LAND LAW AND POLICY IN ZAMBIA

by

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ABSTRACT

This thesis discusses the evolution of the land tenure system of Zambia over the years 1924 to 1975. This is done by tracing the development of government land policies from the establishment of the Colonial Office rule (superseding the British South Africa Company administration). The presence of Europeans in a country predominantly inhabited by Africans required a land tenure system that could accommodate the interests of both races. The British South Africa Company which retained some land and extensive mineral rights continued to constitute an important economic group. Thus the Company became also interested in moulding a land tenure system compatible with economic expansion. The Imperial Government, on the other hand, exercised the right of control over all categories of interests in land.

On the Territory's attainment of Independence in 1964 these factors influencing policy developments in the land laws faded away. The Imperial Government and the Company disappeared and the remaining European settlers lost the power base. African interests now became pre-eminent. However, the Government of the Republic now controls the use of land.

The thesis is arranged in five parts. Part I is introductory and consists of Chapters 1 and 2. Chapter 1 discusses inter alia the indigenous title to land. Chapters 3-5 trace developments of indigenous title to land. Chapters 3-5 trace developments in Part II

during the colonial period: 1924 to 1964. Chapter 6 reviews the post independence era: 1964-1975.

Chapter 7 in Part III appraises the vacuum created in the law applicable to dealings in land after Independence.

Part IV consisting of Chapters 8 and 9 evaluates Government control in land use and the facilities available in assuring a landholder's rights.

Part V concludes with chapter 10 suggesting the need for overall land reforms.

Research undertaken includes both oral and documentary sources.

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LIST OF ABBREVIATIONS

A.C.	Appeal Cases (House of Lords and Privy Council).
A.R.C.	African Representative Council.
All. N.L.R.	All Nigeria Law Reports.
BSA. Co.	British South Africa Company
C.A.	Court of Appeal.
Ch.	Chancery Division.
CO	Colonial Office.
Cols.	Columns
E.A.	East /or Eastern/ Africa Law Reports
E.A.C.A.	Court of Appeal for Eastern Africa.
E.A.L.R.	(1) East Africa Protectorate Law Reports. (2) East Africa Law Review.
F.L.R.	Federal Law Reports (Australia).
FO	Foreign Office.
F.S.C.	(1) Federal Supreme Court. (2) Selected Judgements of the Federal Supreme Court of Nigeria.
G.L.R.	Ghana Law Reports.
H.C.	High Court.
H.C.D.	High Court Digest.
H.M.G.	His/Her Majesty Government.
I.A.I.	International African Institute.
J.A.A.	Journal of African Administration.
J.A.L.	Journal of African Law.

J.P.L.	Journal of Planning Law.
K.B.	King's Bench Division.
K.H.D.	Kenya High Court Digest.
L.L.R.	Lagos Law Reports.
L.T.	Law Times Reports.
Leg. Co.	Legislative Council.
M.L.R.	Modern Law Review.
N.A.C. N & T	Native Appeal Cases Natal & Transvaal.
N.L.R.	Nigeria Law Reports.
N.M.L.R.	Nigerian Monthly Law Reports.
N.R.C.D.	National Redemption Council Decree
N.R.L.R.	Law Reports of Northern Rhodesia.
Ny. P.L.R.	Nyasaland Protectorate Law Reports.
O.A.G.	Officer Administering Government.
O-in-C.	Order-in-Council.
P.C.	Privy Council.
Q.B.	Queen's Bench Division.
R & N.L.R.	Rhodesia and Nyasaland Law Reports.
S.C.	Supreme Court.
S.I.	Statutory Instrument.
S.J.Z.	Selected Judgements of Zambia.
T.C.P.T.	Town and Country Planning Tribunal.
T.L.R.	Times Law Reports.
T.S.	Transvaal Supreme Court.
U.G.L.J.	University of Ghana Law Journal.
U.N.I.P.	United National Independence Party.

W.A.C.A.	(1) West African Court of Appeal (2) Selected Judgements of the W.A.C.A.
Z.I.S.	Zambia Information Services.
Z.L.J.	Zambia Law Journal.
Z.R.	Zambia Law Reports.

(The following are abbreviations of unreported judgements of the High Court for Zambia cited in this work).

H.K.	High Court, Kitwe with Year and Suit No.
H.N.	High Court, Ndola with Year and Suit No.
H.P.	High Court, Lusaka with Year and Suit No.

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1947 Native Trust Land Order in Council.

