

Any document made in connexion with a transaction at law can belong to either of two types: it may be a memorandum, which is made subsequent to the agreement or transaction, and whose aim it is to record in permanent and easily visible form matters which might otherwise be in dispute: the description of the land conveyed, whether the transaction is a sale or a pledge, the term of a tenancy, the terms on which a pledge or mortgage has been made, etc., etc. The purpose of a memorandum is not to supersede the previous oral agreement of the parties, but to reinforce and record that agreement.

Or the document may be what is termed an "instrument": by this is meant that the document is the operative part of the agreement; it determines what the parties have agreed to; if in competition with the previous alleged terms orally agreed by the parties, it prevails (just as in English law a deed prevails over the oral agreement on which the instrument is based,

so that a party cannot allege that the deed goes contrary to his previous oral agreement).

It is important to keep the fact that there are two classes of document constantly in mind, especially in considering the effect of any particular document made by Africans, since it is submitted that a document, although on the face of it an instrument, may be nothing more than a memorandum if made by an African. Conversely, something which appears nothing more than a receipt or memorandum may be held to operate as an instrument.[2] The Africans use memoranda especially in the case of pledges; and practically no pledge is made today unless it is recorded in writing. This frequently takes the form of a receipt, with certain conditions appended: owing to its ambiguous form, cases arise where it is maintained that this receipt records a sale and not a pledge.[3]

The African is also familiar with instruments, especially conveyances for sale which purport to transfer the freehold estate or fee simple in the land. Such conveyances have been in use for a long time, especially in the coastal regions.

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2. As in the native court judgement in Donkor v. Ologo: (1950) (N. Ct A, New Juaben, June 1950), where the court refused to go behind the terms of a "receipt" given in respect of a pledge, although the receipt was of the normal kind given for such pledges.
3. See Hamilton v. Mensah: (1937) 3 W.A.C.A. 224, and especially the dictum at p. 225 quoted below (at p. 683).

4. EFFECT OF WRITING ON THE JURISDICTION OF THE NATIVE COURTS.

This might not appear to be an important matter as regards the substantive law, were it not that:

(i) Some members of the Supreme Court have expressed their opinion that where there are documents involved the case is not suitable for determination by a native court.

(ii) If the case is not determined by a native court, custom is liable to be differently interpreted.

(iii) The document will probably be differently interpreted.

To take the judges' opinions on this matter:
In Richardson v. Eshun[4] the Court set aside the Native Court's judgement because

> "difficult questions arose upon several documents in English form, questions which were quite unsuitable for decision by a Native Tribunal";

and a rehearing in the Supreme Court was recommended.

But in Mensah v. Cobbina[5] the reverse conclusion was reached. This case concerned land in Kumasi. It was decided that, even though land in Kumasi was at that time held by the Crown, and the Government must consent to transfers of lesser interests, yet:

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4. (1940) 6 W.A.C.A. 141.
5. (1939) 5 W.A.C.A. 108, especially at p. 110.

> "This does not mean that the competent Native Court should not, therefore, take into consideration any deeds documents or consents which may be relevant to the right decision of the case before them whether they be in accordance with English law or not, provided they are valid in accordance with the law regulating Ashanti."

Since this decision, of course, there has been an amendment to the Native Courts (Ashanti) Ordinance,[6] the effect of which is to take a case out of the jurisdiction of a native court where the parties have agreed that their relations are to be regulated substantially by English Law: it will, however, be appreciated that unless use of writing or English form automatically implies that English Law governs in toto (and in any case the parties may agree to the Native Court taking the case), the Native Court may still have jurisdiction on a mixed question.

In an earlier case, Chief John Pobee v. J.B. Doe,[7] it was said that:

> "it has been decided by this Court and the Full Court on more than one occasion that the mere existence of documents is not sufficient for the Courts /i.e., the Supreme Court/ to retain a case."

In the absence of proof that the parties intended to regulate their agreement solely by English law, native tribunals were competent to try such a case.

One cannot, however, do better than cite the excellent

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6. Cap. 80; s. 7, by Ordinance No. 15 of 1943.
7. (1914) D. & F. '11-'16, 74.

judgement of Howes, J., in Kweku v. Wood[8], where he said:

> "The question whether the fact that natives have elected to make use of an English deed of conveyance, affects the jurisdiction of a Native Tribunal was considered by the Full Court in the case of Azzu v. Akardiri, Ren. 677, and Azzu v. Cooper, page 679. In the former case, the Full Court refused to say - 'that from the moment any transfer of an interest in land held by native tenure is effected or purported to be effected by writing, the Native Tribunals have no jurisdiction' -; and in the latter case - 'the mere existence of documents in a case does not of itself do away with the jurisdiction of the native tribunal'.
>
> A case rather analogous to the above cases was also decided by the Full Court in 1927, Adjuah v. Wilson, F.Ct '26-'29, p. 260, in which it was held that a mortgage executed in accordance with English law did not cause the land in question to cease to be held under native tenure.
>
> What I am asked to find in the present case is that the bare existence of the conveyance to Green by the plaintiff's ancestor was evidence that these persons agreed that their obligations under this sale of land should be regulated substantially according to some law other than native customary law within the proviso to s. 43 (1) of the Native Administration Ordinance, or that some other law is properly applicable thereto."

Howes, J., wished that he could try the case in the Supreme Court, but stopped the hearing of the case, and referred the parties to the native tribunal.

A further case was that of Amuakwa v. Anyan[9], where the existence of a lease of land in English form was proved; it

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8. D.Ct '31-'37, 3, at p. 5.
9. (1936) 3 W.A.C.A. 22.

was held that since defendant was not a party to the agreement, English Law did not apply, hence the Supreme Court had no jurisdiction; the trial judge's judgement was therefore set aside and the parties referred to the competent native court.

U.A.C. v. Apaw[10] - again dealing with land in Kumasi - raises a rather different point, and is not relevant here.

Reference may also be made to the cases of Kwaku v.Sacker,[11] Ayim v. Mensah,[12] and Dowuonah v. Assabil.[13]

Some of these cases turn on the point that although there was a deed or other document, yet the rights of the parties were still governed by native law; and hence native tribunals had jurisdiction to try these causes. This implies a converse rule that if the rights of the parties are governed exclusively by English Law then the native courts are not competent.[14]

Whether this assumption is correct in reference to land causes or matters must be considered elsewhere; but it is a different ground for denying jurisdiction to a native court

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10. (1936) 3 W.A.C.A. 114.
11. (1912) D. & F. '11-'16, 37.
12. (1912) D. & F. '11-'16, 6. The Full Court agreed with the Divisional Court's finding that "there was a verbal contract and...that the reduction of the terms of such a contract to writing would not ipso facto take it out of native law, unless the parties clearly intended that it should do so, and unless the written contract was properly executed according to English law."
13. (1914) D. & F. '11-'16, 72.
14. This was the case in Ocquaye v. Sampson: (1927) D. Ct '26-'29, 81, where there was a conveyance duly executed.

from the objection that native courts are unsuitable for the interpretation of documents.

Which ground was the ratio in Gyamfi v. Nyame[15] it is difficult to say. The Court said:

> "In this case the rights of both sides were governed by two mortgages under English law which only the Supreme Court could determine."

It is submitted that it is impossible to maintain that the mere existence of documents is sufficient to remove the Native Court's jurisdiction; and it is necessary to show in addition that the parties agreed to regulate their relations by English law, either exclusively or substantially.

When are the parties to be taken to have agreed to be bound by English Law, so as to oust the jurisdiction of the Native Courts? As with the determination of the effect of any contract, this requires consideration of the express agreement of the parties, and the terms to which they have tacitly or impliedly agreed; but there is also a presumption that natives in dealings with natives intend to be bound by native customary law, whether ancient or modern; and strong positive evidence is required to rebut this presumption. This matter is fully considered below, at pp. 661 et seq.

Here one must examine the legislation to see when the native courts acquire jurisdiction. Native Courts have

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15. (1949) (Unrep: Civil Appeal 82/49.)

exclusive original jurisdiction in land causes or matters;[16] and in other causes or matters involving natives they have jurisdiction, the Supreme Court being bound (s. 17 of cap. 4) to refer the parties to a native court if the case is properly cognizable by that court, and there is a competent native court.

The jurisdiction of the native courts when English Law obtrudes is governed by the provisos to ss. 15[17] and 7 of the

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16. Probably. Cf. Report of Commission on Native Courts, 1951, p. 17, para. 93: "In most /cases/ it has been held that cases governed by the customary law of land tenure, or of inheritance of property, are properly cognisable by Native Courts; one at least has gone further in bringing all land cases within this rubric; but no comprehensive exposition of the phrase /"properly cognisable" in s. 17 of the Courts Ordinance and elsewhere/ has been made."

17. "15. Subject to the provisions of this Ordinance a Native Court shall administer -
(a) the native customary law prevailing within the jurisdiction of the Native Court (as far as it is not repugnant to natural justice, equity, or good conscience, nor incompatible either directly or by necessary implication with any Ordinance for the time being in force: "
(Proviso: does not apply here)
" (b) the provisions of any law binding between parties subject to the jurisdiction of Native Courts.
Provided that in any civil cause or matter a Native Court shall not, unless the parties agree thereto, have jurisdiction to determine any cause wherein it shall appear either from express contract or from the nature of the transaction out of which such cause or matter may have arisen, that the parties agreed either expressly or by necessary implication that the obligations arising out of such transaction should be regulated exclusively by English law."

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Native Courts (Colony) Ordinance, No. 22 of 1944, and the Native Courts (Ashanti) Ordinance (cap. 80) respectively. (It is slightly startling to find a provision about jurisdiction embedded in a section regulating the law which native courts are to administer.) The Native Courts are inter alia to administer any law binding between the parties, but are not to have jurisdiction when it appears that the rights of the parties are regulated "exclusively" (Colony) or "substantially" (Ashanti) by English Law.

Is there any effect in this difference in wording? It is submitted that there is: if the rights of the parties are regulated "exclusively" by English Law, it follows that native customary law must be entirely excluded. "Substantially", on the other hand, means that one must look to the nature of the agreement. If its substance or essence is English law, it does not matter if it has customary trimmings or additional terms (cf. the English law of sale of goods - the distinction between conditions and warranties).

Here one must notice s. 74 of the Courts Ordinance, which contains a similar proviso about English Law: s. 74 sides with the Native Courts (Colony) Ordinance in using the word

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17. (cont. from previous page) -

And section 14 (1):

> " All land causes shall be tried and determined by a Native Court having jurisdiction over the area in which the land which is the subject-matter of the dispute is situated..."

"exclusively", but a more important point is that this refers to a person's claiming the benefit of "a local law or custom" and not to the jurisdiction of the Native Courts. S. 74 relates to the law to be administered: the Native Courts Ordinances to the jurisdiction of certain courts.

There are certain problems of interpretation to overcome. The first one is to do with the words "exclusively" and "substantially". At times it appears as though learned judges have overlooked the presence of this or similar terms, and have failed to see if the essence or the whole of the contract was pure English Law, having instead contented themselves with saying that "English law applies".

Secondly, there might be difficulty in regard to appeals from Ashanti, where the rights of the parties are regulated substantially, but not exclusively, by English law.

It should be noted that in the cases considered (where English law applies) the native courts have no jurisdiction "unless the parties agree thereto". In practice, the native courts exercise jurisdiction, unless the parties object: I have not discovered instances where parties have raised the point <u>at this stage</u>. No formal agreement, it is respectfully submitted, is required between the parties to operate the clause; the plaintiff, by making his claim in a native court, must be taken to make an offer to the defendant to have the cause tried by the native court. If the defendant defends, appears and

joins issue with the plaintiff, his act is acceptance of the plaintiff's offer, and agreement sufficient for the words of the proviso is present. One must except the case where the defendant enters a plea to the jurisdiction under the section: in this case it is obvious that there is no agreement. A view has been put forward that there must be a formal acceptance by both parties of the native court's having jurisdiction, and that, unless there is such acceptance, the subsequent proceedings are necessarily a nullity.[18] It is respectfully submitted that this construction places on the words of the proviso a greater strictness than they should bear.

If defendant denies the jurisdiction of the court on other grounds, and, his plea not being upheld, the case goes to judgement in the Native Court, it is a question whether there would be deemed to have been a sufficient agreement - but probably not.

Where the defendant does not defend, and a native court might be entitled to give judgement in default, then it is to be presumed that it is the court's duty to see first of all - before giving judgement for plaintiff - whether the claim is based exclusively or substantially on English law or not.

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18. But see: the judgement of Ragnar Hyne, J., in Mensah v. Carthy: (Unrep: 1949, Land Appeal No. 15/48, Sekondi); - "There is nothing on the record before this Court to show that the parties agreed that the Native Court should have and exercise jurisdiction in this cause before them - such agreement must, in my opinion, be explicitly stated."

To summarise, the use of documents, even if in English form, does not necessarily imply either that the parties intend to regulate their relations exclusively by English Law, or that the jurisdiction of the Native Courts is ousted.[19] It is necessary in most cases to go into the contract and the circumstances of the case in order to determine the intention of the parties. The Native Court may thus find itself at least part-hearing a case over which it has no jurisdiction. One question must also be asked: what is the effect of the words "it shall appear" either from express contract, etc., that the parties intended to regulate their obligations by English Law? Do the underlined words equal "it is certain", or "the Court finds good reason for holding", or merely that "prima facie the transaction is governed by English law, because that is the first impression which would be gained"?

If the words mean "give the impression or raise a presumption" then such a case would have to be tried by the Supreme Court, whose first duty it would be - before considering the merits - to dedide whether appearance was sustained by reality, i.e., was consonant with the interpretation of the acts and intentions of the parties. If the Court found that the appearance was deceptive, it would have to remit the case for hearing to the appropriate native court (sed dubium).

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19. See Azzu v. Cooper:(1913) F.Ct.Ren. 680

Another difficulty arises from the proviso: where there is a bilateral or multilateral transaction, agreement between the parties, either expressly or by implication of law, can be found. But in the case of a unilateral act, no agreement can possibly be constructed. Certain judgements of W.A.C.A. are helpful in this regard: in Mensah v. Takyiampong[20] it was held that if there is a dispute about whether property is family or individual, the existence of a will affecting the property does not take the matter out of the cognisance of a native court. And in Solomon v. Allotey[21] it was held that the mere fact that a testator purported to devise by English-form will some of his property does not prove whether he intended to regulate his relations, etc., by English law so as to oust the jurisdiction of the Native Court. Again, in Villars v. Baffoe[22] it was held by the Full Court that "a man cannot by simply taking out letters of administration oust the native law so far as 'the family' is concerned. The administrator elects to be bound by English law, but his election to be so bound does not bind 'the family' of /sic: read OR/ the 'family property'."

The proviso refers to "parties": this cannot refer to the parties to a transaction; it concerns the parties to the case before the court.[23] Hence, if one of the parties in a

20. (1940) 6 W.A.C.A. 118.
21. (1938) 4 W.A.C.A. 91.
22. (1909) Ren. 549.
23. But Bartholomew, in Private Interpersonal Law, I.C.L.Q., (July 1952) I, 325, at pp. 331-2, disagrees with what he

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case is not a party to the transaction, his agreement, express or implicit, to be bound by English law cannot arise - this was the ratio in Amuakwa v. Anyan,[24] where the defendant was not a party to the lease which was the source of dispute; and the native court had jurisdiction.

Again, in the case of a will (and it is now sufficiently admitted that Africans have power to make written wills) one must ask: who are the parties who could agree within the terms of the proviso? There is only one party, the testator; and no agreement exists or could possibly be implied between him and the beneficiaries. It has been suggested that anyone who bases his claim on the will thus elects to be bound by English Law: but this is not helpful where one of the parties disputing the succession is a devisee under the will, and the other the customary family.

It follows that the proviso would not operate to remove English-form wills as such from the jurisdiction of the Native Courts; all English-form wills are justiciable by the Native Courts provided the testator and the beneficiary or other person suing are "natives". By what system of law the Native

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23. (cont. from previous page) - calls "one fundamental objection" to such a provision, that "it lays down no legal rule which is to be applied to a given factual situation". He thinks that once the courts have decided a particular case, "then it is no longer true to say that there is no law applicable to that particular factual situation", which will apply, unless there is reason to the contrary, in future cases.

24. (1936) 3 W.A.C.A. 22.

Court would try such an issue is another matter. The suggestion that it is inconvenient for matters of interpretation of English documents to be considered by native courts[25] is entirely different in kind from the suggestion that the native courts have - on the present legislation - no jurisdiction. This confusion is one which seems to occur. In this connexion it is relevant to quote from Azzu v. Akardiri,[26] where the appellants claimed that "from the moment any transfer of an interest in land held by native tenure is effected or purported to be effected by writing the native tribunals have no jurisdiction; and from this contention it logically follows that from such date an interest in land previously held by native tenure ceases to be held by native tenure". This contention was rejected by the Full Court as a "confusion between inexpediency and illegality". But in Vanderpuye v. Plange[27] it was held: "A covenant of title has no existence in native customary law: the rights and liabilities under a covenant of title can be ascertained only by reference to English law." Hence the Native Tribunal had no jurisdiction as "the parties by implication agreed that their obligations in connection with the transactions should be regulated substantially according to

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25. Presumably white man's magic must not be handled by native magicians. But surely a native court is more likely than any other to know the minds of the parties?
26. (1912) F.Ct. Ren. 675; (the name is also spelt "Akadiri" and "Acardi").
27. (1942) 8 W.A.C.A. 170.

the provisions of English law."

A deed of gift made for no valuable consideration is also a unilateral act: and similar considerations may apply as in wills.[28, 29]

5. THE EFFECT OF WRITING ON THE RIGHTS OF THE PARTIES.

The forms which may be adopted for the doing of an act or the transfer or creation of an interest in property may be classified under three heads:

(a) (African form;
(African form with a memorandum;

(b) English form;

(c) Mixed form.

(a) African form:

By this is meant a customary mode of conveyance, transfer, etc., not involving writing. Such a form may be either

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28. See also: Cheshire & Fifoot, Law of Contract, pp. 19-20: (speaking of contracts under seal) -
"The idea of mutual assent, of bargain, is completely lacking. So far, indeed is his liability removed from the ordinary conception of agreement that it has even been held that a deed may create a legal duty in favour of a beneficiary who is unaware of its existence. The affinity of the deed is with gift rather than with bilateral obligation..."

29. For a consideration of the more general questions relating to the jurisdiction of native courts, see my The Extent of the Operation of Native Customary Law: J.A.A. vol.ii, (July 1950), 4; and also Marriage Laws in Africa, by Arthur Phillips, especially at pp. 176 et seq. (in Survey of African Marriage and Family Life, 1953).

ancient or modern; in either case it is good according to native law and custom. Examples are:

(1) sale of land by guaha or tramma;

(2) gift with aseda;

(3) tenancy, free or on the abusa system;

(4) customary pledge;

(5) samansew or oral will;

(6) caretakership.

The first question which one must ask is whether the grantor or grantee has power to create subsequent or dependent interests over the subject-matter in English form. There are really two questions: can a grantee subsequently use non-African form for the conveyance of what is in effect an African interest? Can lesser interests be carved out of the customary interest which he possesses, but by the use of non-African form? The answer to both questions seems to be a decided affirmative. It seems obvious that if land is sold outright by customary form, the grantee can mortgage the land by English mortgage; and similarly if there is an outright gift. He could also re-transfer his interest by English conveyance if he so wished. A tenant may mortgage his cocoa-farm (with the permission of the landlord). A person bequeathed property by native will may deal with it as his own, including disposing of it by English form.

It is obvious that he cannot create interests which are

incompatible with the rights of others. This will especially apply where, for instance, a gift is not outright. If the family of the donor have not given their consent to the gift, the property will be claimed back by them on the death of the donor; the donee can therefore grant no more than an "estate pur autre vie", and perhaps not even that. He certainly could not successfully transfer the property outright by deed of gift and evade the customary requirements (or he should not be able to do so).

In most cases the granting party retains some right over the subject-matter: if there is sale of the land, he may retain right to the minerals; he may revoke a gift or bequest for good reason; in other cases he holds the reversion. These rights are determined by native law and custom. Now the grantor and grantee may - and not infrequently do - conclude a subsequent agreement in English form; e.g., after a customary sale, a conveyance may also be executed.[30] A gift may be confirmed by deed; an oral will may be strengthened or replaced(?) by an English will; a lease may be made between landlord and customary tenant. Rights under the English forms are different in many cases from rights under native law and custom. When these rights are in competition, it is necessary to ask which set prevails.

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30. See: Dowuonah v. Assabil: (1914) D. & F. '11-'16, 72; coram Smyly, C.J., in the Supreme Court.

Three results are possible:-

(1) The subsequent conveyance does not affect the rights of the parties, but merely records and strengthens the customary alienation, even though some of the rights and powers expressed in the conveyances are in conflict with custom.[31] In such a case, the conveyance serves merely as a memorandum; and the transaction becomes an example of "African form with memorandum".

(2) Alternatively, the conveyance prevails, and its terms, and the rights and powers implied thereunder by English law, are substituted for powers under native customary law. The transaction is thus converted into "(b) English form".

(3) Finally, conveyance and customary transaction must be read together as two parts of one transaction: the case is then one of "(c) Mixed form".

To decide which of these results will occur, whether as a general rule or in particular cases, the vexed question of "native tenure" must be examined.

Land under native tenure: Is there such a thing as "land under native tenure"? This is a phrase commonly encountered in the reports,[32] but one cannot always be certain what is meant thereby.

31. Cf. Brobbey v. Kyere: (1936) 3 W.A.C.A. 106, where a samansew was confirmed by a writing. The legatee "never at any time claimed his right to the inheritance under an English will" - at p. 107.
32. Traceable, of course, to the provisions of s. 11 of the old Native Jurisdiction Ordinance, now repealed.

The converse of "land under native tenure" is "land under English tenure"; is then land under native tenure such because of the category of land, or of the persons enjoying an interest therein, or of the nature of the interest, or of the method by which they became seised of that interest?

(i) To consider the first point: this is obviously untenable. It is impossible to divide up the Gold Coast physically, and declare that such-and-such an area is and always has been and always will be under English tenure, and the remainder will always be under native tenure. Hence it is not the land itself which lends character to the tenure.