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PART I

INTRODUCTION AND BACKGROUND

In this part, we look at background data; trace the origins of title to land in historical perspective; and pursue current developments relating to indigenous title to land. The historical review involves a discussion of Crown ownership in protectorate lands and the rights ceded by treaties entered into between the British South Africa Company and the African chiefs. Then the nature of title to land is analysed in relation to a landholder's rights. The latter discussion is amplified by focusing on the current customary law relating to land.

CHAPTER 1

HISTORICAL BACKGROUND

A.

(i) Introduction

Zambia, an independent Republic in Central Africa is bounded to the north by Zaire, to the south by Botswana and Rhodesia, to the west by Angola, to the east by Tanzania and Malawi and to the south-east by Mozambique. The latest population estimate has been put at 4,695,000 [1] over an area 75,260,000 hectares. [2] Of this 47,453 square kilometres is State land. 23,794 kilometres of State land is alienated and 22,494 square kilometres is unalienated and 1,165 square kilometres consists of townships. 705,161 square kilometres are Reserves and Trust land with 270,681 square kilometres accounting for the former and 434,480 square kilometres for the latter. [3]

Because of the climate and soil conditions large tracts of land are uninhabitable and unsuitable for cultivation although the ratio of arable land to population -- 21.8 acres per capita is reportedly one of the highest in tropical Africa. With a tropical

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[1] See Sample Census of Population 1974, Central Statistical Office, February 1975, Lusaka, p. 4.

[2] See Census of Population 1969, Central Statistical Office, 1971, Lusaka, p. 9.

[3] Office of the Surveyor General, September 1975, Lusaka.

For the three classes of land, see map at p.648, infra.

climate, a hot wet season alternates with a cool and dry one. In most of the country heat and humidity is lessened by the altitude of about 4,000 feet above sea level. In areas of lower altitude (below 3,000 feet), such as Luangwa and Zambezi valleys, the climate is hot and humid during the rainy season and because the areas are disease ridden they are virtually uninhabited. The tse-tse fly infestation in the west and north-west and the Luangwa Valley of the south-east, and light soils in many areas, which water-log during the rainy season, have affected patterns of settlement. Areas along the line of rail (Southern and Copperbelt Provinces) and parts of the Eastern Province accessible to roads have the best soils and climate thus attracting a high concentration of human settlement. [1]

There are seventy two ethnic groups in Zambia [2] within the nine administrative provinces [3] of the country. Despite this number of ethnic groups, there are only as few as four to five main language dialects within the country. The seventy two ethnic groups are predominantly matrilineal. [4]

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[1] For Physical Environment and Agriculture in Zambia, see Kaplan & others, Area Handbook for Zambia, U.S. Govt. Printing Office, Washington, D.C., October 1969, Chapters 2 and 18. Cf., C.S. Lombard & A.H.C. Tweedie, Agriculture in Zambia Since Independence, NECZAM 1974, pp. 63 and 76; and G. Kay, Maps of the Distribution and Density of African Population in Zambia, University of Zambia Institute for Social Research Communication Number Two, 1967, pp. 18-22.

[2] For these ethnic communities, see W.V. Brelsford, The Tribes of Northern Rhodesia, Govt. Printer, Lusaka, 1956.

[3] The City of Lusaka, the Capital of Zambia, has just recently been constituted the ninth Province. See Zambia Newsletter, Information Section, High Commission of Zambia to U.K., 20th February, 1976.

[4] See C.M.N. White, "Matrimonial Cases in Local Courts in Zambia", [1971] J.A.L. Vol. 15, No. 3, p. 256.

(ii) Constitutional developments: the making of Zambia

Zambia has passed through a number of stages of political evolution from the end of the 19th century until independence in 1964. The country first fell within the sphere of the British influence from 1891 onwards before becoming the British Protectorate of Northern Rhodesia. While still a Protectorate, the country became a constituent member of the Federation of Rhodesia and Nyasaland. Soon after the dissolution of the Federation, the territory was granted independence as a Republic within the Commonwealth.

Nyasaland (now Malawi) preceded Northern Rhodesia as a protectorate. Both Nyasaland and Southern Rhodesia provided a spring-board from which Northern Rhodesia was penetrated. The British South Africa Company, a pioneer in British expansion in Central Africa, had sought an extension of its charter to regions north of the Zambezi. The charter, initially granted in respect of Southern Rhodesia, was extended to cover the northern areas in 1891. [1] The Company's administration north of the Zambezi was divided between the two areas: 'North Eastern Rhodesia' and 'North Western Rhodesia', territories in which protectorate status was established in 1895 and 1897 respectively. [2] These territories were administered by the Company with supervisory powers over the former vested in the Commissioner for the British Central Africa Protectorate and the latter in the High Commissioner

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[1] For the extension of the charter to the north of Zambezi, see Hertslet, Sir E., Map of Africa by Treaty, Vol. 1, 3rd ed., London, 1967, pp. 277-279.

[2] See A.J. Hanna, The Beginnings of Nyasaland and North Eastern Rhodesia 1859-95, Oxford Clarendon Press, 1956, pp. 263-264; and G. Clay, Your Friend, Lewanika, London, 1968, pp. 106 et seq. Cf., C. Goudsbury & H. Sheane, The Great Plateau of Northern Rhodesia, London, 1911, pp. 39-40.

in South Africa. This arrangement was terminated in 1911 when the two parts were amalgamated into one territory thereafter known as Northern Rhodesia. The British High Commissioner in South Africa now became solely responsible for the Company's administration of the territory. The Company, however, ceased its administrative functions over the territory on behalf of the British Crown in 1924 when Northern Rhodesia came under direct British rule. [1] In 1953 the three Central African territories merged into the Federation of Rhodesia and Nyasaland with the two northern neighbours retaining their protectorate status. The Federation was short-lived and its dissolution at the end of 1963 heralded the achievement of independence of Northern Rhodesia as the Republic of Zambia in 1964.

The extension of the British South African Company's charter to the north and the establishment of the British Protectorate had a considerable influence on the historical development of land law. The concessions obtained by the Company from the various indigenous chiefs of the region involved the surrender of rights to land, minerals and territorial sovereignty. The extent to which these concessions could be regarded as a root of title to land will be discussed after an examination of the effect of Protectorate status upon land titles.

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[1] Cf., African No. 1146 (Conf.) p. 5.

B. Protectorate Status

Whatever defects might be alleged in regard to the earlier concessions, which will be discussed later[1], the protectorate status of the territory was put beyond doubt by the promulgation of the 1899 North Western Rhodesia Order-in-Council and the 1900 North Eastern Rhodesia Order-in-Council. Protectorate status had an important bearing on the whole question of land ownership. But before we can explore the competing legal theories on the matter, let us first look at the nature of Protectorate status.

A British protectorate has been described as "a country which is not within the British dominions, but as regards its foreign relations is under the exclusive control of the king". In theory every such territory "is, as respects internal sovereignty, left more or less under an independent government".[2] In practice, however, the reality was often very different: under the broad terms of the Foreign Jurisdiction Acts 1843-1890, a wide measure of internal administrative control could be assumed by or on behalf of the British Crown, and this is what occurred in Northern Rhodesia.[3] Thus Lord Lugard observed of tropical Africa: ". . . territorial acquisition,

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[1] See Section D below.

[2] See Jenkyns, Sir H., British Rule and Jurisdiction Beyond the Seas, Oxford Clarendon Press, 1902, pp. 165-166.

[3] Although certain aspects of the more limited type of protectorate survived within Northern Rhodesia in the "Protectorate of Barotseland" which kept its "native government" throughout the colonial period (see G.L. Caplan, The Elites of Barotseland 1878-1969 (C. Hurst, 1970)).

whether under the name of Protectorate or otherwise, meant nothing less than sovereignty and the control of the natives". [1]

By the end of the 19th century, the British view regarding the legal import of a protectorate had certainly become assimilated to that of Germany and France. The view held by these countries was that "the existence of a protectorate in an uncivilised country imports the right to assume whatever jurisdiction over all persons may be needed for its effectual exercise". Commenting on the Colonial Office despatch sent to Governor Sir B. Griffith over the matter of exercising legal jurisdiction in the protected countries adjacent to the Gold Coast Colony, the Law Officers approved this new protectorate doctrine. In this regard the Law Officers wrote: ". . . we have thought it right, while agreeing in the terms of the enclosed Despatch, to draw attention to the fact that it constitutes an acceptance of a legal doctrine not hitherto unequivocally accepted by Great Britain". [2]

Northern Rhodesia fell within this expanded version of the protectorate doctrine. Indeed it was held in the Northern Rhodesian

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[1] Lord Lugard, The Dual Mandate in British Tropical Africa, London, 1965, p. 13.

[2] See Law Officers' Opinions, Feb. 14, 1895, Vol. V. 1892-1899, Miscellaneous No. 86. For a thorough discussion of the legal doctrine of a protectorate and its application to British African Protectorates, see H.F. Morris and J.S. Read, Indirect Rule and the Search for Justice, Oxford Clarendon Press, 1972, Chapter 2.

case of Ex parte Mwenya [1] that the internal governance of Northern Rhodesia was in legal effect, indistinguishable from that of a British colony. The 1899 and 1900 Orders-in-Council show that the Company assumed extensive internal jurisdiction, although in the North Western part of the territory a semi-autonomous status in internal administration was reserved to Lewanika. [2] By the time of direct British rule in 1924, there were virtually no limits on the jurisdiction of the Crown.