(ii) Or is the criterion the type of person enjoying an interest in the land? That is, if the right-holder is a native, then must the land be under native tenure? One has only to consider the case of Africans enjoying freehold interests, or interests as mortgagors and mortgagees, to see that it would be untrue to hold that a native can only hold property by native tenure.

(iii) Does the nature of the interest enjoyed determine the type of tenure? This is much nearer the truth; but again from the nature of the interest enjoyed it is impossible to label or characterize <u>the land itself</u> as under any particular form of tenure. There may be more than one party interested in the subject-matter: A may hold an interest recognized at English Law; B an interest recognized in native custom.

To take a simple example: A may be a lessee under an English-form lease of a house; he dies, and the benefit of the lease is inherited by his successor or family. A's sons will have a customary right of residence free in the house, whilst the family enjoy a right under English law.

It is thus incorrect to argue that, because a person enjoys a particular interest in land, the land is therefore governed by the appropriate tenure in such a way that all interests in the land must be ones known to that tenure. Perhaps the judges refer only to the dominant interest in the land.

(iv) Does the method by which a person becomes seised of an interest determine the tenure under which he holds? If a man acquires land by English form, does he then hold it under English tenure; and conversely with African form? The answer is "Yes and No". It is submitted that the answer is "Yes" when the transfer is not outright or perfected as between the original parties;[33] a lessee under an English lease will be governed by English Law in his relations with his landlord. Otherwise the answer is "No". It is submitted that a man may acquire property outright either by an English conveyance or by custom-

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33. Thus in Mensah v. Carthy the land in question was assigned to C by M under an Indenture; M acquired it in a judicial sale. But the interest assigned here was a leasehold, originally demised by Government to one K.B. The relevant factors in this case were (a) original non-native party; (b) a continuing interest (c) known only to English law (d) created and transferred by English methods. Hence the interest of C was not in "land under native tenure".

ary conveyance. Once he has acquired the property his powers are similar (if the same interest is conveyed).[34] Similarly, a beneficiary under an English will may be in a similar position to a beneficiary under a native will. Because he acquires under an English will, the beneficiary does not lose his powers of alienation under customary. This principle was illustrated in Azzu v. Cooper (cited above).

One important result of a decision by a Court that English law is to apply to a transaction between natives is that the Statutes of Limitation will therefore operate: a pledge accompanied by writing might thus be barred by time, if held to be governed by English law.[35] Another consequence is that the requirements of the Statute of Frauds would have to be observed.

These questions need never have been asked if there had been a clear understanding from the beginning of the relations

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34. Cf. Adjuah v. Wilson: (1927) F.Ct '26-'29, 260. For a clear guide in such cases the recent decision of Verity, Ag.P., in Nelson v. Nelson & ors: Unreported: W.A.C.A. Civ.App. No.77/49, August 1951 (for which I am indebted to Mr. R.J. Pogucki), is of relevance here. It was held that the mere fact that a form of English deed is used does not of itself mean that the incidents of English tenure are attached to the property in question, to the exclusion of native tenure, though it may regulate the dealing itself and any dispute which arises from it. Because a party agrees to the acquisition of title by a conveyance in English form, it does not mean that he has agreed that the tenure itself should be regulated by English law.
35. Cf. Amarquaye v. Broener: (1898) Ren. 145; and see also Hughes v. Davies: (1909) F.Ct Ren. 556.

of English law to customary law in the Gold Coast. Customary law is not a foreign law in the Gold Coast - the very notion is patently absurd; and dicta suggesting this are to be understood to refer only to methods of proof of law in the Supreme Court. Customary law is not an exception to English common or other law. Both are the law of the land, forming two branches of Gold Coast Law; but whilst one is appropriate for "natives", the other is appropriate for "non-natives". That is to say, native customary law is the primary law for Africans in certain fields, and English law for non-natives. It is possible for a person to contract out of his primary law, but, unless he does so, he remains governed by his own law. These concurrent systems of law are administered originally by the native courts for native law, and by the Supreme Court for English law. Each type of court is, however, empowered to administer the other system of law in certain circumstances. When the Supreme Court hears an appeal from a native court, it is itself a native court, and therefore requires no proof of native law (as a foreign law). The judges have to refresh their memories of native law, it is true; but the submissions and evidence they have thereon, and their conclusions which they derive from this evidence, are not fact or findings of fact. They are findings of law. The distinction is vital: the judge's finding on law can be disturbed by a superior court. Room is left for the expansion and modification of

the customary law. Owing to the reluctance of appeal courts to disturb findings of fact consistently maintained through several courts, a wrong view of native law may thus be confirmed, when it is held that findings on customary law are findings of fact. Native parties should not need to plead rules of native law expressly.

The views above may appear heterodox and contrary in some cases to the judgements of the Supreme Court and its predecessors, who have held, inter alia: (a) that native law is foreign law;[36] (b) that it must be specially pleaded;[37] (c) that as a finding on native law is a finding of fact, concurrent findings cannot normally be disturbed by an appeal court;[38] (d) that once

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36. "As native law is foreign law, it must be proved as any other fact" - Francis Smith, J., in Hughes v. Davies: (1909) Ren. 550 at p. 551.
37. Angu v. Atta: (1916) P.C. '74-'28, 43; Bonsi v. Adjena II: (1940) 6 W.A.C.A. 241 - "...where a party intends to set up and rely upon any Native Law and custom it must be specifically pleaded."
38. Cf. Ameyaw III v. Safo: (1947) Privy Council Appeal No. 66 of 1945, where Lord du Parcq mentioned
    "a well-established rule of practice of this Board, that their Lordships do not advise any interference with a decision where there are concurrent findings of fact by two Courts in the country from which the appeal comes."
    That a finding on customary law is to be treated as a finding of fact for this purpose is obvious from a later dictum in the same case:
    "In this case the Courts had to consider native customs and to hear evidence as to tradition, and so forth, and it was obviously right that their Lordships should not be asked to review concurrent findings of fact."

a native custom is notorious to the courts, as it may become by frequent judicial notice, evidence tending to disprove the continued existence of the custom, or to deny that the custom is correctly represented, will not be admitted.[39]

The Supreme Court's administration of native law has been bedevilled, as is well known, by mistaken judgements which have misinterpreted, or wrongly recorded, rules of native customary law; these judgements having been continually followed, a false doctrine has been built up in many instances (e.g., on non-Akan custom of succession); until finally judicial notice is taken of these customs,[40] and it is doubtful if the courts would listen to evidence designed to disprove them. Unfortunately, the customs of which judicial notice is now taken are usually those which either never existed in the form stated, or else have been completely modified in customary usage, or even abandoned altogether. (Judicial notice is usually taken of notorious facts; some of these facts may not be so notorious that the Judge will not require some refreshment of his judicial memory: cf. McQuaker v. Goddard,[41] where it was judicially noticed that a camel is a domestic animal.)

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39. Cf. the dictum of Sir A. Channell in Angu v. Atta (already cited); approved in Amissah v. Krabah: (1936) P.C. 2 W.A.C.A. 30, at p. 31
40. Cf. the case of succession in Accra, as described in my article A Note on the Ga Law of Succession, Bulletin of School of Oriental, &c., Studies, XV/1, 164.
41. (1940) 1 K.B. 687.

Can African form be used where one of the parties is not a native; and if so, what is the effect of using it?

The most frequent instance of this has occurred in the case of the missions, who acquired land for their churches and schools by gift from local chiefs or citizens. In the early days these gifts were "stamped" by the payment of rum from mission to grantor; and thenceforth both parties acted on the assumption that the gift was perfect.

By what law is such a transaction governed? If the gift is by native law and custom, the rum operates either as "knocking-fee" or "stamping-fee". In either case the donor would retain right to the reversion in the land, and especially it would revert to him if the donee abandoned the land given. The donor could also insist that the land should not be used commercially, e.g., by sale to a third party, without his permission. The donor would also retain the right to minerals, unless otherwise agreed.

Unfortunately, the trouble which brought the Statutes of Mortmain into existence in England - that churches do not die - arises here; and the donor is likely to lose his land for good.

In addition, land so acquired by certain missions has been used for the erection of stores, a commercial use of the land not contemplated by native custom.

If one says that the transaction is governed by English

law, the gift could be construed either as an outright gift, or a sale, or a free tenancy at will ripening into ownership.

If it is the first, the gift should surely have been made by deed according to English Law.

If the second, then the consideration is found in the drink given; but this would be to wilfully misinterpret the significance of the giving of drink. In such a case again, there should be a deed. If the admission into possession and the interpretation of the drink as consideration add up to a contract, that contract - to be efficacious - would have to be construed as a contract to execute a conveyance when required; but such a contract would not - I think - be enforced at English law.

If the third interpretation is correct, and there is a permissive tenancy of indefinite duration, then it might be contended that by the Statutes of Limitation the tenant's interest could ripen into ownership by lapse of time. But the answer to this contention is that the tenant cannot raise a claim adverse to the owner's title.[42]

The truth of the matter is that here English law is quite inappropriate, since the donor has followed a form well-known to the customary law. This appears to be a case where, even if English law were held to be applicable, "substantial

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42. Miller v. Kwayisi: (1930) 1 W.A.C.A. 7, for instance, impliedly raises such questions.

injustice" would be done to the donor by a "strict adherence to the rules of English law"; and s. 74 (1) of the Courts Ordinance would operate.

(b) English form:

(i) From native to native: Is the use of English forms of conveyance and transfer permissible for "natives"?

There seems no doubt that this question must be answered in the affirmative; and English form is today frequently used in practice by Africans for creating or transferring interest in land which they themselves are interested in by native custom.

Use of English form appears to be sometimes:

(a) optional or permissible;

(b) compulsory;

(c) forbidden.

(a) Optional: As a general rule, an African may today use either an English or an African form of conveyance, etc. Such an option is indicated at pp. 642, 643 above. Sometimes his choice will make no difference to the subsequent rights of the parties; at other times their rights will be affected (see pp.661 ff. above).

(b) Compulsory: The Courts appear to be ready to hold that use of English form is sometimes compulsory. In particular, if Letters of Administration are granted, the administrator may be required to deal with the property administered - as regards

for instance, its vesting in the parties entitled - according to the methods of English Law.

Where land is held under an English head-lease, the property may have to be dealt with, especially by persons holding lesser interests dependent on that lease, according to the rules of English Law.[43]

When a person holds an interest known only to English Law - e.g., as tenant for life under a settlement - he must deal with his interest by English Law.[44]

(c) Forbidden: It would be truer to say that in certain cases use of English form is nugatory, in that an African cannot fulfil his purpose, and grant the interest intended, by any other than the methods of native customary law.

Does the use of English form alter the rights of the parties?

The answer is "Yes" according to Fawcett v. Odamtten,[45] where it was held that a conveyance written in English in the usual form must be construed in accordance with English law. And again, in Quarshie v. Plange[46] it was held that where

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43. E.g., in Mensah v. Carthy: (1949: Land Ct, Sekondi, Land Appeal No. 15/48) coram Ragnar Hyne, J.
Compare the obiter dictum about Kumasi lands in U.A.C. v. Apaw (referred to above, at p. 651); and the restriction of tenants in Obuasi in theory to dealings with their interest according to English law.
44. And see: Lutterodt v. Lutterodt: (1915) K-F, 1, where a deed of settlement made in English form was interpreted in accordance with English law.
45. (1929) F.Ct, '26-'29, 339.
46. (1927) F.Ct, '26-'29, 246.

parties adopt the English method of sale they are bound by the principles of English law. These cases should not be taken at their face-value.[47]

Where the parties have agreed that their obligations should be governed exclusively by the rules of English Law, obviously their agreement prevails; and English Law alone will govern their relations between themselves. Since it will be appreciated how rarely Africans will intend to forgo all the rights which they possess in customary law, one may understand that such a state of affairs is the exception rather than the rule. Nevertheless, when it exists, the grantee will not forfeit the powers which he possesses by custom to create rights or interests in favour of others, unless to do so would be expressly contrary to the rules of English law applying between the original parties.

Hence a state of affairs may exist where A transfers an interest by English law to B, who in turn creates an interest by customary law in favour of C. The relations of A and B are governed by English law; the relations of B and C are governed by customary law; and the relations of A and C presumably by English law.

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47. But in Adjuah v. Wilson: (1927) F.Ct. '26-'29, 260, it was held that because a mortgage, executed in accordance with English law, of land under native tenure is made, and a sale takes place thereunder, it does not necessarily follow that the land ceases to be land under native tenure.

If the form affects some but not all the rights of the parties, then the form is mixed.

It is submitted as a rule which must be borne in mind in considering such cases, that the mere fact that African parties have executed a document in English form does not necessarily imply that English law is to govern their relations solely, partly, or at all.[48]

A frequent case falling for interpretation is where there is a pledge or mortgage of land by a native to a native, accompanied by writing. This writing usually takes the form of a receipt, and/or a so-called "promissory note". The mere use of such writing may be held to import English law, and hence bar the debt by limitation: see Amarquaye v. Broener,[49] and Aradzie v. Yandor;[50] or the contrary may be found: see Parbi and Wusu v. Muffatt.[51]

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48. In Sampah v. Yarboyoe: (Unreported): New Juaben A Court, No. 216 of 1946, defendants' title to a house was based on a sale with accompanying document: plaintiffs maintained that the conveyance was invalid. The Native Court said:
    "In regard to the objection by the plaintiffs that the Ex. "A" is not conveyance and therefore not valid in law, the onus of proof rests on plaintiffs to state that during the transaction both the late Sampah Kojo and defendant intended that their obligations should be regulated exclusively by English law. Both of them were natives and also not legal persons for which it would be possible for them to consider about this term "Conveyance"."
49. (1898) Ren. 145; but in this case it was found that there was not a mere receipt, but a receipt coupled with an agreement.
50. (1922) F.Ct '22, 91.
51. (1923) D.Ct '21-'25, 37.

Again, such a writing may contain a power of sale without an order of the court. If the mortgage is held to be a customary African pledge, then no order of the Court is required: Norh v. Gbedemah;[52] but it may be held to be an English equitable mortgage or charge, under which there can be no sale without an order of the Court: Sei v. Ofori.[53]

Certain matters influence the Court in deciding whether the parties intend to govern their relations exclusively by English law: the first, whether the transaction of which the writing is a memorandum is one known to customary law. Hence, in the pledge cases, the fact that the pledgee does not go into immediate possession is held to indicate that there is no true customary pledge, and hence English law applies in toto. Two remarks must be made: that the Courts fail to take into account modern developments of African pledge, charge, and mortgage; and secondly, that even if English law applies, it may not apply in toto.

Another test as to the intentions of the parties sometimes used by the Courts is that of literacy. In Koney v. U.T.C.,[54] the fact that the African concerned was educated was a point in influencing the court to hold that no substantial injustice

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52. (1929) F.Ct '26-'29, 395.
53. (1926) F.Ct '26-'29, 87.
54. (1934) 2 W.A.C.A. 188.

would result from applying the Statutes of Limitation.[55] Whilst one cannot deny that there is some relevancy in whether a party is capable of reading, it is submitted that the mere fact that he could read (even if not understand) an old English mortgage is not sufficient of itself to bind him to its terms.

African form followed by English form: when does the English form prevail?

The English form may operate either as a memorandum or an instrument. If it is a memorandum only on the face of it, then it is submitted the African form prevails. Or it may be an approach to English form, which fails, however, for want of some vital particular:

it is not stamped (Parbi & Wusu v. Muffatt);
it is not under seal (Azzu v. Cooper);
it is not registered (- do -);

in which case the African law will probably prevail, unless the documents purports to be a mortgage, but fails; in which case, it may be interpreted as an English equitable mortgage or charge (Sei v. Ofori). This last interpretation is somewhat dubious, in the light of what will be said now on the subject of instruments.

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55. and conversely "there is no presumption that a native of Ashanti, who does not understand English, and cannot read, or write, has appreciated the meaning and effect of a legal instrument because he is alleged to have set his mark to it by way of signature." - Kwamin v. Kufuor: (1914) Ren. 814; P.C. '74-'28, 36.

The document may be good in form, and would normally operate as an instrument. It is submitted that it will not operate as an instrument if:

(1) It is made subsequent to the conveyance or act which it purports to affect. The greater the interval of time which elapses between the transaction and the execution of the instrument, the stronger is the presumption. The document is in effect a memorandum or record, although in form an instrument - see Dowuonah v. Assabil.[56, 57]

Even if the interval of time is small, it may still not operate: e.g., if A sells land to B, and B pays part of the purchase-price, guaha is cut, and the parties adjourn and execute a conveyance, the land has already been validly conveyed by native custom when the conveyance is made. It cannot be conveyed again; hence on the principle of "nemo bis dat" the subsequent conveyance is meaningless as a conveyance. It will need very strong proof to hold that the sale was subject to a condition precedent. The distinction is important; if the deed operates as an escrow, the condition being the payment of the rest of the price, then the conveyance is inoperative until the balance of the purchase price is paid: Gbedemah v. Okai.[58]

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56. (1914) D. & F. '11-'16, 72; in the Supreme Court.
57. Cf. also Brobbey v. Kyere: (1936) 3 W.A.C.A. 106, where a samansew was confirmed by a writing. The legatee "never at any time claimed his right to the inheritance under an English will" (at p. 107).
58. (1929) D.Ct. '29-'31, 17.

If, however, the conveyance by guaha was valid, then the remedy of A is to sue for the balance as a debt, and ownership is immediately vested in B.

(2) The instrument does not represent the intention of the parties; e.g., the grantor or grantee is illiterate.

(3) It purports to grant an interest which the grantor is incapable of transferring by native customary law, or the grantee of enjoying.

Even if taking effect as a memorandum only, the instrument may still serve certain purposes:

- it is evidence of the nature of the transaction: e.g., that a pledge and not a sale was intended and made;[59]

- it can import subsidiary terms into the transaction or agreement: e.g., it can fix the time for repayment in a pledge, the rate of interest, the boundaries of the land conveyed.

- it can operate as against other parties, who subscribe the document as interested witnesses, guarantors, etc;

- it is "registrable" against other claimants: e.g., if authenticated by the local chief's signature, it is strong evidence against the claim of other parties. It might also be registered under the Land Registry Ordinance, cap. 112, and thus

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59. In Kwaku v. Sacker: (1912) D. & F. '11-'16, 37, Gough, Acting C.J., permitted two conveyances to be used in this way as evidence "and also because he (plaintiff) is not taking proceedings to enforce rights under it."

prevent others getting priority by a subsequent registration (although once the court examined the facts, the registration might turn out to be a nullity at law).

- it may also determine the law which is applied to a dispute between the parties: e.g., if there is a pledge accompanied by a "promissory note", and if the creditor chooses to sue on the promissory note and not on the pledge, then the Court will not look behind the note to the customary terms of the pledge (such as its indefinite duration), but will apply the English law, including the English law of limitation of actions.[60]

One sympathizes with the dictum of Francis Smith, J., in Hughes v. Davies[61] in regard to the similar proviso to s. 19 of the old Supreme Court Ordinance:

> "But...the proviso in my opinion implies knowledge of the effect of the transaction and an agreement to be bound thereby. Can it therefore be contended that the plaintiff, in merely accepting the I.O.U.'s, had such knowledge of the difference of the effect of native law or custom and English law bearing on the transaction? That is, in the one case time can be no bar to her remedy, and in the other it would deprive her of that remedy..."

(ii) Non-native to native:

The fact that the lease from the Chief Commissioner of Ashanti to the Omanhene of Agona was in the English language,

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60. Cf. Aradzie v. Yandor: (1922) F.Ct '22,'91; Sei v. Ofori: (1926) F.Ct '26-'29, 87.
61. (1909) Ren. 550, at p. 555.

and in English form, was held by the W.A.C.A. in U.A.C. v. Apaw[62] to mean that the agreement must be construed by the law of England, and the agreement must be governed by English law. This case concerned land in Kumasi, which at the date of the lease (1927) was Crown land. Kumasi lands are a special case; and perhaps the same rules will not apply now that they have been vested in the Asantehene in trust by the Kumasi Lands Ordinance of 1943. It will be appreciated that there is a distinction between holding that an agreement concerning Kumasi lands is governed by English law; and holding that Kumasi lands in general are not subject to native tenure. The position now is that as regards leases to chiefs and individuals, an English form of lease is used: but this cannot be held to mean that all customary rights are to be excluded, and that, for instance, it is now impossible for a widow or children to claim a right in some particular portion of Kumasi land by virtue of customary law.

Where there is a dispute between native and non-native, section 74 of the Courts Ordinance lays down in effect that English law is to be applied by the Court, unless substantial injustice would result to either party by a strict adherence to the rules of English law.[63] This gives us a rule, or a guide, when an issue comes before the Court; it is, of course,

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62. (1936) 3 W.A.C.A. 114.
63. See: Koney v. U.T.C.: (1934) 2 W.A.C.A. 188.

of no assistance at all in deciding what law is applicable if there is no case before any court. The fact that one of the contracting parties is a non-native puts the native on enquiry, as it were; the native party is to be taken to comprehend that English law is the ordinary law in contracts with non-natives; and the use of writing strengthens this presumption. But the presumption is not conclusive. In dealings between natives and non-natives it is possible for them - exceptionally - to contract according to the provisions of some other law, be it European - French, etc.; or native. Contracting parties to some extent make their own law;[64] if they choose to adopt native law as the basis of their contract, they are free to do so. The onus will, however, be on the party alleging it to show that native law is to govern such a contract.

The question of the literacy of the native party is also to be considered; even without there being such a deception as to amount to fraud, yet there may be such a failure on the part of the native to understand the legal consequences of his contracting as to make the parties not ad idem.

In Hamilton v. Mensah[65] one party was from Sierra Leone, and not a native. As regards the sale of timber, coupled with a receipt which W.A.C.A. accepted as a sufficient memorandum of the agreement, but not a concession within section 2 of the

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64. This is the view of Kelsen, from the jurisprudential angle, following the maxim Modus ac conventio vincunt legem.
65. (1937) 3 W.A.C.A. 224.