This brings us to consider what effect this assumption of internal jurisdiction in the Protectorate had on the Crown ownership of lands.

C. Crown ownership of the lands in a Protectorate

Barotseland was given a special status in matters of land so before examining the general position we will take a further look at this part of North-Western Rhodesia. Barotseland was expressly reserved for the Lozi King and his people. Thus in land matters the reserved area remained the concern of Lozi customary law. Barotseland continued to enjoy this status through successive constitutional developments till after the independence of the territory. The Lewanika Concessions and the position of Barotseland were recognised

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[1] [1960] 1 Q.B. 241 at p. 303.

[2] Cf., S.V. Mubako, The Presidential System in the Zambian Constitution, M. Phil. Thesis, University of London, 1970, pp. 25-33, 88-90.

in all the Orders-in-Council affecting the constitutional development of the territory. [1] For example, when Northern Rhodesia became a constituent member of the Central African Federation, these rights were again affirmed.

The Federal constitution provided: ". . . and all rights reserved to or for the benefit of natives by the said concessions as approved by the Secretary of State shall continue to have full force and effect". [2]

The following consideration of protectorate status vis-a-vis land ownership therefore does not apply to Barotseland in North-Western Rhodesia.

The establishment of a protectorate carried with it the assumption that this, in itself, was sufficient to enable the Crown to assert ownership over the land of the protectorate. [3] The 1923

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[1] See North-Western Rhodesia Order-in-Council 1899; Northern Rhodesia Orders-in-Council (1911 and 1924); Federation of Rhodesia and Nyasaland (Constitution) Order-in-Council 1953; and Northern Rhodesia (Constitution) Order-in-Council 1963. Cf., Lord Hailey, An African Survey, Oxford University Press, (Revised 1956) p. 488 and pp. 490-491.

[2] See s. 33(2), S.I. No. 1199 of 1953. Cf., s. 112 of the Northern Rhodesia (Constitution) Order-in-Council 1963, S.I. No. 2088.

[3] See the Law Officers' Opinion of 1899 cited at pp. 49-50, infra. Thus said Lennox-Boyd, Secretary of State for the Colonies, in the Northern Rhodesia African Representative Council: ". . . as you know, before there were Native Reserves at all or Native Trust Land, all the land of this country was Crown Land . . .". A.R.C. Special Session with the Secretary of State, 21st January, 1957, col. 28.

Devonshire Agreement as will be seen, inter alia, transferred the Company's powers of management and control of the land in the whole territory except Barotseland to the Crown. (In the absence of concessionary grants of such powers in North Eastern Rhodesia, the Company had presumably claimed them as administering authority on behalf of the Crown, to which the powers then reverted).

Although there has been no authoritative judicial pronouncement on the matter in Northern Rhodesia, Crown rights to land became an issue in other African protectorates. Consideration of the issue in this comparative context must help to throw light on the subject as it affected the territory under discussion where these contemporary cases from other African jurisdictions were studied with interest and concern.

As examples of the conceptual tangles which could enmesh colonial judges on this point, some decisions from the neighbouring British Central Africa Protectorate (later Nyasaland) (from which North Eastern Rhodesia was for some time administered) are of interest. Nunan, J., in the celebrated case of Cox v. The African Lakes Corporation Ltd., [1] better known as the Kombe case considered the whole question of proprietary rights and Crown jurisdiction in a protectorate. This was a petition to restrain the defendants from preventing the collection of Kombe seed (strophanthus) by the petitioner in Chief William's country, and for judgment as to the validity of an Agreement dated 2nd August 1900, whereby the said Chief William

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[1] Before Mr. Chief Judicial Officer Nunan, 16th and 23rd July 1901 (unreported). See Enclosure in Commissioner Sharpe to Secretary of State for the Colonies, Despatch No. 114 of 5/4/1905. CO/525/1905/7.

purported to grant a monopoly of the strophanthus in his District to the defendants. Prior to the declaration of the British Central Africa Protectorate (later called Nyasaland), a number of treaties entered into between the Crown and the chiefs in this district ceded to the Queen, "All our sovereign rights including all mineral and mining rights absolutely and without reserve . . .". A further number of treaties entered into after declaration of the Protectorate in 1891 made over absolutely and in perpetuity to the Queen, "the whole of our territory surrendering thereby all our proprietary rights to the same . . .". Some of the treaties were, however, quite vague as to what rights were ceded. The defendants in the instant case obtained the grant in question after declaration of the Protectorate.

Nunan, J., interpreting the effect of a protectorate glossed over the vagueness in some of the treaties and placed "the very widest interpretation" on them, in what he conceived as "in the British interest in this country, and in the interests of the natives themselves". On this premise he concluded: [1]

> The Court therefore holds that the effect of these Treaties and of the Sovereign Act of the British Crown of May 14th 1891 in proclaiming the protectorate was to vest in the Crown the entire soil of the British Central Africa Protectorate not especially exempted and to confer upon the Crown the same prerogative and sovereign rights as in England. All land not specially exempted by deed or treaty is Crown land.

With this rationale, his lordship held that the grant obtained by the defendants was invalid because "without the consent of the Commissioner, no such . . . profit a prendre as is here claimed by

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[1] at p. 13

the African Lakes Corporation, can be given by any Chief". Hence the injunction sought was granted.

What his lordship appears to have enunciated is that in a protectorate only the Crown is the source of title as all land, except that not ceded, was Crown land. Hence one could only obtain good title over ceded land by a Crown grant or by a private transaction consented to and sanctioned by the Crown. His lordship subsequently applied this ratio in Supervisor of Native Affairs v. Blantyre and East Africa Ltd., [1] also known as the native land case. In this case the land in issue was allegedly conveyed to the defendants by the indigenous occupants, through the headmen, for a freehold estate. The petitioner Supervisor sought that the Agreement be set aside for being, inter alia, inequitable. Nunan, J., expressed satisfaction that the lack of the Commissioner's consent to the agreement was sufficient in itself to render the deal invalid.

Although these treaties were vague, an interpretation was placed on them which enabled the Crown to assume such ownership. These two cases never seem to have gone all the length to suggest that protectorate status in itself entailed Crown ownership. Nunan, J., however went beyond this view as it became apparent in two other subsequent cases. In Paolucci v. The Commissioner of Mines for the British Central Africa and The Crown Prosecutor of the British Central Africa Protectorate v. The British Central Africa Co. Ltd., [2] both

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[1] Reported in Supplement, The British Central Africa Gazette, April 30th 1903, p. 1.

[2] Reported in The British Central Africa Gazette, February 29th 1904, p. 196.

heard at the same time, Nunan, J., let it be known that declaration of a protectorate meant nothing less than Crown ownership of the Protectorate land.

In both cases the plaintiff in the first case and the defendant in the second case obtained grants of land from indigenous chiefs prior to the establishment of the Protectorate. The form of grant was similar in both cases with very minor differences. In the conveyance involving the first case there were two distinct grants of land and all mining rights to Sharrer, his successors and assignees "in the full and absolute possession . . . for all time coming . . .". In the second case the conveyance granted lands, woods, rivers, minerals, etc. within certain boundaries to Steblecki and Lamagna "in full and absolute possession for all time coming". Sharrer and Steblecki respectively, were the predecessors in title of the British Central Africa Co. and Paolucci.

When the Protectorate was declared, chiefs and sub chiefs in the areas in issue ceded "all . . . sovereign rights including all minerals and mining rights absolutely and without reserve to . . . the Queen . . .". Johnston, Commissioner for the Protectorate, subsequently enquired into the original purchases and certified his formal satisfaction that there were no valid counter claims and that the granting chiefs were the sole owners of the rights granted. In this regard he confirmed the grant of an estate in fee simple.

Pursuant to this Certificate of Claim, the plaintiff Paolucci petitioned the High Court of the Protectorate to have a declaration

that he was entitled to all minerals in the land and consequently to restrain the Crown, through the Commissioner of Mines, from issuing prospecting licences over his estates without his leave and to have the Crown recognise the need to obtain such leave. The Crown in turn applied against the plaintiff and subsequently against the defendant to have a declaration as to:

(1) the ownership of all minerals in land held under the Certificates of Claim, and

(2) the rights of the Crown to issue prospecting licences over the same without the leave of the landowner.

Nunan, J., refused to recognise mineral ownership as vesting in the holder of a Certificate of Claim and consequently did not grant the petition sought. Revealing his conception of the far reaching effect of protectorate status, he said: [1]

> . . . Absolute ownership of land is impossible in a subject here as well as in England and lands held by Certificate of Claim as well as other lands in the Protectorate are held of the Crown.

His lordship was here confronted with a novel situation. Concerned with mines royal which under the common law of England remain the property of the Crown notwithstanding private ownership of the land, [2] he was attempting to assimilate the position of a protectorate to this acceptance. In so doing his lordship hoped to get rid of the two obstacles to this conclusion, namely that (a) the grants in issue

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[1] at p. 198.