Concessions Ordinance, the Court in ordering a retrial did not say whether English law applied or not. But, said the Court, at p. 225:

> "It is clear that the plaintiff's case is not that the receipt purports to grant the timber in question, but that there is a verbal agreement as to the sale of the timber and that the receipt is merely evidence thereof. If this contention is correct then it is quite clear that the right to the timber has been transferred to the plaintiff by a verbal agreement and that the receipt is merely evidence thereof and not the writing whereby the rights in the growing trees were transferred, and therefore not a concession."

U.A.C. v. Apaw was adverted to in the unreported case of Asamoah v. Mprenguo[66] where Smith, J., putting the view of the Court, spoke of "the difficulty of trying to superimpose a form of native tenure of a house where the land on which it is built is held under a lease according to English law, as the case of U.A.C.Ltd. v. Kwadjo Apaw & ors (3 W.A.C.A. 114) has decided that in Kumasi the ownership of buildings goes with the land on which they are erected." The case of U.A.C. v. Apaw was not decided on this point, the dictum of the Court being, it is submitted, obiter.[67] In any case, there is no difficulty in superimposing a form of native tenure of a house on a form of English tenure of the land on which it stands: in

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66. (1949) W.A.C.A. Civil Appeal 72/48; 28.2.49.
67. At p. 117: "By reason of the principle of law shortly expressed in the legal maxim quicquid plantatur solo, solo cedit, the new building became annexed to and formed part of the freehold."

other parts of the country it is possible to sell, or to seize in execution, a house, without affecting the land on which it stands; and this principle has long been recognized by the Courts of the Gold Coast.

In any case, despite his assertion above, Smith, J., then went onto order that appellant (holding on a sub-lease from the Odumhene, himself holding the land on a head-lease from the Asantehene) should not have an order for possession or an account, that the house was appellant's property, but the respondent should be "entitled to occupy it for her life or the life of the house, whichever be the shorter, provided that she pays her customary dues to the Odumhene". This very much resembles the superimposition of a bastard form of "native tenure" upon an English tenure.

(c) Mixed form:

The type of case included here is similar to that considered by the Full Court in Boodoo v. Bissa,[68] upon which the then Chief Justice, Brandford Griffith, remarked:

> It was a "difficult matter to apply either English law or native custom entirely to the facts of this case. The parties concerned were mostly illiterate natives who used some of the forms of English law, and yet, to some extent, guided themselves by native custom".

He considered that it was not necessary to apply either native

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68. (1910) (Full Court) Ren. 585, of which there is a fuller report at first instance in Earn. 35.

or English law exclusively; justice could be done within the provisions of s. 19 of the Supreme Court Ordinance. This type of case is more frequent than might be imagined; it is of particular interest when considering the place of documents in Gold Coast law, inasmuch as it principally arises when there has been some document. Another example was provided by Abah Abrobah v. Moubarak and Omanhene of Dutch Sekondi.[69] Here there were two claimants for the land in question, the plaintiff claiming that he acquired the land by conveyance from one A.L. (which conveyance was approved by the stool of Dutch Sekondi), the first defendant claiming that he acquired the land by deed of gift from the same stool. For the stool as co-defendant the contention was that:

> "...the land belongs to the Stool of Dutch Sekondi and that the deed of gift to the first defendant was according to native custom, the ownership not passing entirely to the first defendant, and as regards the alleged deed of conveyance to the plaintiff, the second defendant alleges that this also was only a deed of gift according to native custom, and that as the plaintiff failed to comply with the conditions upon which the gift was made, he, the second defendant, ree voked the gift, as he was entitled to under native customary law.

This excerpt is sufficient to illustrate the amazing results which may follow the mixture of customary law with modern exotic trimmings. Ancient customary law knows nothing of a "deed of gift according to native custom." The chief was

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69. (1935) D.Ct. '31-'37, 103.

maintaining that the customary duties of the donee and customary rights of the donor remain unaffected by the use of an English deed, in particular that:

> "as the land was Stool land its occupancy was governed by native customary law; the occupier for the time being was under an obligation to recognize the suzerainty of the Stool, he had no right to build on the land without the Stool's permission and was obliged to contribute towards the payment of the Stool debts when called upon to do so."

Whether this list of customary duties is correct or not is immaterial (it is probably too extensive); but unfortunately the intricate question posed - and provisionally answered by the stool - was not answered by the court, since Barton, J., found that the assignment made by A.L. was valid, and therefore gave judgement for plaintiff.

A very frequent example of a mixed form at the present day concerns customary tenancies and leases in English form. Strangers on <u>abusa</u> tenancy and other forms of tenancy have in some states (e.g., in Adansi) been required to accept a written lease. The lease provides for the observance of the tenant's customary duties, and preserves the rights of the stool; one can only conclude that the result is a mixed form. Again, strangers wishing to build houses in certain towns take a lease of a house-plot; this is expressly done not so as to alter the rights of the parties, but so as to preserve the right of the stool to the land. Once the stranger has built his house on

the plot, it is his own absolute property, although standing on a leased site. In Bekwai citizens also take leases of their plots, mostly post facto (i.e., in respect of plots of which they are already in occupation); but since the lease is not expressed to be for any rent, and its specific terms are neglected except where they coincide with customary duties, they do not seem to alter the legal position very much. In Kumasi the position is still more complicated, owing to previous vesting of title in the Crown; and the past and present employment of English-form leases. In Obuasi the townsfolk enjoy their houses on tenancies from the Ashanti Goldfields Corporation Ltd., based on the latter's head-lease from the Adansi stool. The advocate of the tenure theory must find the legal position here rather complicated, since Adansi granted a lease, carved out of the customary title of the stool to the land; out of this lease, A.G.C. again granted interests at English Law to Africans; and the Africans themselves have busily carved interests known only to customary law out of these sub-leases. There is thus here a dual shift, from African to English, from English to African, tenure. Such problems of mixed form are no juristic stumbling-block to those who support the idea that there is a Gold Coast law, compounded of both elements: as W.A.C.A. pointed out in Mensah v. Cobbina,[70]

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70. (1939) 5 W.A.C.A. 108, at p. 110.

a competent native court can "take into consideration any deeds documents or consents which may be relevant to the right decision of the case before them whether they be in accordance with English law or not, provided they are valid in accordance with the law regulating Ashanti." (The subsequent proviso inserted, as a result of this case, in the Native Courts (Ashanti) Ordinance, cap. 80, does not affect this principle, except where English law substantially governs the relations of the parties.)[71]

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71. But an inelegancy must be pointed out. In many cases of mixed form the plaintiff appears to have an election: if, for instance, there is a customary pledge with "promissory note" attached, his decision to sue on the promissory note will apparently estop him from referring to the customary or other terms of the pledge outside the promissory note, and a decision will be given according to the English law alone. The terms, however, of the proviso in all the relevant ordinances command the Court to consider the agreement of the parties or the nature of the transaction as the determinant of the law to be applied, for which the form of action is not the criterion.

CHAPTER XII.

LONG POSSESSION OF LAND.

In any system of law the fact of possession plays a definite part. By itself, and however short, it is evidence of title in the possessor.[1] The presumption engendered by possession gathers strength as the duration of the possession increases, and the other means of proving title gradually disappear. Time with his scythe mows down the muniments of title; with his hour-glass he establishes presumptions in their place.

Besides its function as evidence, possession (more particularly if long) may have other effects: it may (by provision of law) serve as a ground for the acquisition of a prescriptive title by the occupier; it may bar either the right to sue, or the actual title itself, of another (the true owner) - this is limitation or so-called "negative prescription". In the account which follows we shall consider each of these functions in Gold Coast law. The present situation is somewhat confused; this confusion can be traced to various causes:-

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1. Indeed in the case of occupatio rei nullius the mere taking of possession may create title: just as the abandonment of possession corpore et animo may destroy it. However, in the case of taking up waste land for agricultural purposes some systems of law require a minimum period of cultivation to establish title; meanwhile the possession is protected. This is not a feature of Akan law.

(1) There has been insufficient recognition of the great difference between the concepts of English and African law; in particular, there has been a failure to appreciate the existence of exotic forms of subordinate ownership, and the separation of title between land and the things on it, which has sometimes led to attempts to apply English ideas to African facts.

(2) The judges have come up against the fact that prescription in the English sense is not part of customary law, and that the Statutes of Limitation do not ordinarily apply to land held under native tenure; hence they have fallen back on such rules as those of estoppel (en pais or by laches), and the bona fide purchaser for value, to fill the gap. The settled doctrine that as between the purchaser and parties interested other than the vendor the purchaser must prove that he acted without notice after making all enquiries open to him (cf. In re Nisbet & Potts' Contract: (1905) 1 Ch. 391; (1906) 1 Ch.386) appears to have sometimes been overlooked.

(3) Unfortunately, the judges do not always appear to have comprehended the nature of these rules in English law; one finds that a decision will in one case be given against an owner on grounds of estoppel, in another case with similar facts on grounds of laches, and in a third under the doctrine of innocent purchaser for value.

(4) Cases involving problems of possession do not usually show any clear line of doctrine, wherein earlier decisions are referred to and evaluated. There is thus a difficulty in relating a collection of isolated decisions and assigning them to their proper categories.

(5) Modern Gold Coast law is in fact a mixture of English and African law today.

1. LONG POSSESSION AS EVIDENCE OF TITLE.

By itself possession raises a presumption of ownership, or at least of lawful occupation. Such a presumption can of course be rebutted by proof of a superior title (as soon as the courts say that such a presumption is or shall be "conclusive" or "irrebuttable"[2], then the presumption ceases to be part of the law of evidence or adjectival law, and operates as prescription, as part of substantive law).

Two cases arise for consideration:

(i) a party who is in possession relies on that fact as evidence of his title;

(ii) a party not in possession sues to eject a party in possession, or for a declaration of title.

In the former case, the possessor need only sit back and let the other party (seeking to evict him) discharge the burden created by the adverse possession; in the latter case the

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2. Cf. Elizabeth v. Sam: (1910) Earn, 19; Tsibu v. Kyei: (1922) F.Ct '22, 14.

plaintiff will usually have to put his own title in proof, or else show how the possessor came into possession.[3]

Possession is only one of the elements which go to make up proof of title; where there is a lack of documentary evidence of the title to the land, then the courts are forced to rely on less tangible proof. In practice, other elements besides the mere fact of possession are present: the first of these is the long duration of the possession.

(a) Long occupation:

The fact that possession has been long strengthens the presumption of title. By itself, long occupation may serve as evidence either of ownership or of some lesser interest; it may indeed be evidence only of lawful entry on the land.[4]

(i) As evidence of ownership: the kind of title claimed varies partly according to the nature of the contestants. Although it is possible, as we have seen,[5] for families and individuals to hold an absolute interest in the land, it is more usual for such an interest to be claimed by stools. In Class I Areas, in which ownership of the absolute interest in land is with the stools, this is the rule; and individuals will be able to claim no more than free tenure subject to the

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3. Summary procedure (to prevent one who has recently obtained possession by unlawful means from relying on the possession so obtained to cast the burden of proof on the dispossessed plaintiff) is outside the scope of the present work.
4. Cf. Wiapa v. Solomon: (1905) F.Ct. Ren. 405.
5. Vide ante Chapters on THE FAMILY and THE INDIVIDUAL.

interests of the stool. In Class II Areas, where the rights of stools are jurisdictional, families and individuals will rely on long possession to ground their claims to absolute title.

Claims by stools will usually be to the absolute interest; but cases frequently arise where two subordinate stools subject to one paramount dispute "ownership". The paramount stool does not interfere, because its rights are safe. Even if one subordinate stool is awarded "ownership", this is only ownership as against the other party, and not as against its paramount. The position is probably different where the subordinate stools of two different paramount stools are in conflict; since a decision against the subordinate stool will probably affect the rights of the paramount stool as well (which is the reason why the paramount stool will usually join in such litigation, or at least support it financially).

A claim by a stool to land is based as a rule on the possession of its subjects. Such was the case in The Stool of Abinabina v. Chief Kofi Enyimadu (on behalf of the Stool of Nkasawura,[6] which came before the Privy Council very recently, Respondents claimed title to certain lands, based on possession by subjects for many years without paying tribute. Appellants claimed title, and that respondents were only on the land by leave and licence. The Board said by way of preface:

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6. (1953) Privy Council Appeal No. 5 of 1951.

> "Before turning to the record of proceedings their Lordships think it advisable to observe that the expression 'title' appears to be used throughout in the sense of the usufructuary right defined by Lord Haldane in Amodu Tijani v. The Secretary, Southern Nigeria (1921) 2 A.C. 399 at p. 402."

The ghost of the Amodu Tijani decision (given for Nigeria) seems to haunt the customary law. The claim that native titles are all usufructuary and communal should surely be seen not to be the case, as the preceding exposition of Akan law should have demonstrated. It is submitted with great respect that in the instant case, as two stools were litigating, the claim was to a stool (or absolute) interest, not to a mere usufructuary interest. (If the claim had been only a jurisdictional one, it would not have been cognisable by the courts.)

Since stools must usually rely (if their claim is based on long possession) on occupation by their subjects, one must bear in mind the dictum of the Privy Council in Kobina Foli v. Obeng Akesse:[7]

> "In questions of disputed ownership of land, occupation and possession of portions of the disputed area is not relevant evidence of title to the whole area unless it can be reasonably attributed to a right of the whole area."

The possession of an individual subject cannot presumably be attributed to a claim to the whole area; but the right under which they claim to farm there may be so attributable (since it

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7. (1934) 2 W.A.C.A. 46, at p. 50.

derives from their membership of the stool laying claim to the whole of that area).

(ii) As evidence of the acquisition of a lesser interest: Long possession may suffice as evidence of the acquisition of an interest less than full ownership. Such cases may arise when a stool endeavours to assert title based on the occupation of its subjects; or where an individual "squatter" resists an attempt to evict him, or to make him pay tribute for the land which he occupies.

The former case was considered in Akesse v. Ababio.[8] There was a dispute between two chiefs; W.A.C.A. (per Kingdom, C.J.) said at p. 266:

> "...if the title to the land was in plaintiff's people at the time the Oath was sworn, the subsequent making of cocoa farms by defendant's people was a mere trespass and such trespass, no matter how persistent, could never give the defendant's people title to the land as communal /sc. stool/ land, though the trial judge was careful, in his judgement, to conserve any individual rights which might have accrued by long possession."

And in Kuma v. Kuma[9] Sir Lancelot Sanderson said (at p. 7) that:

> "...even assuming that the defendant and his predecessors have been to some extent in occupation of parts of the land in question without paying tribute to the plaintiff or his predecessors, such possession...is not conclusive evidence of the defendant's title."

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8. (1935) 2 W.A.C.A. 264.
9. (1938) P.C. 5 W.A.C.A. 4 (reversing the judgement of W.A.C.A. reported at (1934) 2 W.A.C.A. 178).

All that was found in this case was that "plaintiff had followed the practice of his ancestors in not extracting tribute from the persons occupying the land; and that he only objected when the defendant tried to dispose of it". Only permissive tenancies on plaintiff's land seem to have been recognized; and plaintiff was entitled to a declaration of title.

In Adu v. Kuma[10] it was held that the Provincial Commissioner went too far

> "to hold that land proved to have been plaintiff's has become defendant's because defendant has occupied it undisturbed for sixteen years. That decision being contrary to well-established native custom cannot be upheld."

Ownership, not possession, was in issue in this case.

Apart from the length of occupation, it is usually necessary for it to have other characteristics: these include the fact that it was peaceful, that no rent or tribute was paid, that there was no acknowledgement of ownership, that the occupier himself performed acts of ownership, that oral tradition reinforces the claim for title.

(b) Peaceful possession.

Generally, the possession must have been peaceful and undisturbed. If the occupation has been continually challenged in the past, its value as evidence is very much weakened. In Ninson v. Adjuah Aduwah[11] the Privy Council took nine years'

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10. (1937) 3 W.A.C.A. 240.
11. (1932) P.C. 2 W.A.C.A. 14.

peaceable possession by A immediately preceding the action as strong evidence against B, who sued for a declaration of title. Peaceful possession here negatived a claim of title. (The Full Court decision[12] was reversed.) In Abinah v. Kennedy,[13] where there was "long and undisturbed possession" of a house, the plaintiff's family having lost it by a judicial sale, the Full Court took the possession as evidence that defendant's husband bought the house from some-one with a right to sell it. In Tsibu v. Kyei[14] possession for a "long period" was taken as conclusive evidence of title. Peaceful possession for a long period, coupled with non-payment of tribute, was proved.

Peaceful possession where the original entry was lawful or by leave does not count, since such possession will not of itself be adverse to the owner's title. Examples are Nkoom v. Etsiaku,[15] where plaintiff entered on a mortgage from defendant's predecessor. He had been in occupation for thirty-four years, and the money had been repaid. It was held that there was no acquisition by prescription. In Accuful v. Martey[16] it was held that there was no adverse possession, since defendant was aware of his tenure, which was a mere permissive one, though no rent had been paid for thirty years.

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12. (1929) F.Ct. '26-'29, 465.
13. (1921) F.Ct. '20-'21, 21.
14. (1922) F.Ct. '22, 13.
15. (1922) F.Ct. '22, 1.
16. (1882) F.C.L. 156.

In Ackon v. Kotoh[17] plaintiffs allowed defendants to farm on their land and use the land for many years. All that was acquired here was the right to farm indefinitely on payment of tribute. In Bissoe v. Aithie,[18] the lawful entry was under a lease. And in Kofi v. Kofi,[19] there was a pledge from A to B's ancestors in 1869, but it was ruled that it could be redeemed, despite the lapse of time.

Must the possession be bona fide? Since the courts will examine facts rather than motives, the good or bad faith of the occupier will not usually be examined,. Where a claim is based on laches, of course (see below), this will be a most important consideration. But recognition of long possession as a root of title is a practical rule, which prefers to leave a situation as it has existed for some time undisturbed, except for very good reason.

(c) Non-payment of rent or tribute; no acknowledgement of ownership:

The value of long possession as proof of title, or to resist a claim for title, is completely altered if the occupier has paid rent or tribute to another, or otherwise acknowledged ownership in some other person. Since a stranger on another's land should normally be paying rent or tribute - or even a nominal amount, such as an annual bottle of gin or a sheep - if he makes no such payment then there is a presumption that he is

17. (1922) F.Ct. '22, 9.
18. (1926) F.Ct. '26-'29, 113.
19. (1933) 1 W.A.C.A. 284.

entitled to be on the land in his own right. But in the facts of African custom this is not necessarily so. There may have been a free permissive tenancy of land for farming or house-building, not connoting any claim to the title in the land itself; in such cases there is no acknowledgement of ownership made by the tenant annually (except in a tenancy for a nominal rental). Since the landlord does not forfeit his claim to the land however long the tenant occupies it, and since the tenant may hold the land indefinitely unless he denies his landlord's title, mere length of occupation is not conclusive on this point. The landlord need do nothing until his tenant claims title (i.e., to the land) by virtue of his long occupation. In custom he need still do nothing. Today, if the landlord acquiesces in the tenant's putting himself forward as an owner, then the Superior Courts tend to invoke the relevant doctrines of English law and equity.

Hence, the next requirement is important as evidence of ownership, to wit -

(d) Acts of ownership:

If it can be shown that the occupier has behaved as an owner in regard to the property, then it is strong evidence of title if there has been no objection raised to his behaviour by any interested party. It should be noted that in the case of the tenant (just given) the tenant is owner of his house or farm, and acts of ownership with regard to these are inconclus-

ive, unless his behaviour expressly, or impliedly, covers ownership of the land as well. But if the occupier's acts are referable to some interest other than ownership, he may not succeed in his claim to title. The case of Abinabina v. Enyimadu,[20] establishes a most important principle in this connexion. The trial judge, Jackson, J., had said:

> "In claims for declaration of title the onus is upon the Plaintiff to establish his cause upon the strength of his own case and not upon the weakness of his opponents. In such action he must evidence such positive and numerous acts within living memory sufficiently frequent and positive to justify the inference that he is the exclusive owner.
>
> This test the Plaintiff has failed signally to satisfy and I do dismiss the claim of the Plaintiff both in respect of the declaration sought for and in respect of that for damages and trespass."

W.A.C.A., when the matter came to them upon appeal, contented themselves with affirming the trial judge's findings. Before the Privy Council it was claimed that

(1) the trial judge was wrong in holding that sufficient and frequent positive and numerous acts within living memory were necessary to establish title and, inferentially, that such title could not be supported by traditional evidence alone;

(2) the trial judge was not justified in his conclusion that plaintiff was lying. The Board found substance in both these contentions: specifically, that it is not well founded to maintain that frequent, etc., acts of ownership are

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20. (1953) Unreported: P.C. Appeal No. 5 of 1951.

essential to justify the inference of exclusive ownership. Tradition alone might be sufficient. In Nana Osei Assibey III, Kokofuhene, v. Nana Kwesi Agyeman, Boagyaahene,[21] another very recent case before the Privy Council, plaintiff (respondent) claimed undisturbed possession since 1700, and that he had collected cocoa and game tribute from defendant's subjects, and from other persons, on the land. The trial court (the Asantehene's A Court) found the plaintiff's case proved beyond all reasonable doubt. On Appeal to the Chief Commissioner's Court, to the West African Court of Appeal, and to the Privy Council, this judgement was sustained.

(e) Tradition:

Some courts have in the past been very chary about accepting tradition as evidence of title, if otherwise unsupported. For example, Watson, C.J., in Agyeman v. Yarmoah,[22] said:

> "...I do not propose to base my judgment on a claim of this nature /by tradition/, as I cannot admit the principle that land in this Colony can be said to vest by use and occupation of an indefinite tract, supported only by tradition handed down from one generation to another by word of mouth only. I think something more definite must be shewn to enable one stool to establish a title to land as against another stool, and I therefore ignore entirely the long historical traditions which have been adduced by both sides."

The dictum of the trial judge in Abinabina v. Enyimadu[23]

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21. (1952) Unreported: Privy Council Appeal No. 41 of 1950.
22. (1913) D. & F. '11-'16, 56.
23. (1953) Unreported: Privy Council Appeal No. 5 of 1951.

requiring acts of ownership was stated to be not well-founded by the Privy Council, who laid down that "traditional evidence may be very relevant...". In the native courts today tradition is frequently quoted as evidence, there often being little other.

Tradition may relate either to the elements stated above, or may itself state that title is with the party alleging it. That is, a party may produce tradition as evidence that:

> he has been in long occupation (or that his ancestors have been);
>
> the possession was peaceful;
>
> he has never paid rent or tribute;
>
> he has exercised the powers of an owner in the past;

or the tradition may simply state that:

> he and his ancestors have always owned the land.

In Abinabina v. Enyimadu (already cited) the Judicial Committee distinguished traditional and factual evidence:

> "... /The evidence/ was partly traditional - that is to say evidence as to rights alleged to have existed beyond time of living memory and proved by linguists or other members of the various tribes concerned - and partly factual as to actual events occurring within living memory."

In giving evidence of tradition a party will often step into the shoes of his ancestor, or predecessor in a position, and say "I did so-and-so".

Tradition, then, may be a method of proof of facts which

are evidence of title; or may itself be one of the facts which prove title. It may well be inevitable that such evidence should be accepted; but it is obviously advisable to treat it with circumspection.

2. PRESCRIPTION.

Prescription is acquisitive possession; the enjoyment of a right adversely to its owner for a period of time creates title for the occupier and destroys the title of the previous owner - but only if such owner was lawfully entitled to possess. Watson, J., in Agyeman v. Yarmoah[24] declared positively that "there is no such thing in native customary law as a prescriptive title"; and that "mere use and occupation for some time cannot of itself oust an original title". And again the Privy Council approved the dictum of W.A.C.A. in Kojo v. Dadzie[25] that "it was well established Native Law and Custom that rights of ownership are not extinguished by lapse of time". Prescription is theoretically contrary to Akan customary law (but it applies where there has been undetected encroachment or forcible dispossession, as by conquest). This rule of customary law appears to conflict with a later dictum by Watson, J., in the same case, where he said:

> "...it is absurd to suggest that if an individual scratches a farm on a piece of waste land and then abandons it, he or his des-

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24. (1913) D. & F. '11-'16, 56.
25. (1951) P.C. Appeal No. 61 of 1941.

> cendants can return years afterwards, and oust anyone who happens to have followed him."

This is in fact what the ancient custom did suggest.

Apart from adverse prescriptions, Akan law recognizes a title by occupation, such as was considered in Oman of Yamuransa v. Kessi II[26] by Jackson, J., who said:

> "The Aburadzi family claimed they were the owners by virtue of being the first persons to clear the virgin bush after the land had been conquered by their clan."

Such clearing (by a citizen) in an area where a stool already holds the absolute title in the land engenders in him, not ownership, but a dependent interest.[27]

3. LIMITATION.

The limitations of actions (sometimes called "negative prescription") is a rule of public policy - interest reipublicae ut sit finis litium - which holds it impolitic that persons should be vexed by stale claims; hence, after a statutory period, a person's right of action, or sometimes his title, is barred.

Failure by an owner to sue in defence of his land within the statutory period may bar either his right of action, or his right or title. In English law up till 1833 only the remedy of the owner was barred; since that date his title also is

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26. Unreported: Land Court, Cape Coast, 31.10.1946.
27. In most systems, even an instant's possession animo domini of a res nullius creates ownership; it does not merely evidence it.

extinguished. Limitation does not transfer the former owner's title to the adverse possessor: the term sometimes used -"a Parliamentary conveyance" - is thus a misnomer. In essence limitation is a procedural rule and negative in its effect; but indirectly it may affect substantive rights.

It has been frequently ruled in the Gold Coast that the Statutes of Limitation do not apply to:

"a native tenancy of land" : Bodoa v. Ofoli;[28]

"land held by natives under native tenure": Abinah v. Kennedy;[29]

"land held under native law" : Incroma v. Marmoon. (30)

But they do apply when the parties' relations - whether by agreement or otherwise - are regulated by English law, which may be shown by:

using an English method of loan : Aradzie v. Yandor;[31]

or a power of attorney : Tandoh v. Williams;[32]

or a lease : Dainsuah v. Cole;[33]

or a document : Amarquaye v. Broener;[34]

or where the transaction is one between native and non-native; the fact that the native was educated was a point in influencing the court to hold that no substantial injustice would result from applying the Statutes of Limitation: Koney v.

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28. (1910) Earn. 51.
29. (1921) F.Ct. '20-'21, 21.
30. (1882) F.C.L. 157, (note).
31. (1922) F.Ct. '22, 91.
32. (1923) F.Ct. '23-'25, 18.
33. (1924) F.Ct. '23-'25, 135.
34. (1898) Ren. 145.

U.T.C.[35]; or, in the case of a gift to a concubine, if a party fails to plead a native custom, English Law applies and the Statutes of Limitation operate: Hughes v. Davies: (1909), F.Ct. Ren.556, reversing the trial judge, Ren. 550.

Native law and the native courts do not recognise limitation of actions; and did not recognise res judicata. There was no such thing as a stale claim; and any claim might be re-opened.

Since prescription and limitation of actions as known to English law do not usually govern dealings with land held under native tenure in the Gold Coast, the courts have called in aid other doctrines and devices to deal with cases where the possession of an occupier, and perhaps the negligence of the true owner, might otherwise bring about an unjust result. These devices are: estoppel; laches; innocent purchaser for value.

4. ESTOPPEL.

Estoppel is a rule of evidence, or a rule of procedure, under which in certain circumstances a party is estopped from denying a fact which by his conduct or words he has represented to be true; and the other party must have spent money or done an act on his wrong faith in the truth of this representation. For our purposes here estoppel by word or conduct - estoppel in pais - is our principal concern; estoppel per rem judicatam

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35.(1934) 2 W.A.C.A. 188.

is really a fundamental principle of the validity of judgements and not a rule of evidence.

Estoppel is only a defence, and not a cause of action.

The estoppel present in cases involving long possession is usually by conduct, in that the true owner, by failure to assert his rights over a long period, or by acquiescence in an occupier's holding himself out as owner, is to be taken to imply that he consents to such possession or conduct, or at least that he is debarred from asserting the contrary.[36] An example might be where a member of a family holds himself out to the world as owner; his family permit him to do so; a purchaser from the member in good faith is evicted by the family. The family are estopped by their conduct from denying the member's right to convey - Russell v. Martin;[37] Basel Mission Factory v. Suapim.[38] Brandforth Griffith, C.J., said in Russell's Case that:

> "In every case in which a member of a family holds himself out as owner and is allowed to so hold himself out, very satisfactory evidence is required to prove that the land or house is not his sole property."

And Crampton Smyly, C,J., said in Basel Mission Factory v. Suapim:

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36. But see Kofi v. Twum: (1942) 8 W.A.C.A. 165, for some of the limitations on the use of estoppel as a defence.
37. (1900) Ren. 193
38. (1911) D. & F. '11-'16, 13.

> "In my opinion where one member of a family holds himself out to the public as the owner of real property, it is essential that the family should have some independent corroboration, if they wish to set up some private arrangement between themselves, for the purpose of defeating his creditors."

Another case was Miller v. Kwayisi,[39] where the occupier had paid no rent or tribute to the stool of Akwapim - the true owners - for eighty years; it was held that "the stool by their own conduct and acquiescence are now estopped, therefore, from disputing the plaintiff's title".

These decisions are perhaps in line with the law in England, where it has been held that one who culpably stands by and allows another to hold himself out to the world as the owner of property, and thereby to sell it to a bona fide purchaser, cannot afterwards assert his title against the latter.[40] (This indicates a link with the doctrine of innocent purchaser for value, which is considered below).[41] It is uncertain what line is to be drawn between estoppel and equitable estoppel, which is also a defence in equity.

Equitable estoppel rests mainly on the acquiescence of the owner, operating by way of estoppel. Lapse of time as such is irrelevant if all the five ingredients mentioned below occur. In general, if A stands by while B infringes A's right, A will be unable to assert his title if:

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39. (1930) 1 W.A.C.A. 7.
40. Cf. Gregg v. Wells: (1830) 10 Ad. & El. 90.
41. See p.716.

(i) B was mistaken as to his rights, and was unaware of A's rights.

(ii) B spends money, or does an act (to his detriment) on the faith of his own misbelief.

(iii) A is aware of his legal rights.

(iv) A knows of B's mistaken belief.

(v) A either directly encourages B, or else abstains from asserting his legal rights.[42]

5. LACHES.

It will be observed that equitable estoppel bears some relation to the doctrine of laches, which is also an equitable defence.[43] The main elements in this defence are:

(i) Infringement by B of A's rights.

(ii) Acquiescence by A in the infringement.

(iii) Change of B's position brought about through this acquiescence.

(iv) A must have a legal right to take action, and fail to do so.

Lapse of time is generally evidence of acquiescence by A. If the lapse of time is gross, e.g., for 20 years, a claim may be rendered stale even without acquiescence in the change of B's circumstances. Generally, laches operates only where

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42. Cf. Savage v. Foster: (1723) 9 Mod. Rep. 35.
43. In fact, one might say that laches is merely a special case of equitable estoppel.

there is no statutory bar.[44]

The defence of laches is a dangerous and uncertain weapon unless carefully handled by the courts; in this connexion it is important to bear in mind the opinion of Lord Blackburn in Erlanger v. New Sombrero Phosphate Co.[45] on the subject:

> "In Lindsay Petroleum Company v. Hurd (L.R. 5 P.C. 239) it is said: 'The doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct done that which might fairly be regarded as equivalent to a waiver of it, or where, by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases lapse of time and delay are most material. But in every case if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances always important in such cases are the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy.' I have looked in vain for any authority which gives a more distinct and definite rule than this; and I think, from the nature of the inquiry, it must always be a question of more or less, depending on the degree of diligence which might reasonably be required, and the degree of change which has occurred, whether the balance of

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44. But where there is no period of limitation the maxim, "Equity follows the law", may operate, i.e., a Court of Equity will commonly withhold relief if the statutory period of limitation which would govern a common-law action has been allowed to pass without good reason.
45. (1878) L.R. 3 A.C. 1218, at p. 1279.

> justice or injustice is in favour of granting the remedy or with-holding it. The determination of such a question must largely depend on the turn of mind of those who have to decide, and must therefore be subject to uncertainty; but that, I think, is inherent in the nature of the inquiry."

The essence of the doctrine of laches is thus the negligence by the owner in asserting his rights by action when he is in a position to do so, thus causing detriment to a person who innocently infringes those rights. As the maxim has it: vigilantibus non dormientibus jura subveniunt. Adverse possession, where it is innocent, and has caused possible detriment to the occupier through the negligence or acquiescence of the owner, may raise the defence. Such negligence was present in the case of Amoa v. Obil,[46] where the owner was present and raised no objection at a sale of his property which was without his authority. The purchaser remained undisturbed in possession for six years thereafter. And in the Bokitsi Case[47] it was said that:

> "/It is/ contrary to the principles of equity to allow the native law to apply in its entirety, such law being that the original owner can after any length of time and under any circumstances, obtain recovery whatever may be the detriment caused by the fact that original owner chose to sleep on his rights."

The Bokitsi case was followed in Weytingh v. Bessaburo,[48] where there was fifteen years' undisturbed possession by the domestics

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46. (1885) F.L.R. 39.
47. (1902) F.L.R. 159, at, 160.
48. (1906) Ren. 427.

of the true owner. In Kwadjoe v. Cudjoe,[49] where plaintiff (the true owner) sued the purchaser at an irregular judicial sale, the mere fact that defendant was innocent did not protect him. It was held that the balance of equities favoured the plaintiff.

The fact that the defendant occupier has made improvements to the property is obviously of great relevance; and may debar an owner from later asserting his claim to evict a trespasser. This was the case in Stephens v. Blay,[50] where Blay improved by putting up buildings, and plaintiff family's claim was held to fail on the ground that equity forbade their claim, and that they were estopped by conduct.

In a case before a native court, Danso v. Mansa,[51] where it was found that B had been in possession of A's cocoa-farm under an invalid sale, the court held that the claim of the owner was barred by:

the fourteen years' possession of B;

material improvements made to the farm by B;

the fact that A was present during the whole period in the village, and yet did nothing to rectify the situation.

The defence of laches is raised by the acquiescence of the true owner in the occupation of the trespasser. In the facts of Akan law one has to consider the type of possession

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49. (1930) D.Ct. '29-'31, 25.
50. (1910) Ren. 578.
51. Kokofu Native Court.

by the occupier, and in what the owner acquiesced. In this connexion the decision of W.A.C.A. in the Nigerian case of Oshodi v. Imoru[52] is of great assistance. Kingdon, C.J., said (at p. 95):

> "It seems to me that in these cases there are two things which must be distinguished.
> The first is acquiescence in occupation over a period which would bar the original overlord from bringing an action for ejectment as in the case of Akpan Awo v. Cookey Sam (2 N.L.R. 67).
> And the second is such acquiescence as would serve to pass the original rights of the overlord to the occupier. Very much more is required to establish the second than the first."

It was found that the plaintiff family acquiesced in the occupation but

> "how can it be argued that the plaintiff or his family acquiesced in the alienation from them of their reversionary rights when they had no knowledge that such rights were being challenged or interfered with? There is no suggestion that the family gave prior acquiescence to the conveyance or sale...the evidence is quite insufficient to justify a finding that the family acquiesced after the event in the conveyance in question, which would have the effect of abrogating the family's reversionary interest."

The learned Chief Justice thus drew a valuable distinction between acquiescence in occupation, and acquiescence in conveyance, stressing that though an owner's right to evict might be barred through his failure to take action, this did not imply

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52. (1936) 3 W.A.C.A. 93.

that his title to the property was also lost. Possession by the occupier might not be inconsistent with the title of the true owner.

Laches, as a defence, is thus not a method of acquiring title by prescription. It was emphasized in Ado v. Wusu[53] that "the native custom is clear...that the ultimate ownership remains in the original owner for all time". So many years' undisturbed use may only entitle the occupier to continue farming indefinitely on payment of tribute - Ackon v. Kotoh;[54] and it was held in Kuma v. Kuma[55] that defendant could remain in possession undisturbed if he set up no adverse title. Plaintiff's title was held proved, despite occupation by defendant's people for six generations. In the Nigerian case of Ita v. Asido[56] a declaration of title to occupy in accordance with native law and custom, and not of a title in fee simple, was given; whilst in Dadzie v. Kojo[57] plaintiff sued for a declaration of title. The delay in bringing a claim was considered, but was held not to affect his claim:

> "If this were an action to recover possession, this matter of 'sleeping on his rights' might have to be carefully considered, but it is well-established Native Law and Custom that rights of ownership are not extinguished by lapse of time, and consequently the Plaintiff has not lost his right to the declaration he seeks." (58)

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53. (1940) 6 W.A.C.A. 24.
54. (1922) F.Ct. '22, 9.
55. (1938) P.C. 5 W.A.C.A. 4.
56. (1935) 2 W.A.C.A. 339.
57. (1940) 6 W.A.C.A. 139.
58. At p. 140.

When the occupation is by an individual claiming against a stool, then it is likely that the occupier acquires only a lesser interest.[59] The occupier's interest may be less than full title when he has entered under a mortgage, lease, etc.; or where he is aware of the customary rule with regard to prescription.[60]

6. BONA FIDE PURCHASER FOR VALUE WITHOUT NOTICE.

There are really two distinct doctrines of "bona fide purchaser for value". The former is available only against the actual vendor and those claiming title under him, namely, that in consideration of the value which the vendor has received he shall do everything in his power to implement his grant, and in particular shall allow the purchaser to stand in the vendor's shoes and work out any remedy which might have been available to the latter. The second plea of "bona fide purchaser for value without notice" applies where a purchaser from a legal owner endeavours to set up a title adverse to the beneficial estate. It is a single plea to be pleaded and proved as such. It is not a plea of bona fide purchaser for value to be met by a plea of notice. The type of case where the plea operates is that where the purchaser of the legal estate alleges that he has no notice of equitable interests

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59. Cf. Akesse v. Ababio: (1935) 2 W.A.C.A. 264; Owusu v. Manche of Labadi: (1933) 1 W.A.C.A. 278.
60. Cf. Ado v. Wusu.

governing that estate; the lack of notice is vital to the plea. This element requires that the purchaser must show that he has taken all possible precautions to investigate any interests affecting the estate; i.e., he is bound not only by those interests of which he has actual notice, but by those of which he had constructive notice as well. A purchaser who has not been diligent in investigating the title of his vendor will be affected by notice of those interests which he would have discovered by reasonable enquiry.

In the facts of Gold Coast, more especially by reason of the multiplicity of interests which families, stools or individuals may have in any given parcel, and of the customary modes of conveyance, which are designed to ensure that those holding concurrent interests in the subject-matter shall either actively consent in dealings with it, or at least be aware of such dealings, such a rule is required, and a purchaser should be put on enquiry.

It does not appear from the decided cases that the limitations of the doctrine have always been borne in mind in the Gold Coast; sometimes the reports are too sparse to follow its application to the facts of a particular case. The doctrine has, however, been invoked in some cases, especially involving the sale of family land.

The general rule of law is that nemo dat quod non habet: if A sells B's property without authority to C, an innocent

purchaser for value, it is obvious that when the fraud (or honest mistake) is discovered one of two innocent parties, B or C, must suffer. Normally C will get nothing; but if B is not entirely innocent, but has acquiesced or been guilty of negligence, then laches or estoppel may operate to the benefit of C. Or B may be taken to have impliedly adopted the sale to C. The case is similar where A, a member of a family F, and holding an inherited interest, purports to sell to B (passing the entire estate) title to the property, including F's interest. If A does so without the authority of F, nothing passes. Had F's interest been merely equitable, then the doctrine of innocent purchaser might have operated. The doctrine says in general terms that a bona fide purchaser for value of land acquires it free of equitable interests of which he is innocent (i.e., innocent after making all enquiries which he ought to have made), but not free of legal interests, whether he had notice of them or not. Juristically, a family's interest in inherited property held by one of its members is not equitable but legal; the member does not hold the legal interest on trust for the family, nor are the family trustees of the legal estate, holding it in trust for the individual member. It is therefore difficult to follow how the doctrine can be applied to such a case as we have given. The ratio of Boodoo v. Bissa[61]

61. (1910) F.Ct. Ren. 585; the details of the case emerge more clearly from the report at first instance in Earn. 35 (esp. p. 37).

is thus difficult to discover.

The fact of the innocence of the purchaser may be relevant if he wishes to raise a defence of laches or estoppel.

Many cases where family land has been sold irregularly reach the courts; some of them have already been considered elsewhere;[62] but it might be worthwhile to examine some of the implications raised by decided cases. We consider the case where members of a family F have irregularly sold family land to A, without the knowledge or approval of B, a member of the family, whose consent is essential to the sale.

(i) As regards A's position, the sale is void according to Gaisiwa v. Akraba;[63] and voidable (i.e., valid until repudiated) according to Boodoo v. Bissa (already cited) and Bayaidee v. Mensah.[64]

(ii) As regards F, a family can apparently be bound by the act of some of its members, according to Insilhea v. Simons[65] and Boodoo v. Bissa. Where a third party is involved, the knowledge of one member will be attributed as knowledge of the family; but apparently this constructive knowledge will become effective only after some lapse of time.

(iii) Consequently, it appears that the Courts will hold that the family is guilty of laches, if some members of it

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62. See under SALE, at pp. 374c et seq.
63. (1896) F.L.R. 94.
64. (1878) Ren. 45.
65. (1899) F.L.R. 104.

are so guilty. This is a very hard doctrine, even if the English rule about constructive notice to fellow-trustees is quoted in support (though this is not really comparable). Why should not such a rule apply also in the case of a member's private debt, and constructive notice to and the acquiescence of the family in the debt not be similarly presumed? And again (if we adopt this reasoning), why should execution against a joint-tenant affect only his interest in the property subject to the joint-tenancy?

(iv) As for B's rights, B's interest in F's property is not legal, since the members of a family do not have a joint tenancy in the family property (there being no partition): family property is owned by the family, a single legal person. Nor would it be correct to term B's interest equitable, since, inter alia, native custom has never heard of equity. It is doubtful whether B has any remedy against the land. Nor apparently has B any right of action against the family, the courts having held that a member of a family cannot sue other members for an account, or for apportionment.[66] It appears that B is without a remedy; in any case, mere monetary compensation would be of little value.

But apart from B's interest or right as member of the family in the property, he may also have a personal right in that property. If the property is a family house, B may have

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66. See FAMILY, pp. 220-1, ante.

a right of occupation in it. Then the sale is surely voidable if it takes place without B's knowledge or consent. It is possible that B's right of residence might be overreached by an otherwise valid conveyance to an innocent purchaser for value. The Nigerian case of Lawani v. Tadeyo[67] provides a pointer to the solution of this problem. It laid down that if A is owner of a house in which lives B, who has a right to reside there during good behaviour, and if A's right, title and interest are sold by a judicial sale to C, then:

(i) not only does B have a continued right to reside in the house;

but (ii) C cannot exercise A's power to evict B for misbehaviour. As regards laches, the laches of the rest of the family may serve to bind B also (for example, if the sale takes place whilst B is absent) as regards title to the property itself; but it surely cannot also serve to bar B's personal right, viz., of residence.

The line of cases following Manko v. Bonso,[68] requiring a family to act "timeously" to set aside a sale of family land made /without the necessary concurrence of its members, has been criticised by Jackson, J., recently.[69] He referred to

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67. (1944) 10 W.A.C.A. 37.
68. For which see ante, at p. 375.
69. In an unnamed appeal to the Supreme Court, Eastern Division, Land Court, Accra, on 31 May 1951, of which I received a note from Mr. H.E. Devaux, then Acting Senior Judicial Adviser.

> "the decisions of these Courts which have held repeatedly that sales of family land, made without the concurrence of the members of the family are not void but voidable";

and went on to declare:

> "In my judgment, with great respect, these decisions go perilously near to the wind to destroy one of the factors which goes to the very root of the validity of a sale by customary law and which Sarbah has described as being necessary for the constitution of a valid sale." (70)

7. SQUATTERS AND CUSTOMARY LAW.

As we are aware from the previous discussion, the customary law did not recognize prescription. If a man unwittingly cultivated another's land, then he could be ejected after any period of time. He acquired no right in the land, and he had no right to remove crops he might have planted there. (This last point is confirmed by Acquainoo v. Abiram,[71] where it was held that a trespasser has no right to the crops which he has planted on the land on which he trespassed, once judgement for trespass has been given against him. The trespasser cannot cannot enter to remove the crops.) Two different cases really arise: (a) a stranger cultivates virgin stool land, and makes farms thereon;

(b) a trespasser cultivates land which belongs to

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70. At p. 27 of the judgment. The learned judge was referring to the requirement that the family must consent to dealings with the property of the family.
71. (1910) Earn. 43.

another individual, even if the latter's interest is only a citizen's interest, dependent on the title of his stool.