[2] For the Crown ownership of royal mines at common law, see A. Brown, A Treatise on the Law of Minerals, (4th ed.) London, 1878, p. 117. Cf., A. Rodgers, The Law Relating to Mines, Minerals and Quarries in Great Britain and Ireland (2nd ed.): London, 1876, pp. 175-178.

preceded the Protectorate, and (b) the territory's mining law, as contained in the Mining Ordinance of 1899 regulating mining operations, specifically excepted land estates as the ones in issue. To get round the validity of the original grants, recognition of which would have negated the common law Crown prerogative to minerals royal, his lordship saw, in the submission to Johnston's enquiry into land claims, a surrender of the original title to the Crown and a re-grant of title by the issuing of the Certificate of Claim.

In his conclusion of automatic Crown ownership, Nunan, J., certainly abandoned his earlier acceptance in the Kombe case that only those proprietary rights ceded to the Crown constituted Crown ownership. The message was now that all land in a protectorate, however obtained, was Crown land or as his lordship succintly put it -- "all land in this country is held either mediately or immediately from the Crown".

The Full Court of Appeal for Eastern Africa in Paolucci v. The Commissioner of Mines for British Central Africa Protectorate and British Central Africa Co. Ltd. v. The Crown Prosecutor [1] was not disposed to accept Nunan, J.'s rationalisation. The Court addressed itself to the questions: ". . . what were these Certificates of Claim? Were they vouchers of titles already existing in the holders

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[1] In the Court of Appeal for Eastern Africa, Civil Appeals Nos. 7 and 8 of 1904 (unreported). Enclosure in Marison, J. to Principal Secretary of State for the Colonies, Despatch No. 108 of 1/4/1905. CO 525/190/11.

or were they grants by the British Crown of new, valid and substantial titles?" Their lordships found in Nunan J.'s conception of a surrender and regrant a legal fiction for which there was no evidence as the Certificates of Claim were a confirmation of those rights which were already in existence.

On the effect of a protectorate over private rights, the Appeal Court, finding that by 1901, as revealed in the Kombe case "the British Crown did not claim the Royal Prerogative of justice in as much as justice to natives was administered in the local courts", concluded: ". . . It would seem from this that the other Royal Prerogatives did not apply to the country". On this premise the Court held:

> ". . . The lands therefore were the absolute property of the predecessors in title of the appellants here before the British Crown acquired any sovereign and territorial rights and privileges in the country and it follows . . . that . . . the appellants had a title free from any condition not expressed in the original and not shown to be incidents implied therein (i.e. in the original grant)." [1]

On this reasoning the lower court's decision was reversed, and it was held that the property rights in the lands vested in the appellants.

The effect of this decision was of great potential significance: it purported to qualify the presumption that the protectorate status of a territory was sufficient in itself to give the Crown ultimate ownership of the lands. Now, before Crown ownership could be

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[1] at p. 48.

achieved, the Royal Prerogative would first have to be expressly applied to the territory. [1] Until then the Crown could not claim to be the source of title. H.W. Fox, a senior official of the British South Africa Company, writing in London in 1913, commented on this judgment as confirming the view ". . . that the holder of a title recognised by the Crown in a British Protectorate is vested with a good title". [2] This comment, it is submitted with respect, was ill conceived. A mere confirmation of title by the Crown is not a good source of title. The Crown itself needed first to obtain a good title to protectorate lands.

Nunan, J., saw in this appellate court's decision a misconception of the category of protectorate territory within which Nyasaland fell, which he thought was quite distinct from some existing in East Africa. Reacting to the decision, he wrote the Commissioner: ". . . Unlike the case of Nigeria, Zanzibar, and some other places, an utter absence of settled Government, civilisation, or established native laws or customs existed at the date of the Proclamation of the Protectorate in 1891. In consequence, the Administration assumed full power to deal with all lands and have sold and leased them on its own authority since that date". Seeing the judgment as whittling the sovereignty of the Crown in land matters, he pressed for an appeal to

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[1] Possibly by the express application of the common law of England. See per Denning, L.J., in Nyali Ltd. v. Attorney-General [1956] 1 Q.B. 1 at p. 16.

[2] H.W. Fox, Memo on Land Settlement in Rhodesia 1913: Notes and Cases submitted to the Privy Council, Printed by Waterlow & Sons Ltd., London 1913, p. 31.

the Privy Council. In this regard he added: ". . . the question of jurisdiction of land tenures in this Protectorate should be determined once and for all by an opinion of the Privy Council followed if necessary by legislation, perhaps even by an Order-in-Council". [1]

The Law Officers in their advice to the Colonial Office did not however think reference to the Privy Council as suitable at the time. They felt the questions posed, which went beyond the judgment of the Appeal Court, should only be considered if they arose in a practical form. The Law Officers expressed, nevertheless, disagreement with both the Court of first instance as to its surrender and regrant theory, and the Court of Appeal for questioning the Certificates of Claim. [2]

As to the former they reported: ". . . we cannot see any ground for the hypothesis upon which the Court of First Instance proceeded, that there was a surrender to the Crown followed by a regrant . . .". As to the latter they reported: "The Certificates of Claim were issued under the authority of the British Government as the Sovereign Power which assumed the right of confirming or disallowing any claims to land, and we do not think that the conditions imposed in these certificates could be questioned in any municipal Court".