(a) Against a stool: Squatters may by lapse of time and the acquiescence of the stool acquire the right to continue cultivation indefinitely, provided they pay tribute, or sometimes (e.g., where a stool has deliberately failed to exact tribute from them, or evict them) to continue cultivation free provided they assert no claim to absolute title for themselves or for the stool they serve.

(b) Against an individual: A certain amelioration is detectable in the decisions of native courts in such cases. Although, said an informant,[72] the customary rule that it is not possible to acquire title by lapse of time is still recognised, if A makes a cocoa farm on apparently forest-land which he does not know belongs to anyone, and, after being in occupation for some time, is attacked by B, who proves that he has an ancestral right to the land, then, although the Native Court will recognise B's title, it will make an equitable order. It will declare that the farm shall be physically divided, two parts going to the farmer, and one part to the land-owner. Thenceforward, each party will be the true owner of the respective portions. The average length of occupation for the practice to operate was given as ten to fifteen years. If the

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72. From New Juaben.

period is less, then the court will merely order the return of the land and farm to B, the owner. For the rule to apply, the possession must be bona fide. Occupation mala fide destroys this "equitable" claim. The order of the court recognizes the title of the true owner, but through its division of the property effects a judicial transfer of title. The rule thus compensates those who innocently make improvements on another's land. It was specifically stated that the practice does not apply to cases where stools find strangers farming on stool land. In such a case (given at (a) above), the stool will either evict the stranger, or allow him to farm on payment of abusa. However long a stranger squatted, he could acquire only farming rights, since his possession is different in nature from that of the stool.[73, 74]

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73. The Nigerian case of Oloto v. John: (1942) 8 W.A.C.A. 127, discusses when, if ever, a court will protect "squatting possession".
74. Long occupation of land has been the subject of Judicial Adviser's Circular to Native Courts, No. 13.

CHAPTER XIII.

REGISTRATION OF LAND.

A. INTRODUCTORY.

It is not proposed to consider in detail here the arguments for or against registration of land.[1] It is, however, necessary to say something in a general way about the methods and meaning of registration, and to mention previous history in the Gold Coast and elsewhere of attempts at registration.

1. DISTINCTION BETWEEN REGISTRATION OF DEEDS, AND REGISTRATION OF TITLE.

It is necessary to make this distinction patent, because some persons have been led astray into thinking that any system of registration of deeds can ever serve the purposes envisaged for a proper system of registration of title.

There is already in existence in the Gold Coast (as in England also), a Registry of Deeds: the salient fact about such registration is that it is the parties to the deed who are significant, and not the parcel of land conveyed. It is impossible, by consulting a Registry of Deeds, to see clearly, if at all, the history and present state of any parcel of land at

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1. The reader is referred to Land Registration, by Sir Ernest Dowson and V.L.O. Sheppard, for an analysis of the principles and practice of registration. What is put forward below should be read with this authoritative work in mind.

law. A system of registration which records the changes in interest relating to parcels of land by reference to those parcels is essential. Such a system registers interests and not deeds, and is commonly referred to as "registration of title". The kind of title registered is insignificant here, except that one must point out that the titles registered may be either possessory, with reference to the actual occupation of the land; or proprietary, with reference to the ownership of interests in the land.

2. THE NEED FOR A SYSTEM OF REGISTRATION IN THE GOLD COAST.

That the only solution to the problem of land tenure in the Gold Coast is a system of land-registration has long been evident; but Governments have hesitated to attempt such an enterprise for various reasons, which are considered in full at C. (below).

It appears that only by registration will the present confusion as to the scope and nature of interests in land there be resolved, and the consequent litigation greatly diminished.[2]

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2. Cf. the dictum by the President of W.A.C.A. in Amuie v. Sabih: (1949) (unrep: Civil Appeal No. 33/48), when he said: "I would add that the uncertainty that prevails about the tenure of the Brazilian Community's land is yet another illustration of the urgent need for a system of land registration in urban areas in this Colony. It is to be hoped that the recommendations of the Havers report in that respect will be implemented in the near future."

Gold Coast is unlike some other British African territories in that no claim by right of conquest or statute is at present made by the Crown to the ultimate title in the land (except in the case of the Northern Territories, by the Land and Native Rights Ordinance, cap. 121); and the forms of tenure of land existing when the British came continue with modifications to the present day. Hence it is impossible to give a snap answer - such as may be possible in other territories - to the question: "who owns the ultimate title to the land?"

At various times in the past it has been suggested that the Crown, to protect the interests of the inhabitants, should assume the ultimate title to land in the Gold Coast, holding the land in trusteeship for the indigenes; but such suggestions have been strongly resisted by African public opinion (under the misconception that this would weaken or destroy their rights), and such a solution is not now feasible.

Litigation over land has had an undue share in the activities of the people, it being a road to financial exhaustion for individuals, families, and stools. Whether or not it is a substitute for tribal warfare (as has been jocularly suggested), there is no doubt that it should be severely curtailed in the best economic interests of the people.

B. MAIN REQUIREMENTS FOR REGISTRATION OF TITLE TO LAND.

These are indicated here so that the reader may easily see what has to be done, and how, before registration is feasible or accomplished in the Gold Coast; and in particular, the obstacles presented by difficulties peculiar to the Gold Coast, or of particular importance therein.

1. SUBJECT-MATTER.

The first requirement is that the subject-matter should be accurately surveyed, having regard to the user to which the land is actually put, and the special needs of registration. This implies a process of cadastral survey, and adequate marking by pillars or otherwise.

2. INTERESTS.

Next, it is essential to decide:

(i) the kinds of interests which may exist in land, examining their nature, effects, etc.;

(ii) which interests should be registered, and which (if any) not registered;

(iii) whether the lesser interests, and if so, which ones, should be registered as charges or conditions on major or absolute interests;

(iv) whether registration should be possessory, or proprietary.

As to (i), it cannot be said that there is yet sufficient evidence as to conditions of tenure - distinguished area by area - to permit an immediate registration. Some of this information must be gathered at or about the time of registration (as is done in the case of Forest Reserves); but the rest must be already available before registration is initiated. Most important is it that juristic evaluation of such interests and their place in the combined British-African legal framework of the Gold Coast should be undertaken without delay; if the knot is too tangled to unravel by reason alone, it must be severed by the Alexandrine method - in this case legislation.

As to (ii) and (iii), these decisions must be taken together, having regard to the professed aims of registration - certainty, protection of legitimate interests, reduction of litigation; and more especially whilst keeping in mind the fact that registration, however worked, will produce some alteration in the substantive law or custom. This last is so because the jump is here not from a system of conveyance by deed to one by registration (as in England), but from unwritten transfer to transfer by means of a register.[3]

As to (iv), the answer to this question can no doubt best be given by the experts on registration; but it does appear that registration of possessory title would do little to achieve the objects of registration mentioned above; though it might

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3. I.e., involving two jumps instead of one.

be better than no registration at all.

3. SETTLEMENT AND PROCEDURE.

The subject-matter, the land, having been adequately surveyed, and the interests which may exist therein ascertained, the next step is the matching of the one to the other by a process of settlement. Settlement is a dual process: settlement of title, and settlement of boundaries.

(a) Settlement of Title:

By this is meant that the settlement officer must decide what interests subsist in the subject-matter, and in favour of which parties.

(b) Settlement of boundaries:

This must be done concurrently with settlement of title, so as to indicate not only the legal extent of interests found to exist in the land, but their spatial extent also.

Once these interests and boundaries have been settled, then they must be recorded permanently by means of registers and plans. Little need be said about this side of registration, since the general principles behind the organisation and compilation of registers are sufficiently well known.

4. EFFECTS OF REGISTRATION.

The general desired effect of registration in other countries has been to substitute conveyance by register for conveyance by deeds. Hence it is most important that:-

(a) The title given by an entry in a Register should not be generally open to challenge.

(b) Instruments affecting the land should have no force unless registered.

(a) Is the aim to give an indefeasible title by registration attainable, or only a pious wish? It is obvious that registration of possessory title cannot from its very nature bring indefeasibility. Such registration is evidentiary rather than conclusive. Registration of possessory title can, however, be converted by lapse of time into registration of proprietary title, if it is provided that a possessory title unchallenged for a certain number of years shall ipso facto become an indefeasible proprietary title.

Sufficient allowance must be made for mistakes or fraud; but apart from this it should be made plain that titles will not be contestable after a certain fixed time.

It is not essential to a system of registration that all interests affecting a parcel should be registered; in fact, a multiplicity of equitable interests, easements and common rights on the register would defeat the purpose of registration by clogging the machine. I consider that indefeasibility is possible; but, to achieve it, it is necessary that the requirements detailed above be met, and that the machinery should not break down or become congested once the initial settlement and registration have taken place.

(b) To this end, it is necessary to make registration complete and compulsory. A piecemeal registration is worse than none at all. This must not be taken to imply that the whole country should be registered simultaneously; all it means is that within a specified block no parcels of land not registered should be allowed to exist. Any system which leaves it to the choice of the individual whether he registers or not will not secure uniformity of registration. Hence it will be essential that, within the block, registration should be compulsory for all holders of registrable interests in land. As will be seen when we consider registration in the context of Gold Coast land tenure below, certain existing blocks and defined areas are already available, of which use should be made.

C. PARTICULAR DIFFICULTIES IN THE GOLD COAST.

Although the champions of registration maintain that systems of registration can be devised for any type of tenure, it is hardly surprising that special circumstances are encountered in different areas which call for appropriate solutions. Such is the case with the Gold Coast.

1. SUBJECT-MATTER.

The Gold Coast has in general been very adequately surveyed, considering the natural obstacles and the paucity of

resources in men and materials for such a survey.[4] This survey is not, however, generally cadastral, nor is it on a large enough scale to satisfy the requirements of registration. Registration will call for an abnormal effort from the surveyors, so that one naturally looks for methods which will be comprehensive yet economical in effort and time. Survey by air photographs may be of some help in this regard; but the fact that a large part of the lower Gold Coast is forested and lacks clearly defined natural features is a drawback.

To descend to detail, boundaries are rarely if ever indicated - at least not in a manner visible from the air;[5] and the land is put to many uses which may call for distinct methods of mapping.

It is presumed that if survey is decided upon, deficiencies of personnel will be met, and adequate systems of marking points or boundaries devised or adopted.

2. INTERESTS.

It is when we turn to the interests capable of subsisting in land that one of our main difficulties is met. These

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4. And it appears that even at the present time the shortage of trained surveyors is much felt. The problem of training sufficient surveyors for the work of registration appears almost unsurmountable; it might be partially evaded by confining registration to smaller blocks to begin with.
5. Ways in which boundaries may be marked are indicated at pp. 147, and 365 et seq.

difficulties arise from

(a) the multiplicity of interests;

(b) lack of knowledge of them.

(a) Multiplicity of interests:

The severance of ownership of land from ownership of the things in or on land leads to confusion for a person trained in European systems of law. This implies a stratification of interests, and that registration will have to be vertical as well as horizontal in extent. The descending chain of interests from absolute ownership through individual usufructuary interest to lesser interests (of, for example, a caretaker or pledgee) should have been sufficiently revealed by previous chapters not to need further exposition. Theoretically, there is no limit, either upward or downward, to this chain of interests. There is here a complete contrast with the English law, which recognizes a title (that of a person seised of a fee simple absolute in possession) beyond which it is impossible to go. But in the Gold Coast one cannot say that the absolute interest of today might not become a dependent interest tomorrow.[6]

(b) Lack of knowledge:

It is impossible to say today what interests in fact exist in any one area out of the possible choices. It is possible to formulate general principles, but their application in

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6. Cf. the effect of the restoration of the Ashanti Confederacy.

detail may vary from area to area. It will be recommended that settlement officers should - at the same time as they record the interests of individuals for a particular area from their knowledge of the principles - also record the detailed application of those principles.

The fact, then, that we do not as yet know in complete detail the land tenure of all areas should not deter us from beginning registration (although this has operated as a deterrent in the past).

3. SETTLEMENT.

The practical difficulties of registration in the Gold Coast are more formidable than the theoretical. The settlement of boundaries (always a vexed question) already occupies a considerable amount of the courts' time.[7] The Boundaries Ascertainment Ordinance, cap. 118, which might appear to facilitate the settlement of disputed boundaries, is of little real assistance, since it does not permit a judge to lay down a fair boundary, but only to declare where the boundary is as a fact. Settlement of boundaries is thus at present a question of fact; and much fact has to be gone into in order to ascertain a particular boundary. In addition, settlement of a boundary

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7. Mr. T. Hutton-Mills, giving evidence before the Belfield Commission, was unduly optimistic when he said (p.46,para.5):
"I am inclined to think that the owners of land are able to define their boundaries. Intertribal boundaries are easily ascertained."

for one set of parties may operate in customary law to settle it for another set of parties. The legal position to be adopted by the courts is not, however, clear. An instance may be given:

> Stool A, which serves Paramount Stool X, has a boundary dispute with Stool B, which serves Paramount Stool Y; judgement is given fixing the boundary between A and B. Does this judgement operate as an estoppel by record against X and Y?

A point such as this will have to be settled in the legislation authorizing registration, in order to avoid multiplicity of disputes on similar facts.

The registration of boundaries with reference to a cadastral plan will also occasion difficulties. It is said that the accuracy of such a plan may be varied according to the user to which land is subject in a given area - the accuracy may be to so many feet if the land is planted with trees in rows, to inches if planted with annual crops (e.g., groundnuts) in rows; and to use a higher standard of accuracy than this is obviously a waste of effort.

But in the Gold Coast the user of land varies from place to place, and from year to year. The land may be occupied by virgin-forest, cultivated land reverted to secondary forest, cocoa, rubber, palm-trees, and smaller crops (e.g., yams, cassava, plantain, pepper, groundnuts). Nor is it usual to find cultivation in rows. An errof of six inches might change

the ownership of a cocoa tree. The difficulties experienced by the Cocoa Rehabilitation Survey in this matter are illuminating.

It is in the matter of the settlement of titles or interests that one must expect the major stumbling-block to speedy registration to appear. The settlement officer, faced almost inevitably with a mass of conflicting claims, will have little to guide him but a patient examination of the evidence, and a shrewd ability to spot the lie or liar. Physical examination of the land by himself will be of a little help, but may be deceptive. If two men, A and B, are farming adjacent plots, the first, A, may have acquired his farm himself (it is 'self-acquired property'); the second, B, may have inherited his farm (it is then 'family property'). Hence A will have an absolute interest (or an interest qualified by the superior right of a stool), while B will have a limited interest dependent on a family interest. Yet to the casual eye of the observer both A and B will farm their lands in the same way, and there will be no external evidence of the difference in interest between them.

One of the major aims of the introduction of registration is to cut down litigation; the effect of the inquiry by the settlement officer will be to raise all disputes affecting the land at the same time, and indeed to revive disputes that are dormant. Necessarily, especially if registration is to give

an indefeasible title, the settlement officer must determine such disputes in a judicial frame of mind, and with a judicial procedure; hence the immediate result of the introduction of registration will be to encourage that which it is desired to reduce, and more litigation and not less will be the first consequence. This is a matter which must be faced and overcome, and should not mean that registration is to be abandoned as unworkable. It serves to indicate the onerous nature of a settlement officer's duties, and the time which must elapse before registration is a fact.

4. EFFECTS.

Will registration in the Gold Coast in fact achieve its aims? One of those aims is almost certain to be that a registered title should be in theory indefeasible; and it should in practice be easily ascertainable by reference to the register.

No-one who has seen either the attitude of mind of the Gold Coast public to their land, or land in general, on the one hand; and the methods by which a claim (sometimes baseless) is pursued through the courts on the other; can doubt that the sleeping dogs of dispute will not be finally committed to eternal rest in the all-embracing arms of a register, but will rather be re-awoken at every opportunity and by every means. The African litigant will admit defeat only temporarily, when

his funds are exhausted; the practitioner will use every procedural device to prevent a final decision being given.

It is necessary in the legislation to make provision for the honest case of mistake or fraud (if the paradox will be permitted); this implies equal investigation of cases where fraud is dishonestly alleged. Even if it produces injustice, it would be better to provide that fraud could be alleged within, say, six years of the date of registration as a matter of course, exceptionally thereafter within, say, fourteen years; and that at the end of that period the title would become indefeasible even if fraudulent in the first place.

A further difficulty may arise in regard to the Registries; such registries, to be of use, must be sited locally. It will be essential to make provision for their ready accessibility, sound and honest custody, and for the prevention of deletions, substitutions, and the like. Microfilm copies kept centrally may be the answer to this difficulty. Another solution suggested is that records should be maintained centrally for ease of working and supervision. In any case there should be two sets of registers to minimise the danger of fraud.

5. PUBLIC OPINION.

Last, but by no means least, comes the question of the public's attitude to the introduction of registration and to its continued working thereafter. Any matter touching the

land affects the African deeply, and he has always shown himself suspicious of any legislation or control - even where evidently intended for his own good and protection - over his ownership or use of land. One need only refer to such disparate events as the protest against the proposed Lands legislation at the turn of the century,[8] and the later protest against "cutting-out" of diseased cocoa-trees, to confirm this statement.

The African's main suspicion will be that registration will alter his rights in land, rather than protect them; that, in effect, a new system of land-tenure will come into being. Such fears - although stremuously contradicted by the expert proponents of registration - are not idle ones: the appearance of "mailo" lands in Uganda is a sufficient example. The change will be overnight from a loose unformalized system of tenure and methods of creation and transfer of rights, to a highly-formalized and sophisticated mode of transfer, meat too strong for many English tastes. One must therefore allay such fears by a publicity campaign, but more especially by affording to the suspicious visible examples of the superior economic benefits which registration will bring. The argument of increase financial gain is one which cannot long be resisted by homo oeconomicus, and especially by the species Africanus; but such

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8. Against the Land Bill, 1894; and the Public Lands Bill, 1897.

motivation - despite the opinion of some socialists - is not an unworthy one. The first field chosen for registration must therefore be one where the chances of failure are negligible, and where the population are already partly accustomed to registers. That is why the unofficial experiments exposed at D.2. below are of such value.

D. PRESENT PROGRESS IN THE GOLD COAST.

It is proposed in this section to examine official and non-official action in certain limited spheres by which certain of the aims and objects of registration have already been achieved, or which could form part of the foundations of a system of land-registration. Some of these actions have been of temporary importance, some have been of little effect, but all are instructive.

1. OFFICIAL.

DEEDS:

(a) Registration of Deeds.

By the Land Registry Ordinance, (1895), cap. 112, which, despite its title, does not concern itself with the registration of land, registration of deeds is permitted, and machinery therefor is provided.

(i) The authority of the ordinance: the Ordinance is permissive and not mandatory. It does not (s. 5) command

registration, but rather seeks to recommend itself to a party by the advantages which registration of his instrument can bring. It achieves this object by conferring priority (s. 20 (1)) on registered as against unregistered instruments,[9] and also by ensuring a permanent record of a transaction, which cannot be tampered with.

(ii) Kinds of deeds registered: Any 'instrument' can be registered (s. 5). 'Instrument' is defined as:

> "any writing affecting land situate in the Gold Coast, including a Judge's certificate." (s. 2)

Such instrument must contain (s. 6)

> "a description which shall include a statement of the boundaries, extent, and situation of the land affected by it, or a sufficient reference to the date and particulars of registration of an instrument affecting the same land and already registered."

Wills may be registered.

Certified (validated) concessions must be registered by virtue of the Concessions Ordinance, 1939.

(iii) Effects of registration: registered instruments take priority as against other instruments affecting the same land from the date of registration (s. 20(1) and s. 22).

Wills which are registered take effect from the date of registration (s. 21); but exceptionally from the date of the

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9. But, according to Dofah v. Williams: (1922) F.Ct. '22, 99, the Ordinance gives no priority to a later registered conveyance over a previous oral sale by native custom of the same land.

death of the testator.

The Ordinance requires that deeds submitted for registration and transferring or charging an interest in land should, as a rule, contain a plan of the land affected sufficient for its identification (s. 6): this requirement is sometimes dispensed with.

BOUNDARIES:

(b) The Boundary, Land, Tribute, and Fishery Disputes (Executive Decisions Validation) Ordinance, (1929) cap. 120:

provided for the validation of certain executive decisions with regard to disputed boundaries, etc., in Ashanti, these validated decisions thenceforth having the force of a judgement with regard to such boundaries. The boundaries so decided were marked - usually by pillars - and recorded in official Boundary Books, so that future disputes regarding such boundaries should not have arisen.[10] This has not entirely been the case: validated boundaries have been challenged, it being for instance alleged that

(1) there is a discrepancy between the boundary book and the boundary marked on the ground;

(2) the pillars have been moved;

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10. Cf. Ohene of Assachere v. Ohene of Dadiasi: (1941) 7 W.A.C.A. 86:-
"...these two exhibits were Validated Executive Decisions which in my opinion are under section 3 (1) of Chapter 120 given the effect of judgments in rem except only as against the Crown."

(3) the pillars have been destroyed or disappeared;

(4) there was an error in description or survey irreconcilable with later and more accurate survey;

(5) the interests between which the boundary was drawn were not the correct ones, or were misunderstood;

(6) the original decision was made as a result of the fraud of one party;

(7) the boundary is inoperative as regards other parties and other interests.

It will thus be seen that registration of boundaries has not put an entire end to disputes.

(c) The Stool Lands Boundaries Settlement Ordinance, (No. 49 of 1950):

The object of this Ordinance is to determine the boundaries between the lands of stools. In the past these have been a fruitful source of litigation, litigation aggravated by uncertainty as to past history, as to the legal effect of past events, as to the distinction between jurisdiction and ownership.[11]

The present ordinance does not attempt to distinguish in terms between jurisdiction and ownership: it merely commands the Settlement Commissioner to settle the boundaries, whether jurisdictional or proprietary (and these may well be different).

11. Compare the dictum of Mr. T. Hutton-Mills, at p. 46 of the Belfield Report:
"Intertribal boundaries are easily ascertained."

The jurisdiction of Native Authorities is at present ascertained for the purposes of the different Native Authority Ordinances[12] (and other ordinances such as that creating electoral districts and sub-districts) by reference to the area in respect of which a Paramount Chief is customarily elected. This is of course a definition which does not define, since the matter frequently in dispute is exactly that: in respect of what area is a Paramount Chief elected? Ignorance of the spatial limits of a Native Authority's jurisdiction means, in particular, disputes over the competing jurisdictions of two native courts, over questions of liability to annual rate or tax, and over liability to pay the rent, tribute or tax demanded of a stranger-farmer.

The Ordinance is thus a first and courageous step in the direction of registration of land, but leaves unanswered as many questions as it answers. Its particular usefulness will be in facilitating the formation of the new local councils; and - in the sphere of registration - of delimiting a block within which complete registration may later take place.

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12. Cap. 79 (Ashanti) s. 2, under the definition of "Division"; Native Authority (Colony) Ordinance, s. 2, sub nom. "state". (The Local Government Ordinance, 1951, has of course altered the system of local government; but it appears likely that the Councils which the Minister may, by s. 3, establish will be set up with reference to the existing states and divisions - so that the difficulty mentioned in the text will still exist.)

RIGHTS AND BOUNDARIES:

(d) The Forests Ordinance: (1927) Cap. 122:

By this Ordinance provision was made (s. 5) for the delimitation of forest reserves so proclaimed by Government, and for dealing with questions of ownership and interest therein. In particular, the Stool's ultimate titles to the forest land were under consideration, and also the interests of farmers in the land, and communal rights over the land and forest-produce.

The Reserve Settlement Commissioners who were appointed under the Ordinance proceed by way of enquiry held locally (s. 9): the results, and the rights recorded, are a little uneven in quality.

Since the Ordinance was designed to protect existing rights and prevent the creation of new ones within the reserve (except under control), the boundaries of the individual holders were delimited and recorded; a copy of this record is kept and used by the Forestry Department for the administration of the reserve.

The aim of the Ordinance is thus closest to registration of land, and the experience of the Reserve Settlement Commissioners is of importance. It is worth noting some of the provisions of the Ordinance:

The Reserve Settlement Commissioner has the jurisdiction (s. 10(1)) of a Court for the purposes of his enquiry; when ownership of land is disputed before him, he is directed (s. 9 (3))

by the Ordinance to refer such questions to a native court for determination.[13] He adopts their decision as his own.

Whilst the Ordinance says in clear terms that (s. 17 (1))

> "the ownership of land within a Forest Reserve shall not be altered by its constitution as a Forest Reserve",

yet claims to rights in the land affected by the Forest Reserve not submitted to the Reserve Settlement Commissioner are in general extinguished (s. 13).

Transfers of interests in land within a Forest Reserve are controlled by the Forestry Department, it being provided that (s. 18)

> "rights in a Forest Reserve may not be alienated by sale, lease, mortgage, charge or transfer, unless and until the right-holder shall have given a written notification of his intention to the Conservator of Forests."

Despite this, conveyance is not by register, and prospective transferees do not investigate the transferor's title in a Register; nor does an entry in the record confer an indefeasible title.

(e) The Kumasi Lands Ordinance, (No. 17 of 1943):

The history of the lands situate within the boundaries of of the town of Kumasi has been peculiar. The Crown was originally seised of the lands therein absolutely by right of conquest; but in 1943 the Government made over its rights to the

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13. He may also refer questions to the Land Court.

Asantehene (s. 3), to hold them as trustee for the Golden Stool and the Kumasi Division.

The ordinance prevents (ss. 10-11) the conveyance of absolute interests, and permits only leasehold tenure by citizens, strangers, and non-natives.

It prescribes (s. 21) the terms of such leases; and a central register is kept (under s. 16) in the Asantehene's Lands Office of demises, sub-leases, mortgages and assignments by lessees.

The extent of the plots leased is recorded on a cadastral plan contained in the lease (s. 23).

All leases must be registered (s. 22; and see s. 23).

Despite this, the validity of transfers depends on the assent of the Asantehene, and not on entries in the Register.

The boundaries of Kumasi are laid down by the Kumasi Town Boundaries Ordinance, cap. 119.

(f) Cocoa Rehabilitation Survey:

The Cocoa Rehabilitation Department (whose future is in doubt)[14] has had to survey cocoa farms devastated by swollen-shoot, pay compensation to farmers for trees cut-out, and make replanting payments. The basis of the C.R.S.'s authority is executive, and its manner of working empirical. Plans were made on the spot within each block of the farms, and within

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14. It is no longer in doubt, it having disappeared, and some of its personnel absorbed in the Department of Agriculture. The above gives the position in 1951.

that block on the basis of information supplied by the farmers; and title thereto was similarly ascertained. This information regarding the boundaries of and title to farms was used for the payment of compensation. The C.R.S. has not acted judicially; in case of a dispute as to boundaries or title, the parties have been referred to a competent native court and the judgement of the Court used as a basis for payment. It has frequently happened that a person has been recorded as owner of a farm, when in fact he is not so, but has, either of his own motion or after being authorized by the true owner, put himself forward as owner. Such might well be the case where an individual holding inherited family property has registered in his own name. Although in paying the compensation to the individual the C.R. Department does not look behind the transaction, the rights of the parties are not thereby affected. The individual is then merely a trustee of the monies he so receives, and must pay them over if so required to the true owner. The Native Courts do admit evidence of the receipt of C.R. money from the Department as evidence of ownership, but attach to it no conclusive weight.

The C.R.S. has met with some difficulty in the demarcation of plots; totalling the acreages indicates that some overlapping has taken place. Their experience in the difficulties of rural survey is valuable if we are considering the problems of registration of rural areas. Now that the Department is

apparently to be wound up, it seems that officers experienced in such survey might be useful for registration purposes.

(g) The Concessions Ordinance, (No. 19 of 1939):

This Ordinance repealed and replaced the Concessions Ordinance, 1900, and the Concessions Ordinance (Ashanti), 1903, (by s. 66).

The Concessions Ordinance may not seem to have much connexion with registration of land: nevertheless, there is a strand connecting them, and that is that the Ordinance regulates the transfer of certain types of interests in land, providing that such transfers are not to have effect unless in the prescribed form, validated by the Court, registered and so on. It is therefore worth while considering the provisions of the Ordinance more closely, since it bears not only on the present permitted modes of transfer of property, but also on the application of a system of registration in the Gold Coast.

The Ordinance regulates the grant and enforcement of "concessions". It is therefore necessary to ask what a concession is.

> " 'Concession' means any instrument whereby any right title or interest in or to land, or in or to minerals, timber, rubber, or other products of the soil in or growing on any land or the option of acquiring any such right, title or interest, purports to be granted or demised by any native, but does not include an assignment or sub-demise of the whole or any part of the rights granted by any concession, or a sale, mortgage, lease, or agreement to lease land within

> a town or village, from which sale, mortgage, lease or agreement all right title, and interest in or to minerals is excepted." (s. 2).

'Instrument': The Ordinance catches only the written contract or conveyance, and does not operate over an oral agreement, or presumably over customary transfers(?).

(The Land Registry Ordinance (cap. 112), s. 2, defines 'instrument' as meaning: "any writing affecting land situate in the Gold Coast".)

Evasion of the Ordinance by a non-native grantee by use of an oral agreement only is prevented by the terms of section 3:

> "Any agreement whereby any right, interest, or property in, to or over land, in or to minerals, metals, precious stones, timber, rubber or other products of the soil in or growing on any land, or the option of acquiring any such right, interest or property, purports to be granted by a native to a person who is not a native, shall be void unless it is in writing."

'By any native': It will be noticed that whilst s. 2 operates only with regard to the grantor, s. 3 takes note also of the personality of the grantee. It is thus to be concluded that a native grantee is not caught by the statute unless his agreement is in writing, nor apparently will the non-native grantor be caught in any circumstances, even if the grantee is a native.

Wills: It is tentatively suggested that the terms of s. 2 might be held to be wide enough to include wills made by natives

in writing, and containing a devise of real property. If this is so, it is certainly not observed in practice.

Towns: Instruments affecting land situate in towns and villages are excepted from the provisions of the Ordinance, provided right to minerals, etc., is not conveyed. Such a grant excluding right to minerals may be made either by specific reservation of mineral rights to the grantor, or by grant of a lesser interest which does not include right to minerals. Whilst it is in general true that in the interior, when land is conveyed within towns and villages, minerals are specifically reserved to the stool, or else only a right of occupation granted, yet this does not necessarily apply either to conveyances made in former years, when grantors were not as careful of their rights, or to the present day on the coast. (It is true that this is in an area where no minerals have been found, but this is irrelevant.) Is a conveyance "absolutely", or "in fee simple", or "outright" in Cape Coast then invalidated by the Ordinance?

By section 4, the Governor may exclude any portion of the Gold Coast, or any class of concession, from the operation of the Ordinance.

Apart from this, the Ordinance encourages the parties to use the machinery provided in the terms of section 7:

> "No proceedings shall, without the leave of the Court, be taken to give effect to any concession unless such concession has been certified as valid by the Court."

The subsequent sections indicate the prescribed method: the term of any concession is limited by section 20 to a maximum of 99 years; whilst the area over which a concession may extend is limited by section 21 (as amended by the Concessions (Amendment) Ordinance of 1941[15] according to the nature of the rights granted (e.g., mining, timber, rubber, etc.).

By section 30 it is provided that instruments of transfer must be registered under cap. 112, and that they are liable to stamp duty.

Now for the obtaining of a certificate of validity, which must be obtained from the court, as it is provided (s. 9) that if all steps which must be taken for a concession enquiry are not completed within two years from the date of the concesssion, the concession becomes null and void.

Notice of the concession must be filed with the Court within two months of its date of making (s. 8). The Court conducts a concession enquiry, and, if the concession is found valid by the Court, a certificate of validity is given, which must be registered at the Land Registry Office.(s. 16). The concession must not be certified as valid unless:

> "all the terms and conditions upon which such concession was made, which ought to have been performed, have been reasonably and substantially performed." (s. 12 (5))

The certificate of validity must (s. 17) contain a

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15. No. 9 of 1941

description of the exact boundaries, extent and situation, of the land the subject of the concession; and a cadastral plan will be ordered (s. 19) unless the Director of Survey certifies that it is unnecessary.

The effect of a certificate of validity is given by s.31:

(1) "A certificate of validity shall be good and valid from the date of such certificate as against any person claiming adversely thereto.."

(2) "A certificate of validity shall not be liable to be impeached by any person by reason of any lack of notice of the boundaries or extent of the land in respect of which it is given, or for any other reason or on any other ground save that of fraud... /...to which the holder of the concession is proved to be a party/." (16)

The presumable effect of the Concessions Ordinance is then that, until the grant of the Certificate of Validity, a concession is operative but not enforceable by action by virtue of the validity of the conveyance or agreement made by the parties; once the certificate has been given, the validity and enforceability stem from the certificate.

It will be observed that, as with other regulating statutes, and as will presumably happen in the case of the institution of registration in the Gold Coast, rights of parties are in fact affected. The Ordinance in fact affects the rights of persons not parties to the concession, their chance to assert their rights coming at the time of the concession enquiry.

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16. The words given here in brackets were added by Ordinance No. 35 of 1942.

The effect of validating a concession is thus more or less to crystallize rights affecting the land subject to the concession and also the boundaries of the interests in such land. Since in addition the land is accurately surveyed, it is obvious how close is the resemblance to a process of registration. The grant of a certificate of validity will not presumably affect at all the interests or rights which are not in competition with those which are the subject of the certificate.

2. NON-OFFICIAL.

(a) Certain Towns:

(i) Mining: Towns which have come into being largely or solely as a result of mining operations in the vicinity by a mining company are a special case. The land on which the town is situated may be held on a long lease by the company from the local stool, as at Obuasi. This is the head-lease, under which the company has created sub-leases in favour of tenants holding houses built by the company. The grant and record of such sub-leases is centralized, so that there is the germ of a register of interests. To take Obuasi as an example:

The Ashanti Goldfields Corporation holds the site of the town on lease from the Adansihene (as representing the Paramount Stool of Adansi Division). It has been laid out in plots, and houses built thereon. The management of the property is de facto entrusted to the Obuasi Sanitary Board, which

is a statutory body.[17] The O.S.B. numbers the individual houses and plots, grants sub-leases over them, and maintains control and record of sub-leases, assignments, and mortgages by the tenants. There is thus in theory (as in Kumasi) an English system of tenure; but in practice the attitude of the African tenants (mostly non-Ashantis) and the Native Courts does not agree with the theory. Their individual tenancies they treat as comparable to the tenancies enjoyed by strangers in farms and houses elsewhere in Ashanti, and they transfer such interests in a customary manner. Such transfers are theoretically of no legal effect unless consented to and recorded by the Board. Native Courts sometimes take evidence of such record as estoppel in favour of the party whose name appears in the record; and sometimes go behind the record to find (as with the cocoa-farms surveyed by the C.R.S.: see D.1.(f) above) that the person is nominal owner only, and in fact holds in trust for another.

The boundaries of the plots are physically delimited, a register of tenants, mortgagees, etc., kept, and conveyance of the plots is in effect by register. Here, then, is found an approximation to registration. Such a resemblance traces, of course, to unity of ownership underlying all the lesser interests.

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17. This gives the position as at the time of my investigation.

(ii) Towns where alienation is controlled by Native Authorities: In theory alienation is controlled by the Stool, since it alone is seised of the absolute interest in the land. In practice the control is exercised by the Native Authority, since it has not been previously usual for the African to take the theoretical distinction between the Paramount Chief and his Council, and the Native Authority constituted by them.

Kumasi: is a special case, since although alienation is controlled by the Native Authority, it does so by virtue of Ordinance; and the system of tenure permitted is expressly stated to be English. Its case resembles that of Obuasi therefore, more than it does, say, Koforidua or Bekwai.

Koforidua: The capital town of New Juaben is unique in being situate in the only Ashanti state in the Colony. Its history is a chequered one, and the uncertainty as to the respective rights of Crown, New Juabens (and formerly Kukurantumi) has been rife. The land on which the state and town are situated was originally purchased by Government from an Akim Abuakwa Stool[18] for the settlement of refugees from Ashanti in 1882, and again in 1895. It seems to follow that the claim of the transferor-stool is gone forever. For a long time, however, there was uncertainty whether Government bought the land for itself - thus making it Crown land - whilst permitting free occupation by the New Juabens; or whether Government

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18. Kukurantumi.

bought it as agent for the New Juabens, so that New Juaben became owner of the land, but subject to certain privileges retained by Government. A third suggestion of the position was that the amount paid to Kukurantumi by Government in regard to the land was a solatium to Kukurantumi for having given the land to the Juabens to settle on.

The uncertainty was resolved when Government vested the lands in the Paramount Stool of New Juaben. New Juaben thus became owner of the land, but Government retains the right to acquire land for the Crown without the payment of rent or compensation. It is doubtful how far this right would be exercised today.

The grant of interests in land in the town is now reserved to the Paramount Stool of New Juaben, which acts through a Native Authority Lands Office. Neither citizen nor stranger can originally acquire a plot for building without the consent of the Lands Office representing the Stool. The position of the citizen and the stranger are however distinguished.

The citizen applies for a plot through the "caretaker" to the Omanhene; he does not need a lease, although he will require approval by the Public Works Department of his proposed building, for which he must submit a plan. The Lands Office will give him a certificate of title to the plot for the purposes of the P.W.D. Thenceforth the citizen remains in indefinite, free, occupation. He will not require the knowledge

or consent of the Lands Office before transferring the whole or part of his interest, unless the transferee is a stranger.

A citizen may, however, apply for a lease from the Stool, whereupon he must pay rent, and his position approximates to that of a stranger (than whom he is, however, in a more secure position as being a citizen with an innate right to take up land in the town). A citizen will apply for a lease especially when he wishes to charge his interest as security for his employment with a commercial firm, or to a stranger.

The stranger can hold only under a lease - of the plot - from the Stool. The stranger agrees on the terms and conditions of the lease with the Omanhene, the area of the plot, the term of the demise, and the rent payable, varying in different cases, although there is a theoretical uniform scale of charges. Transfer of such interests under a lease is notified to and controlled by the Lands Office, and is invalid without the consent of the Stool.

A citizen conveying to a stranger can apply to the Lands Office for a certificate of title to support his claim to enjoy the interest conveyed.

The following registers are maintained by the Lands Office:

(1) A Register of new leases.

(2) A Register of ground-rents.

(3) A Register of sites,[19] showing:

19. Plots are physically identified by description, and by reference to a master-plan.

(i) Date of the lease.

(ii) Number of the lease.

(iii) Site of the plot.

(iv) Name of the lessee.

(v) The annual rent charged.

(4) A Register of Classified Leases, showing:

(i) Term of the lease.

(ii) Other details.

(5) Copies of leases, kept by years.

The plots are identified only by the numbers of the leases demising them, and in no other way.

It will thus be seen that interests affecting plots may be registered, if they are leased to strangers, or to citizens in certain cases: by reference to Register No. (3) above, it is possible to ascertain what interests affect the plots. In the case of plots occupied by citizens, this does not follow.

Interests affecting the houses built on the plots may or may not be ascertainable.

Transfer or creation of interests affecting houses or plots may be: (i) valid without reference to the Lands Office (citizen to citizen);

(ii) valid without reference to the Lands Office, but they must be notified to the Lands Office (citizens to strangers);

(iii) invalid without reference to the Lands

Office (by a stranger).

The boundaries of the plots may be ascertainable by reference to the Registers and the plans deposited; or they may be unascertainable.

The existing system is thus incomplete; but could easily be adapted for the purposes of registration.

This system applies also to other towns in the state of New Juaben, e.g.:

Asokore;	Effiduase;	Oyoko;
Jumapo;	Suhien;	

but its application there appears to be less rigid.

Bekwai: In the town of Bekwai the acquisition of plots by both citizens and strangers is controlled. The system has been described above.[20]

Kibi: Transfers and leases of land to strangers are controlled by the Paramount Chief - acting through the Native Authority. There is a Native Authority Lands Office in the town.

It must be noted that there is a confusion between registration as such and the control of land by a central land-owning authority. This control, at first intended for strangers only, has now extended to citizens, who have been drawn into the system. (This applies especially to the larger towns.)

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20. See INDIVIDUAL, pp. 152-3.

Even the most rudimentary of these systems affords some basis for the introduction of registration, even if it does no more than facilitate investigation of title. The investigation may deceive where a successor-in-title by succession has been registered in place of the original individual acquirer; but the difficulty can be met in practice by careful examination.

The basic ownership by Stools of the title to land is therefore a help, since there is a firm ground-title, even if the interests created subsidiarily thereto vary enormously.

(b) Rural:

Control of rural alienation and land-holding is in a much more rudimentary condition. The control by the New Juaben State of alienations to strangers in the smaller towns and villages of that state is semi-rural in nature; but it does not now apply to agricultural land as such.

In Adansi, alienations of rural agricultural land are controlled centrally if to strangers.

In Akim Abuakwa there is a similar control. In both states - which are wealthy and suitable for development by commercial interests - rights more extensive than those of an individual farmer are frequently granted: concessions for timber, minerals, or rubber are frequent.

Both states have properly-organized offices for dealing

with land-matters; but these are more registers of conveyances and rent-payments than registries of title with reference to the land.

In general, alienations to strangers in many states, (more particularly in Ashanti, Akim and Assin) are controlled by the native authorities.

(c) Present Effects of "Registration":

The centralized approval and granting of interests in land to strangers is aimed at control of alienation, rather than at facilitating transfers of interests.

Cadastral plans may be required (as Kumasi), or the extent of the land subject to the transfer indicated in other ways (rough sketches, verbal description, fencing of boundaries).

Visualization of the land subject to interests may be assisted by block-maps (in Koforidua a scale map of the town carries indications of plots subject to interests, the plots being identified by the lease numbers, to which leases the investigator is thus referred).

Subsidiary interests may or may not be indicated in the Registers; there may be theoretical provision for this (Obuasi, Kumasi) not always observed in practice; or there may be no provision.

Devolution of title: the contemporaneity of the registers varies.

Transfers, etc., may be invalid until registered or

centrally approved (Kumasi, Obuasi, Koforidua); valid, but to be notified post factum to the central office (Koforidua, and Bekwai, in certain cases); or valid without notice (especially when the parties are citizens, but not in Kumasi).

It is uncertain how far transfers not meeting the requirements are absolutely void, voidable, or curable (by the intervention of equitable remedies).

E. PLANS AND POLICY IN THE GOLD COAST.

Now we shall discuss where registration should begin; the method by which it should be carried out; the types of interests to be registered, and how; and the effects of registration.

1. WHERE SHOULD REGISTRATION BEGIN?

There are three categories which must be considered, the areas governed by particular stools; the towns; and the rural areas.

(a) Stool boundaries:

Our question has already been answered by the action of the Gold Coast Government, in that it is now open to them to begin registration of these boundaries under the Stool Lands Boundaries Settlement Ordinance[21]; although when they will do so is another question.

21. No. 49 of 1950. See p. 744 ante.

By this Ordinance the boundaries, jurisdictional and proprietary, of the Stool lands may be settled by Commissioners especially appointed. There is no limitation as to the kind of Stool the boundaries of whose lands may be determined, but the most feasible method, no doubt, is to begin with the boundaries of the Paramount Stools and work downwards.

The resultant settled blocks will be valuable, indeed essential,

(1) insofar as they are jurisdictional, to fix the limits of the authority of native authorities, and new local Councils, and to serve as registration-blocks for lesser interests;
(2) insofar as they are proprietary, that they may be incorporated in the general settlement of proprietary rights consequent on the initiation of registration of title.

(b) Towns:

Actual registration of the mass of lesser interests will take place either within blocks as settled above; or within areas already defined (e.g., under the Towns Ordinance); or within areas artificially and arbitrarily chosen and defined for the purpose.