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[1] See Enclosure No. 2 in British Central Africa, Despatch No. 102 of 31/3/1905. CO 525/7746/7. For Nunan J.'s public review of the Appeal Court's decision, see Central African Times, June 3rd 1905.

[2] See Law Officers' Opinions, August 15th 1905, Vol. III, 1905-1918, Miscellaneous No. 177.

The divergence of judicial opinion underscores the complexity of the legal doctrine underlying a protectorate in then emerging British Africa. Erroneous though Nunan, J.'s view might have been in light of the appellate Court's decision, there was practically no previous judicial elaboration on the matter. His lordship's view does not, however, appear far-fetched for a similar view had been entertained in the East African Protectorates even earlier than the two Central African cases came under review.

In 1899 the Foreign Office sought the opinion of the Law Officers in the matter concerning the Crown's sovereignty in the East African Protectorate over waste or unoccupied land. [1] The material questions posed were, "In regions where Her Majesty exercises rights of Protectorate under Treaties such as those made by the British East Africa Company, which do not specifically grant to Her Majesty the right of dealing with waste or unoccupied land, does that right accrue to Her Majesty by virtue of the right of Protectorate? Is any difference made by the fact of the natives of the region with whom the Treaty was concluded being practically savages without any proper conception of ownership in land?"

To the first question, the Law Officers answered in the affirmative: "We are of the opinion that in such regions the right of dealing with waste and unoccupied land accrues to Her Majesty by virtue

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[1] See Law Officers' Opinion, December 13th 1899, Vol. V, 1892-1899, Miscellaneous No. 86.

of her right to the protectorate". Amplifying the right to such lands, the opinion concluded: ". . . Her Majesty might, if she pleased, declare them to be Crown lands or make grants of them to individuals in fee, or for any term". Accepting the second question as being most relevant, the Law Officers distinguished territories with "some form of settled Government" from those which did not. Satisfied that the region in issue belonged to the latter category, the proposition was advanced: ". . . Protectorates, such as those now under consideration, really involve the assumption of control over all lands unappropriated . . .". Whatever the respective merits of these divergent authorative opinions on this fundamental issue, an answer had to be found.

The Privy Council decision in 1919 in the celebrated case of Re Southern Rhodesia [1] cast some light on this unresolved question. The matter in issue in this case was who owned the unalienated lands of Southern Rhodesia as between the Crown, the British South Africa Company and the indigenous people. Southern Rhodesia became a British Colony in 1923 but at the relevant time was a Protectorate. The decision, therefore, is significant for other Protectorates like Northern Rhodesia and Nyasaland.

It is clear from this case that the assumption of dominion over the lands by the Crown must be undertaken by an express manifestation of intent. It was in this regard held that a manifestation, by

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[1] (1919) AC.211.

Orders-in-Council to exercise full dominion over lands which are unallotted, was sufficient to constitute the Crown, owner of the lands. The Company advanced the argument that the absence of annexation after conquest indicated the Crown's disinterest in the ownership of land and, as the Company was left in occupation, that was property enough. To this Lord Sumner declared: [1]

> . . . if when the protecting power . . . became the conquering power . . . and under the Orders in Council . . . set up by its own authority its own appointee as administrator and sanctioned a land system of white settlement and of native reserves, it was intended that the Crown should assume and exercise the right to dispose of the whole of the land not then in private ownership, then it made itself owner of the land to all intents and purposes as completely as any sovereign can be the owner of lands which are public juris ...

As to whether the Company's first occupation of the territory could be a source of title, Lord Sumner denied: "The questions in this reference refer to property and not to mere occupation . . . The fact of occupation and especially the circumstances under which it was taken and enjoyed are significant and helpful in estimating what the rights of the Crown were and how far, if at all, the Crown conferred rights over the land on the Company; but in itself and by itself occupation is not title". [2]

In Sobhuza v. Miller & Others, [3] another Privy Council decision, Viscount Haldane accepted and applied Lord Sumner's

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[1] at p. 240.

[2] at p. 239.