The boundaries of the major towns (it must be stressed that these boundaries are administrative only) are already fixed by legislation. The first requirement, that registration should take place within a defined block, is thus already satisfied.

In point of need, the towns are obviously a more pressing problem than the rural areas, since there has been a much greater amount of changes of ownership, etc., within them.[22]

It is also easier to begin registration in the towns, since adventitious aids to registration are already available in the form of evidence both as to boundaries and title. The aids available have been exposed at D. above.

It is therefore recommended that registration should be commenced in the following towns:

Accra	Cape Coast
Sekondi-Takoradi	
Tarkwa	Nsawam
Swedru	

and that the existing systems should be converted to full registration of title in the following towns:

Kumasi	Kibi
Koforidua	Obuasi
Bibiani	Bekwai
Tafo	

These lists are not exhaustive, but will do as a suggestion of the size of the problem.

It may be necessary to register some rural areas immediately adjacent to the towns named above; but the problems of rural registration are considered below.

Registration in towns will also be easier in that rights to houses are less complicated and more permanent than rights

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22. Cf. the observations of W.A.C.A. in Amuie v. Sabih: (1949) (unrep: Civ. Appeal 23/48), quoted at p. 726.

in agricultural land.

(c) Rural Areas:

These present a more difficult problem, and the immediate need is less pressing;[23] need for registration of title is still present, however.

Again, registration should take place within defined blocks: if these are consonant with existing well-recognized political or tribal boundaries the difficulties of registration, and acceptance by the public, will be so much the easier.

It is suggested that the easiest block in which to commence would be that of the state of New Juaben, for the following reasons:

(i) Tenure is of the Ashanti type, the root-title being vested in the Paramount Stool.

(ii) The area is small.

(iii) Town and countryside are mixed.

(iv) The area has been surveyed by the C.R.S.

(v) There is an existing scheme of "semi-registration".

Further candidates for early registration are those areas where there has been long-standing disorganization of land tenure, e.g.:

- the Coastal belt of the Colony;

or rapid growth of agriculture (especially cocoa) requires

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23. This point is arguable, however.

immediate action:

- Akim Abuakwa;
- parts of Ashanti.

2. METHOD OF REGISTRATION.

What interests might be registered; which interests should be registered - why and how; and which not registered?

(a) Interests which might be registered:

Interests in land, farms, houses can be classified according to their nature - that they are absolute, dependent, or contingent; according to the right-holder, that they are stool-interests, family-interests, or individual interests; or according to their subject-matter - that they are interests in land, in farms, in houses, etc.

The first and elementary step is to separate interests in land from other interests. It will be recalled from a previous analysis that such a separation of interests is possible. It will also be recalled that a citizen, for instance, holding a farm in his own state in Ashanti, has a limited interest in the land, and an absolute interest in the farm. Since to register both interests would be a matter of great complexity, and one which would not be appreciated by the African, it is proposed to register such an interest in land and farm combined as an interest dependent upon the absolute interest of the citizen's political superior (his Stool), even though this tends to obscure the nice theoretical distinction between these in-

terests. It is also proposed not to combine the absolute interests of a citizen in his house, with his limited interest in the land on which it stands. Each would be registered separately.

Since such dependent interests combine a measure of permanence and security of tenure, which depends on the fact of citizenship, it is proposed to separate those interests which do not partake of the same quality, and to call these last contingent interests, since their term and conditions of tenure are contingent on certain factors, e.g., the existence of a lease or mortgage, the continued existence of a relationship, or the fact that the right-holder is a stranger.

Next, it must be emphasized that interests equal in rank may be held by different classes of persons - stools, families, individuals. Qua the Stool, a family's interest is equivalent to an individual's self-acquired interest; the distinction only becomes relevant when the family-interest is examined à propos of the rights of an individual member of the family.

(b) The following schedule attempts to set out in a concise form the interests which might be registered inland and houses, whether these interests are to be classed as absolute, dependent or contingent (in accordance with our classification above), the right-holders, and whether their interests are stool (S.I.), family (F.I.), or individual (I.I.), interests. Under the head Conditions the limitations on a

particular interest, or the circumstances attaching to its existence, are briefly indicated. It must be emphasized that some of these interests are alternative or mutually exclusive (e.g., either a Paramount Stool, or a subordinate stool, or a family, or an individual, may hold the absolute interest in land), and that not all these interests are necessarily to be found in every locality (see below for some examples). Section (c) below considers which of the interests detailed in the Schedule should, in the author's opinion, be registered.

SCHEDULE.

(24)

LAND.

Right-holder	Stool, Family, or Individual Interest	Conditions
Absolute interest:		
Paramount Stool	S.I.	Subordinate Stools are caretakers only.
Stool	S.I.	Paramount Stool has right of jurisdiction.
Sub-stool	S.I.	Paramount Stool has rights of jurisdiction only.
Family	F.I.	- do -
Individual	I.I.	- do -

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24. Abbreviations: P.S. - Paramount Stool. S. - Stool(subordinate)
F. - Family. A.I. - Absolute Interest.
D.I. e Dependent Interest.

Right-holder	Stool, Family, or Individual Interest	Conditions
LAND (cont.)		
Dependent Interest:		
Stool	S.I.	Paramount Stool owns Absolute Interest.
Family	F.I.	(P.S. owns A.I., (S. owns D.I.; or S. owns A.I.
-section	F.I.	- do -
Individual (member)	I.I.	(P.S. owns A.I., (S. owns D.I., (F. owns D.I.; or (S. owns A.I., (F. owns D.I.; or (S. owns A.I.; or (F. owns A.I.
Individual (non-member)	I.I.	as above, plus Individual owns (A.I. or (D.I.
Contingent Interest:		
Paramount Stool	S.I.	Subordinate Stool owns A.I.
Lessee	F.I. I.I.	
Tenant	I.I. F.I.	by intestate succession
Mortgagee	S.I. F.I. I.I.	(RARE) direct, or by succession
Pledgee	- as above -	
Child	I.I.	of deceased father, in certain instances
Wife	I.I.	of deceased husband, in certain instances
Donee	I.I.	in certain instances
Estate Contract		
Other interests:		
Tenant-at-will		
Squatter		
Caretaker		no interest in property
Family's reversion		in member's self-acquired property - Not an interest
(Equitable interests?)		

Right-holder	Stool, Family, Individual, Interest	Conditions
HOUSES.		
Absolute interest:		
Paramount Stool	S.I.	cf. Ahenfie, etc.
Stool	S.I.	- do -
Family	F.I.	
Individual	I.I.	
Dependent Interest:		
Section	F.I.	Family owns A.I.
Individual	I.I.	-do-, and section may own intermediate D.I.
Contingent Interest:		
Land-owner	S.I, F.I. I.I.	where ownership of the land and house are separated
Lessee, Tenant, Mortgagee, Pledgee, Child, Wife, Estate Contract	(see LAND)	
Other Interests:	(-ditto-)	(25)

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25. Comments: The main problem is the placing of the individual person holding inherited property. It is true that his holding is limited, and contingent upon the family, both as to its beginning (by appointment), and as to its end. Its quality resembles other categories of dependent interest rather than contingent interests; it is recommended that it find its place with the former.

(c) Which interests should be registered, and in whose name?

It is recommended that absolute and dependent interests as detailed above should be registered; and contingent interests registered as charges on the absolute and dependent interests. Interests collected at (b) above under "Other" should not be registered. It is true that by this method not every visible occupier of land will be registered; but the other interests are too transitory or theoretical to be worth registering.

Interests specified as "Stool Interests" should be registered in the name of the stool, with the occupant for the time being noted as the "Person Registering".

"Family-interests" should be registered in the name of the family, with the head thereof noted as the "person registering".

"Individual Interests", if independent of family interest, should be registered in the name of the individual. If dependent on family interests, they should be registered in the individual's name, but with the individual and the head of his family as the "persons registering" jointly.

It appears that registration will have to be extended to wills, English and customary, if a logical system of conveyancing by register is desired: and further, that some means will have to be found of compelling registration of all changes of title subsequent to initial registration.

(d) Interests which should not be registered:

These include equitable interests, and rights of a transitory nature. It is for consideration whether equitable mortgages should be registered, since to do so, if practicable, would obviate some abuses; (and they should certainly be registered if the Supreme Court persists in its attitude that many of what one should classify as native mortgages are to take effect as English equitable mortgages).

The above statement conforms to English ideas and practice; but in the context of the Gold Coast (an undeveloped comprehension of the nature of Equity and equitable interests) it is uncertain how far they apply or should be applied. To take an instance: a family one of whose members is entered as nominal owner of family property on an appropriate register or record have a clear interest in the property; in England this might be described as equitable; in the Gold Coast it is clearly legal. The family remain owners of the property; the member has an equitable duty to maintain their title (by neither disposing of it or denying it). If existing records are taken as the basis of the new registration, there is a danger that this point will become obscured.

3. SETTLEMENT.

The interests which are to be registered have already been discussed. It is now necessary to consider the problems

of settlement, both of title and boundaries, and to endeavour to visualize if possible both the process by which settlement might be effected, and the rough shape of the final registers.

At E.1.[26] a suggested order of priority for registration-areas has been put forward: from that summary three main points in regard to settlement of title may be abstracted:

(i) that it should be within a defined block;

(ii) that it should be compulsory;

(iii) that it should be exhaustive or complete.

(a) Settlement of Boundaries:

The boundaries of the chosen block are those which must be settled first. Whilst it is not essential, that such boundaries be delimited where the block chosen is an arbitrary one adopted for purposes of administrative convenience, yet it is simpler to choose a defined block; the Stool Lands Boundaries Settlement Ordinance, 1950, provides a procedure for settling such boundaries in rural areas. The Towns Ordinance fixes administrative boundaries for the larger towns; but these boundaries may not be wide enough, or cover the whole of the urban agglomerations (for instance, , in Accra).

Within the block settlement of boundaries and titles can proceed hand-in-hand. Time will necessarily have to be allotted before the beginning of the judicial enquiry for:

(i) notice to right-holders of the forthcoming registration (say two months);

26. At p. 764 above.

(ii) preparatory work (assembly of auxiliary material), preliminary surveys, enquiry into the special rights or problems of the particular block).

Regard must be had before fixing the date of enquiry to seasonal movements or occupations (the cocoa-harvest, the absence of many farmers on their distant farms - cf. especially Akwapim); lack of this regard impaired the work of the Census and the registration of voters.

It is suggested that advance-parties should be formed, who would precede the Settlement Commissioner, and clear the ground for him. This party might include an Assistant Settlement Commissioner, a surveyor, and an archivist-registrar-secretary.

(b) Settlement of Title:

This head includes settlement and registration of all lesser interests, and is the major work. It is already the practice in certain areas for a transferee to require or be required to consult the local chief or headman, and the family of the transferor (even where the property transferred is self-acquired). This valuable procedure ensures that family-interests are safeguarded, fraud is avoided, the title of the transferee is secure from objections of the transferor's family in the future, publicity is given to the transaction, and a record of the transaction kept in a secure place. A similar procedure is recommended for the Settlement Commissioner: families of claimants and the local chief, etc., should in

rural areas especially be made parties to the settlement. This would also facilitate the form of registration proposed above.

As to the method of recording interests proved, a certain amount of difficulty arises, since in order to simplify registration it has already been proposed that interests in land and farms should be registered together under "land"; whilst interests in land and houses are to be separated under "land" and"houses".

Let us take some instances:

FANTI: Land:

Absolute interest: in general with a family or individual. To be registered as stool-interest in the case of "stool lands" (unoccupied tribal lands, and tribal lands occupied by the stool). Stool family lands must be registered as a family-interest, preferably in the name of the family, with the head of the family and the stool-holder (if different) as persons registering.

Dependent interests: will include the interest of the individual member of a family with a farm on family land, and an inherited farm.[27]

Contingent interests: - of a stool in occupied tribal lands - it is questionable whether juriddiction should be allowed

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27. Room must be found for the dependent interest of a section ("House", branch, sub-lineage) where the interest is found.

to obtrude on a proprietary register; if the answer is "Yes", then this may be so registered. The interest may be the basis for the acquisition of a proprietary interest, by succession to abandoned land, and perhaps by alluvion.

Houses:

Absolute interest: may be held by a Stool, family or individual.

The holder of the absolute interest in the house may be different from the land-owner.

Dependent interests: see above.

Contingent interests: see above; the question arises whether to record the land-owner as holder of a contingent interest extending over the house. He has no present interest, but:

(i) he may have the right to control alienation or user of the house;

(ii) he may succeed to the house if left derelict.

The land-owner's interest is already recorded in the "Land Register"; to record it again here would tie in the two registers, even if only by a cross-reference.

ASHANTI: Land:

Absolute interest: is in general with the Paramount Stool, but is in some cases with the Wing and other Stools.

Dependent interests: may include those of a Paramount Stool, other stool, family, individual.

Contingent Interests: must include a Paramount Stool's jurisdictional interest, in that it may be customary or necessary for the signature of the Paramount Chief to authenticate a transfer by the land-owning stool.

Houses:

Absolute Interest: may be with a stool, family or individual.

Dependent Interests: in favour of a section or individual.

Contingent Interests: may also include the spes successionis of the land-owner.(?)

MIXED COLONY STATES:

Land:

Absolute Interest: in general is or was with Stools, whether Paramount, Wing, or other. The implication of the sale of land to individuals arises; such sale may be:-

(1) outright (inclusive of minerals, etc.);

(2) outright (with reservation of mineral rights to the grantor);

(3) of farming rights (the grantor retaining ownership of the soil and things therein).

Such sales by stools have gradually changed their character, the general movement being from (1) to (2) to (3). This will confuse the problem of registration greatly, since in (1) the grantee is owner of the absolute interest in the land, and things therein and thereon; in (2) he is

owner of the absolute interest in the land, the grantor owning the interest in minerals and timber; in (3) the grantee is absolute owner of his farm, the grantor of the land.

(1) presents no difficulties in registration;

(2) might be registered with grantee as absolute owner; grantor as owner of a contingent interest;

(3) grantor as absolute owner; grantee as owner of a dependent interest. Theoretically, this is unsound, practically it seems the best solution, since an alien purchaser of farming rights (unlike a stranger tenant-farmer) acquires a right at least as wide as a citizen's interest.[28]

Dependent Interests:)
) follow from the above.
Contingent Interests;)

(c) Objections and Rectifications:

The boundaries and interests having been settled (a process no doubt occurring contemporaneously), they will be recorded in the appropriate registers. Time will have to be left for the hearing of objections in the immediate post-settlement

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28. It should be observed in general that a stranger-purchaser of a house from a citizen may be:
(1) forced to take a lease of house and plot from the land-owning stool;
(2) forced to take a lease of the plot only;
(3) not forced to execute any agreement in writing.

period, and also at a later period.

A suggested timetable is as follows:-

Settlement:	0 months	(Provisional Register published)
Objections:	within S + 6 months	(Provisional Register in force)
Rectification:	to S + 9 months	
Confirmation:	S + 1 year	

From the timetable, it will be seen that 6 months, whilst the provisional register is open to inspection, are allowed for lodging objections; 3 months for the hearing of the objections, and rectification of the register; and 3 further months whilst the objections and rectifications are themselves open to objection. At the end of one year from publication of the provisional register, it is confirmed. From this time until 6 years after publication of the provisional register, applications to rectify the confirmed register might be brought by leave of the court. From the end of this period until the lapse of 12 years from the original settlement, applications to rectify on the ground of fraud alone might be brought by special leave of the court. At the end of the 12 years the register becomes absolute and unchallengeable on any ground whatsoever.

The periods suggested fit in as far as possible with the present practice of the courts in cases of prolonged adverse possession (the Statutes of Limition not applying to land held under native tenure).

The overall timetable then becomes:-

Settlement: Publication of Provisional Register.

Objections and rectification: Confirmed Register.

Up to 1 year (any ground; without leave).

Rectification: For cause shown; by leave of the court up to 6 years.

Rectification: For fraud alone; special leave; up to 12 years.

Register becomes absolute.

It may be held:

(1) that the periods chosen are inadequate or too lengthy; - since the selection of these periods is necessarily arbitrary, any suitable periods may do;

(2) that it is outside the scope of this treatment to consider such matters of detail - unfortunately, such details will have a preponderant effect on a matter adverted to previously,[29] namely, on African public opinion and its reception of the ideas and practice of registration. It is especially in the matter of detail that there will have to be the closest consideration, otherwise inevitable the cry will go up that Government is stealing the lands of the Gold Coast people.

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29. At p. 739 ante.

CHAPTER XIV.

Conclusions.

It may be helpful to the reader to attempt here to pick up some of the diverse threads which run through the whole of this work, to formulate some conclusions, and to indicate what scope there is for development, or field for reform. First, one must answer the question: how far is it possible to enunciate any clear rules for Akan land-tenure at the present time?

1. THE ELUCIDATION OF THE CUSTOMARY LAW.

The rules already given for the different aspects of Akan law represent a formative stage in the evolution of a legal system. The law described is a law in transition, the result of an incomplete adaptation of age-old customary concepts to a modern society. Quite apart from the fluidity of the rules themselves, there is the difficulty of evaluating the evidence from which they may be derived. Each source of information open to us is subject to qualification: the decisions of the superior courts sometimes, it is submitted with great respect, show an incomplete acquaintance with the customary law, or enshrine false doctrines through the working of the rules under which proof of customary law is admitted; the decisions of native courts, though often sounder guides, are sometimes influenced by partiality or by individual or local idiosyncrasies;

the works of text-book writers are frequently sparse, out-of-date, or - most important of all - not written primarily with strictly legal ends in view; and, finally, oral information (on which a great part of the foregoing material is based) reflects the prevailing mood of indecision. One would expect that it would be from this last source that the most accurate material would be derived; this expectation is lessened by partiality and the decline in knowledge of the customary law on the part of informants, and by the obsolescence of parts of the ancient law. In short, one is presented with a mass of often conflicting evidence.

On what principles is one to choose between the sources when they themselves vary? In general, oral information[1] and the decisions of native courts have been preferred to cases from the Supreme Court and the textbooks, since the former class is more likely to represent the law as it is now practised. But conflicts between different oral informants are by no means rare; and here the resolution becomes more difficult. One has to eliminate any warping due to bias; one has to endeavour to segregate variations which are due to local differences.[2] Even after this, however, conflicts may remain. Some of these conflicts can be traced to a desire to modify the

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1. From at least 500 persons drawn from different states in the Colony and Ashanti.
2. Sometimes this is relatively easy, as with the variation between the rights of stools in, say, Fante and Ashanti custom respectively.

customary law;[3] but the majority are due to the fact that the customary law is being modified. During the period of change one can often do no more than indicate the conflict, the resolution of which must be left to the processes of time. This is inevitable when one remembers that the validity of customary law derives from its observance by those subject to it;[4] one can confidently say that an acceptable change in custom has taken place only when usage speaks preponderantly for the abandonment of the former customs. This is a matter of fact, perhaps to be investigated by quasi-statistical methods (along the lines sometimes pursued by sociologists in their enquiries); it may be that the preliminary enquiries which will be needed before registration is introduced will provide the opportunity for such an investigation. Until such a change in custom is satisfactorily established, the courts (and the writers of text-books) must continue to rely on the older rule.

There is one further matter which must be considered before we can turn to an examination of some of these changes: this is the propriety of calling custom a system of law. Is one perhaps attempting the impossible, trying to clothe something essentially non-legal in legal dress? There is at times

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3. E.g., in the law of succession, when it is stated that family-witnesses are no longer required for the validity of a samansew.
4. Cf. the definition of "native customary law" in the Native Courts (Colony) Ordinance, 1944, which provides that the rules must be "fortified by established usage".

a powerful temptation for one nurtured in the literalism of English law to reject the notion that customary law is a true law, and to think of it merely as a guide to conduct or an abstraction from observed practice.[5] The temptation lies in the fact that there is some truth in this notion: the guiding aim of adjudication in customary law was to bring peace between the parties rather than to impose an inflexible rule on a given set of facts. This is clearly shown in the customary institution of "arbitration", which has been subject to some misunderstanding in the higher courts.[6] When so many petty quarrels were settled within the house, and the chief's powers - except in the case of crimes against the community - were really only an extension of such a settlement, it was to be expected that the rules on which these decisions were given should have a flexible content. Hence, even today, it is almost impossible to say that there is a customary law regarding many internal family matters. Often the question is not "has A a right to do such-and-such?" but "who will object if A does it?" The power of the family to control the dealings of its individual members, to contest new ideas of succession, and so on, often

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5. Cf. my article Customary Law of the Akan Peoples, African Studies, March 1953, 12/1, 26; and Dr. M.D.W. Jeffreys' rejoinder printed therewith.
6. Cf. articles by: Matson, The Supreme Court and the Customary Judicial Process in the Gold Coast: I.C.L.Q., (Jan. 1953), p. 47; and Allott, Kwasi v. Larbi (1953) A.C. 164. Akan Customary Law of "arbitration" in the Gold Coast, I.C.L.Q., July 1953, 2, 3, 466.

rests on personal factors - the strength of the head's character, the propinquity of the parties, etc. A customary law of such a flexible nature is now administered subject to an alien and organized system of law; the conflict between the two notions lies at the root of many discrepancies.

2. SOCIAL CHANGES AND THEIR EFFECT IN CUSTOMARY LAW.

Whilst the Akan remained a people devoted mainly to the raising of subsistence crops, hunting, and the arts of war, there was little field for the assertion of concrete rights in land. The pacification of the country, and the subsequent development of its resources, mainly through its natural wealth and the labours of its peasant-farmers, have rapidly led to the growth of claims of a legal nature over the land and the things in and on it. Legal persons have developed side-by-side as bearers of these rights. Such developments often render the appeal to ancient custom nugatory.

As regards the Stool, the main change has been from a relationship resting on a purely personal basis (that of allegiance) to one based on territorial claims and control over land. Formerly, the wealth of a stool was its people, and its main aim was to secure them and their possessions in peace and war. Today, we have destroyed this purpose, which acted as a social cement. What are we to put in its place? We offer the wealth derived from land, in which a stool, as rep-

resenting its people, now has many valuable claims: an absolute title, which may be vendible; royalties from timber and mineral-deposits; revenues from stool-farms and enterprises, and from stranger-farmers. The two-fold movement of wealth, which we observe in the old days, effectively bound stool and subjects together. But today there is an increasing tendency to strip the stool of all those rights and privileges (which went together) which tied it to its subjects. This tendency is accentuated, though it was not initiated, by the Local Government Ordinance, 1951. The government of the people by the stool is now placed in the hands of Local Councils, two-thirds of whose members are democratically elected; the right to try the disputes of its subjects is given to native (or local) courts increasingly staffed by non-traditional members; the right to receive the revenues from its land has been lost by the stool; even its control of stool-lands, and its right to dispose of them, have been taken out of its hands or subjected to the concurrence of new bodies. These changes are irreversible, and were perhaps unavoidable; but they may leave the chiefs (or their stools) an empty symbol without a content.

The new ordinance did not initiate these changes; but it marks a turning-point. The old Native Authority Ordinances, although constituting new statutory bodies, in effect gave extra functions to the existing traditional rules, or regulated old ones. There were no signs of the mental or legal tensions

which one might expect to be induced by the chiefs, their elders and councillors, enjoying twin personalities, customary and statutory. This was perhaps due to the fact that the legal dyarchy was ignored, and the two bodies worked harmoniously together without any great concern over which personality was acting at any given time. Today the gulf is too wide to be camouflaged in this fashion.

The diminishing sphere of responsibility of the stools has other repercussions. The relationship between the stool and the chief who holds it has altered: with chiefs being remunerated by allowances or salaries instead of in the ancient manner (wherein the stool and the chief were one), the claim that chiefs should be allowed to enjoy separate property, instead of all their possessions and subsequent acquisitions being merged in the general stool property, has become insistent, and is now recognized by the customary law.

But the point of greatest concern is the relationship between the stool (or the chief) and its subjects, especially in the context of rights over land. There is a discernible tendency for the previous customary nexus to be replaced by relationships adapted from English law - the use of leases or written forms of agreement in Kumasi and other large towns, even between citizens and their stools, is an example. The influx of strangers, now possible through the cessation of tribal warfare, and spurred on by the search for new land

suitable for cocoa-cultivation, tends to place relationships on a territorial or residential, rather than a personal, basis. In fact, the concept of citizenship, resting on allegiance, is changing; and with this change come new problems, such as the question of security of tenure. Strangers today have increased security; it is now the exception for their holding to be terminated at their death. This alone represents a considerable change of custom.

New tensions have been set up between the ideas of jurisdiction and ownership, which have been considered in Chapter II. The assumption that outright transfer of an absolute title by sale served to pass all rights, including those of jurisdiction, to the purchaser or his stool has been challenged in at least two ways: by maintaining that jurisdiction does not pass under a sale of land, but only agricultural rights; by outlawing outright sales of land. The problems raised by jurisdiction are new ones, which may be alleviated, or - if the worst comes to the worst - aggravated, by the proposed delimitation of stool boundaries.

The powers of the individual over land which he holds have increased in many ways: whereas formerly the cultivator could probably claim no personal right in the land which he occupied, he has now a defined interest, capable of being pledged, leased, or sold, or of being the subject of gift or will. The exact limits which are to be placed on such dealings by the

stool holding superior rights in the same land cannot as yet be said to have been fully worked out. The institutions themselves are changing: the ancient pledge given for no fixed period, incapable of foreclosure, in which the pledgee came into possession and took the fruits as his interest, has yielded to new forms, wherein a definite term is set, at the expiry of which the creditor may be able to foreclose or make the land the subject of judicial sale. In this connexion the self-liquidating pledge is of special interest, as alleviating some of the grosser injustices due to the high reward the pledgee may take (from the sale of cocoa) in comparison with the principal secured.

The trend is everywhere to commercialization: this is most clearly evident in the dwindling use made of "gifts" of land, that is, grants of a holding free or for a nominal sum. Commercial tenancies are substituted, in consonance with the high annual value and comparative permanence of the crops now planted, especially cocoa. The accumulation of wealth is assisted by the employment of "caretakers", who can develop or look after farms for distant owners.

If, then, the individual has developed rights partially at the expense of the stool he serves, no less important is his changing relationship with the family of which he is a member. Until fairly recently it could have been maintained that an individual could hold no property in his own right, save for

some paltry personal belongings. We witness today a stage in the struggle towards emancipation from this older idea of the family. The powers of a family over the property of its members grow steadily weaker; already one can maintain that it has no right to interfere with the use by its members of their own self-acquired property, even though the former custom was undoubted, that any disposition by a person of his property required the consent of the family (evidenced by their presence as consenting witnesses), if he wishes to divest himself of all rights in that subject-matter. Where the transaction is a sale, the new attitude is not yet firmly established; whilst in the case of gifts the old rule (that the family should consent) is still supported by the majority of informants; in both cases the trend away from family control is unmistakable.

The weakening ties of family are equally shown in the case of liability for debt: it is today recognized that family property is not liable for the debt of a member, nor a member's property for the debt of his family. Results similar to the old rules (under which a family was liable for a member's debts and torts) are in some cases achieved by the courts' using the weapons of estoppel and laches. It is, however, the attacks on the customary law of succession which are most significant. These attacks take two main forms: strengthening of the samansew or oral will, and compulsory provision of an aliquot portion of an intestate's estate for his widow and children.

The essence of the Akan family is its matrilineal character, maintained and emphasized by the mode of intestate succession. This character runs counter to many modern features of life in the Gold Coast - these include the spread of Christianity with its stress (perhaps misplaced) on the small patrilineal family, and the increased reward now open to individual effort, whether through speculation, agriculture, or work at a wage or salary. Social habits of residence are changing in conformity, and it is perhaps natural that a progressive African today should wish to pass on his wealth to the children whom he has educated and nurtured, and to his wife, chosen by himself and perhaps of equal education with him, rather than to benefit a distant family. A will is the answer for such an individual; but not a will which depends for its validity on the consent of the matrilineal family who would otherwise benefit. This explains the modern tendency to decry the need for any other than independent witnesses to an oral will; but this tendency is not yet the law. The other way of attack, through compulsory provision for widow and children, rests partially and by analogy on the provisions of the Marriage Ordinance and the "mission-rules" of the Christian churches. The former are law for the minority married under that ordinance; the latter are not (though at times applied through misguided decisions of native courts, or by the co-operation of the deceased's family). The States are interesting themselves in making similar provision;

their resolutions are, however, not yet in binding form.

Besides such attacks as these, which prevent a family's succeeding to the whole property of a deceased member, the rights of families are subject to encroachment at a later stage, when a successor has been customarily appointed, and holds property thereunder. Such "inherited property", as it has been called here, is not owned by the holder for the time being; the ultimate title to it is with the family. The title of the family in such property is menaced by voluntary dealings with it without consultation with the family, and by the action of law, as where it is seized in execution for the private debt of its holder. Control over inherited property still remains strong, but one can foresee that the family's rights will in time probably dwindle.

One cannot emphasize too strongly that tinkering with the customary law of succession, and with the rights of a family over the persons and property of its members, strikes a root-blow at the whole family-system, and thereby at the typical Akan form of land-tenure. It would be improper here to judge this system; but it is important for those who make what appear trifling changes to realize what they are doing. The Akan system has many merits which it would be foolish to jeopardize unless something better could be put in its place.

3. KNOWLEDGE AND CONTROL OF CUSTOMARY LAW.

We are thus naturally led to a consideration of our knowledge of customary law, and the control which should be exercised over its administration and development. Sufficient has already been said passim to show that Akan law is complex, and that its comprehension is made more difficult by its fluid nature at the present time. In fact, the hierarchy of concurrent interests which exists in Akan land-tenure has no real parallels elsewhere; it is most likely to be misunderstood by those who come from an entirely different legal system, with its feudal hangovers, in which estates are measured by their duration rather than by their extent. Some of the problems which now exist - such as those of indebtedness, rights of jurisdiction, etc. - are due to previous lack of knowledge and control of the customary law, to a fear or inability to step in, to absence of a high policy for the future development of customary law. There are few now who would deny that every effort should be made to investigate, record, and evaluate the rules of customary law; though fear is sometimes expressed that the recording of customary law in accessible form will have unfortunate consequences (e.g., by stereotyping or perverting the law which native courts would apply). Some persons see salvation in codification, others in registration of title. Admirable though these may be, they all depend on previous acquaintance with the customary law as it is; a somewhat

contemptuous attitude to custom (such as treating it as "foreign law" in the courts of its native country) must be abandoned.[7]

With fuller knowledge must come control. This implies not merely a day-to-day scrutiny of the workings of the law, but decision on long-term objectives. Is it the aim that the future law of the Gold Coast should be basically English, basically African, or a mixture of the two?

4. GOLD COAST LAW.

The truth of the matter is that even today the two systems, English and African, are irretrievably mixed. This is sufficiently exemplified by the prevalent use of writing to record customary transactions, or to effect transfers of interests, and by the constant moulding to which custom is subjected through the decisions of superior courts, applying English concepts to test customary rules or remedy deficiencies. The fact that the Gold Coast has a single legal system is obscured by the legislation governing the courts, and by the dicta of judges on the status and proof of custom. These matters have already been considered;[8] one sees some of the difficulties involved when the Supreme Court has to consider a customary transaction in which writing has been used, or to

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7. See below, pp. 797-8.
8. Cf. WRITING, at pp. 667 et seq.; and LONG POSSESSION, at pp. 704 et seq.

decide a case of long possession when bound by the rule that prescription and limitation do not operate in customary law. In particular, there is a tendency to find on very weak evidence that "natives" have impliedly agreed to be bound by English law, thus taking the dispute into the far happier ground of English law, and avoiding the problems of the proof of custom and its application to the circumstances.

Part of the trouble is due to the dual system of courts, neither exclusively bound to a single system of law, but nevertheless each having a proper law which is prima facie applicable. There were probably good arguments in favour of having courts whose personal jurisdiction was restricted to Africans, and which could administer only native law in the heyday of Indirect Rule, and before the local inhabitants had emerged into a modern society. Today, when Africans have a law which is neither pure African nor pure English, and may choose to regulate their affairs with any mixture of the two, there are very strong arguments for omnicompetent courts, empowered to deal with parties of all races, to administer any law applicable to the matter in controversy, no matter whether this shows affinities with the English or African system; and it is gratifying to know that the new Local Courts, when they are introduced, will partake of this character. It is to be hoped that at the same time the superior courts will adopt an attitude to customary law which accords more with realities:

that is, that the suggestion that Akan law is a foreign law in the Supreme Court will be abandoned, even if this is no more than a convenient way of saying that the proof of customary law is of its nature more stringent than that of English law. Neither the House of Lords in its appellate capacity, when faced with English or Scottish appeals, or the Judicial Committee, ranging the legal systems of the world, has maintained that any law which it is empowered to administer is foreign to it.[9]

5. THE FUTURE OF AKAN LAND-TENURE.

With the extension of education and the growth of commerce, it is to be expected that not only will writing be used for legal dealings (as it is in any civilized country), thus extending the present trend, but that at the same time many of the forms of English law will be borrowed for general use. This will emphasize the unitary nature of Gold Coast law; it

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9. A searching criticism of the suggestion that a law can be foreign in its own country, and an indication of the lines on which the administration of customary law might usefully develop, is given in the authoritative judgement of the Privy Council (per Sir George Rankin) in the Indian case of The Mosque known as Masjid Shahid Ganj & ors v. Shiromani Gurdwara Parbandhak Committee, Amritzar, & anor: L.R. (1940) 67 I.A. 251. It was said at p. 259:
" A third feature of the suit has reference to the method of trial, the learned District Judge having been persuaded that the mode by which a British Indian Court ascertains the Mahomedan law is by taking evidence. The opinion of Sulaiman J. /in an Indian case/ to the contrary ... was cited

/over

9. (cont. from previous page) -

to him, but he wrongly considered that s. 49 of the Evidence Act was applicable to the ascertainment of the law. He seems also to have relied on the old practice of obtaining the opinions of pandits on questions of Hindu law... No great harm, as it happened, was done by the admission of this class of evidence, as the witnesses made reference to authoritative texts in a short and sensible manner. But it would not be tolerable that a Hindu or a Muslim in a British Indian Court should be put to the expense of proving by expert witnesses the legal principles applicable to his case, and it would introduce great confusion into the practice of the Courts if decisions upon Hindu or Muslim law were to depend on the evidence given in a particular case, the credibility of the expert witnesses, and so forth. The Muslim Law is not the common law of India: British India has no common law in the sense of law applicable prima facie to everyone, unless it be the statutory Codes, e.g., Contract Act, Transfer of Property Act. But the Muslim law is under legislative enactments applied by British Indian Courts to certain classes of matters and to certain classes of people as part of the law of the land which the Courts administer as being within their own knowledge and competence. The system of "expert advisers" (muftis, maulavis or, in the case of Hindu law, pandits) had its day, but has long been abandoned, though the opinions given by such advisers may still be cited from the reports. Custom, in variance of the general law, is matter of evidence, but not the law itself. Their Lordships desire to adopt the observations of Sulaiman J. in the case referred to:-

> 'It is the duty of the Courts themselves to interpret the law of the land and to apply it and not to depend on the opinion of witnesses however learned they may be. It would be dangerous to delegate their duty to witnesses produced by either party. Foreign law, on the other hand, is a question of fact with which courts in British India are not supposed to be conversant. Opinions of experts on foreign law are, therefore, allowed to be admitted.'"

(It should be noted that there is only one system of courts in India; but the argument remains valid for the Gold Coast.)

will also prepare the ground for a form of codification. Perhaps the most successful example of the type of codification which I favour is the English Sale of Goods Act, 1893: this, it must be remembered, was possible only as the result of the patient working-out over a long period by the courts of rules for the regulation of commercial dealings. Codification, to be of any use, must be comprehensive; it must cover not merely customary rules governing land-tenure, but the English or Gold Coast law (e.g., in regard to execution) as well.

As well as codification, there is much to be said for registration of title to land. Many look on this as a panacea for all ills; but indeed it can assist only a healthy patient. Rights must be ascertained before they are recorded; a beginning has been made in Chapter XIII of this work, but this is no more than tentative.

Some of the more flagrant omissions and confusions in Akan land-tenure must be supplied or rectified by legislation: it is for consideration whether rules of prescription and limitation might not now be introduced into the customary law; provision might be made for the recording of native wills in writing, and their registration with a local court; the terms of pledges and mortgages, and their enforcement by fi.fa. and otherwise, might come under scrutiny; the conditions of tenancies granted to strangers might be regulated; and so on.

In short, immediate (though belated) control should be exercised over the details of Akan law, with this end in view - to produce, by a marriage of customary rules, refined and extended where necessary, and English legal method, a law at once in harmony with the traditions and institutions of the people, and adapted to the demands of a modern, democratic society.

APPENDIX.

SOME RECENT LEGISLATION.[1]

1. The State Councils (Ashanti) Ordinance, No. 4 of 1952:

This Ordinance applies only to Ashanti. The protection of stool property was formerly brought about by the Stool Property Protection Ordinance, No. 22 of 1940.[2] This Ordinance is intended to replace that of 1940; and in addition, whilst the Second Schedule of the Local Government Ordinance, 1951, repealed the Native Authority (Ashanti) Ordinance, cap. 79, the Third Schedule to the same ordinance saved certain sections subject to amendment (consisting principally of the deletion of the words "Native Authorities" where these occurred). The new Ordinance repeals those sections of cap. 79 preserved by the Local Government Ordinance.

The ordinance makes fresh provision for the protection of Stool property. The definition of "Stool Property" is given by s. 2, which says:

> " 'Stool Property' includes the Stool itself and all the insignia, and such other properties including land as were handed over or declared as Stool Property to a Chief on his installation, and property (other than private property)

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1. The legislation which follows is either of such recent date, or so recently available in this country, that it has been impossible to notice it in the text. It is appended here to enable the reader to keep abreast of the current legal position in the Gold Coast.
2. For which see above at pp. 57, 299-300, 446 et seq.

> acquired, or made and enjoyed, by such Chief or his Stool during his occupancy of the Stool."

Failure to declare property as stool property at the time of a chief's enstoolment would thus lead, it seems, to property not so declared falling outside the provisions of this Ordinance.

Part V. Protection of Stool Property of the ordinance covers (by s. 23) the recovery of stool property; whilst s. 24 (1) provides:

> "Alienation of Stool Property. It shall not be lawful, without the consent of the State Council concerned, to alienate or pledge any Stool Property, and any instrument, and any transaction or agreement (whether in writing or not), which purports to effect any such alienation or pledge shall, in the absence of such consent, for all purposes be null and void."

S. 24 (3) provides that the ordinance is to be read in addition to the provisions of the Local Government Ordinance, in so far as it relates to land.[3]

This Ordinance did not repeal the Stool Property Protection Ordinance; this omission was rectified by the State Councils (Ashanti) (Amendment) Ordinance, 1952 (No. 41 of 1952).

2. The State Councils (Colony and Southern Togoland) Ordinance, No. 8 of 1952:

This Ordinance is in similar terms to the foregoing. S. 15 provides for the recovery, and s. 16 for the alienation, of stool property in the same words as the Ashanti ordinance.

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3. I.e., such consent is in addition to the concurrence which must be obtained from the Local Council under s. 75 of the L.G.O. (See pp. 62 et seq. ante.)

S. 40 (1) repeals the outstanding sections of the Native Authority (Colony) Ordinance, 1944,[2] as preserved by the Local Government Ordinance.

3. The Chattels Transfer Ordinance, No. 51 of 1952:

This Ordinance appears to be designed to remedy some of the worst consequences of the present confusion relating to the enforcement of security over property, and the use of ill-drawn documents of uncertain effect.[4]

It is limited in its effect to "chattels", which are defined in s. 2 as follows:

> "'Chattels' means any movable property that can be completely transferred by delivery, and includes machinery, stock and the natural increase of stock, crops, growing trees and timber..."

Land is outside the scope of the Ordinance; presumably crops whether severed or attached to the realty are included, as s.27 permits the giving of security over crops. S. 28 provides that the rights of the landlord of the land (or its mortgagee) are not affected by securities over the crops, unless he consents in writing.

The Ordinance provides for the registration of "instruments" affecting chattels. There is no provision that dealings with chattels must be in writing, and thus amenable to registration. One must therefore conclude that evasion of the Ordinance through the use of oral agreements is possible; and

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4. Cf. Chapters VI (PLEDGE AND MORTGAGE) and XI (WRITING) ante.

that the intention of the legislator was only to ensure that if writing is used, it shall be in a certain form and of no effect unless registered.

"Instrument" is defined by s. 2 to mean:

> "...any instrument given to secure the payment of money or the performance of some obligation and includes any bill of sale, mortgage, lien or any other document that transfers or purports to transfer the property in or right to possession of chattels, whether permanently or temporarily, whether absolutely or conditionally, and whether by way of sale, security, pledge, gift, settlement, or lease, and also the following:-
>
> (a) inventories of chattels with receipt thereto attached;
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> (b) receipts for purchase-money of chattels;
>
> (c) other assurances of chattels;
>
> .....
>
> (f) any agreement, whether intended to be followed by the execution of any other instrument or not, by which a right in equity to any chattels, or to any charge or security thereon or thereover, is conferred..."

But "instrument" does not include:

> "securities over, or leases of, fixtures .... when mortgaged, charged or leased in any mortgage, charge or lease of any freehold or leasehold interest in any land or building to which they are affixed..." or
>
> "any instrument which is a concession under the Concessions Ordinance, 1939, and relates solely to chattels..."

The choice of the word "instrument", and the phrase "document that transfers...", in the definition would seem to exclude writings which are merely memoranda,[5] and receipts,

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5. Cf. Chapter XI, at pp. 646 et seq.

except in the specific cases of inventories with receipt attached, and receipts on the sale of chattels. The phraseology throughout the Ordinance is "English" - it is doubtful whether there is such a thing as "freehold" in the Gold Coast, or whether the concept "chattel" is applicable in Akan Law.

Once a document is an "instrument" in the terms of the Ordinance, it must be drawn up in accordance with the forms appended to the Ordinance (with a full series of implied covenants), and - to be of effect - it must be registered. The effect of non-registration is given by ss. 13 and 14 of the Ordinance. A new s. 13 was substituted by the Chattels Transfer (Amendment) Ordinance, No. 13 of 1953, which now provides:

> "Every instrument, unless registered in the manner hereinbefore provided, shall, upon the expiration of the time for registration, or if the time for registration is extended by the Supreme Court, then upon the expiration of such extended time, be deemed fraudulent and void as against -
>
> (a) the assignee or trustee acting under any assignment for the benefit of the creditors of the person whose chattels or any of them are comprised in any such instrument;
>
> (b) any person seizing the chattels or any part thereof comprised in any such instrument, in execution of the process of any court authorizing the seizure of the chattels of any person by whom or concerning whose chattels such instrument was made, and against every person on whose behalf such process was issued, so far as regards the property in or right to the possession of any chattels comprised in or affected by the instrument..."

And s. 14 provides:

> "No unregistered instrument comprising any chattels whatsoever shall, without express notice, be valid and effectual as against any bona fide purchaser or mortgagee for valuable consideration, or as against any person bona fide selling or dealing with such chattels as auctioneer or dealer or agent in the ordinary course of business."

The effect of registering an instrument is given by s. 4:

> "All persons shall be deemed to have notice of an instrument and of the contents thereof so soon as such instrument has been registered as provided by the Ordinance."

The wide-reaching terms of the Ordinance will undoubtedly have an effect, not only on such questions as the form in which pledges are recorded[6] and security enforced,[7] but on the right of the family to interplead when a member allows family property to be seized in execution after pledging it without authority,[8] and on the doctrine of the bona fide purchaser for value without notice.[9] It also makes compulsory the registration of deeds or instruments in certain connexions.[10] Nevertheless, it leaves untouched most dealings with land, so that confusion and injustice will continue in regard to pledges of land, and the seizure of land in execution.

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6. Cf. ante at pp. 425 et seq.
7. Cf. ante at pp. 443 et seq.
8. Cf. ante at pp. 415 et seq.
9. Cf. ante at pp. 716 et seq.
10. Cf. ante at pp. 741 et seq.where the existing optional procedure for registering deeds is described.