[3] A.C. [1926] 518.

proposition in Re Southern Rhodesia that an Order in Council is a manifestation of intent by which the Crown can assume dominion over the lands. In Sobhuza's case, arising from Swaziland, the issue was whether the Crown could by Order-in-Council abrogate a Convention, entered into between Great Britain and the South African Republic, securing customary law and the agricultural and grazing rights of the indigenous people. Swaziland was at the date of the Convention, an independent African State treated as a protected dependency of the Republic. By Orders-in-Council subsequent to the said Convention certain lands in Swaziland were expropriated by the Crown, to the extinguishment of the use and occupation of them by the indigenous people. It was held that the Orders-in-Council were effective, even if they were not within the powers recognised by the Convention.

The two Privy Council decisions do at least dispel Nunan J.'s view, shared earlier on by the Law Officers, that protectorate status was in itself sufficient to confer on the Crown dominion over a territory's lands. There was need for an express and unequivocal assertion of Crown ownership. [1] Although the two Privy Council decisions talk of a manifestation of intent on the Crown's part to assert dominion over the lands, it appears that such intention ought to be expressed by legislative enactment such as by Order-in-Council.

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[1] Cf., Sir K. Roberts-Wray, Commonwealth and Colonial Law, London, 1966, Chapter 14.

Such an expression being an Act of State is not amenable to question. By this very token, a mere assumption of purported ownership such as by occupation cannot suffice.

Thus in Northern Rhodesia, it could be stated that land in North Eastern Rhodesia did not become Crown land by virtue alone of the creation of the Protectorate. In North Western Rhodesia, where the Lewanika Concessions ceded land rights, these Concessions are the source of title, assuming that Lewanika had the power to grant such rights. Crown lands were, however, subsequently declared in the territory and quite appropriately so. We shall see subsequently what considerations influenced the Crown in formulating its land policies and how the same were effected. We might, however, reiterate that the mere assertion of a protectorate on the part of the Crown was not in itself sufficient to vest land in the Crown: it was necessary, in addition, to assert overtly, such as by legislation, the intention to vest lands in the Crown.

D. Origins of Title to land in Zambia

(i) The Land Concessions in North Western Rhodesia

The British South Africa Company land claims in the territory are mainly based on concessions obtained from Lewanika [1] in the part of the territory which came to be known as Barotseland North Western Rhodesia. Subject to the approval of the Secretary

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[1] Lubosi Lewanika was Litunga (i.e. ruler) of the Lozi people 1886-1916, see M. Mainga, Bulozi Under the Luyana Kings, London, 1973, at p. 215.

of State for the Colonies the Company did of course have the authority under its charter to enter into such concessions. [1] Two such concessions of great importance are those entered into in 1900 and 1909 between Lewanika on the one part and the British South Africa Company on the other. The 1900 concession granting various rights to the Company was "over the whole of the territory of the said (Barotse) nation or any future extension thereof including all subject and dependent territory." In matters of land this Concession stated: ". . . but the British South Africa Company shall have the right to make grants of land for farming purposes . . . to white men approved by the King, the British South Africa Company undertaking that the native lands, villages, cattle posts, gardens and fountains shall be in no way interfered with . . .". An area known as The Barotse Valley was exclusively reserved for the King and his people and the Company acquired no rights within that area.

However, this Concession does not appear to have granted land rights to the Company over unalienated land. Lewanika did not at this stage part with his land as grants by the Company to European settlers were dependent on his approval. Thus title over such grants, in theory at least, would derive from him alone. The Law Officers, commenting on similar phraseology in the Lippert Concession in Southern Rhodesia in reply to a request for an opinion from the Colonial Office, were disposed to think that the Concession did not

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[1] For this authority under the BSA Co. charter, see Herslet, Sir E., Map of Africa by Treaty, op. cit., pp. 272-273.

grant rights over unalienated land. By the Lippert Concession, King Lobengula granted the Concessionaire Lippert the exclusive right during 100 years "to lay out, grant, or lease, for such period or periods as he may think fit, farms, townships, building plots and grazing areas . . . to give and grant certificates in my name for the occupation of any farms, townships, building plots and grazing areas". The Law Officers thus observed: "So far, therefore, as the concessionaire, or his assign, purports to alienate pieces of land to grantees in return for payment, he gives a title which is derived from Lo Bengula and is acting for him and his name. It by no means follows that the unalienated land of Lo Bengula belongs to the concessionaire . . .". [1]

If there was any doubt about this interpretation, then Re Southern Rhodesia [2] certainly endorsed the Law Officer's view point. The Privy Council interpreting the Lippert Concession ruled, " . . . the concession did not give the concessionaire the right to use the land or to take the usufruct. It did not make any land his, nor did it enable him to make it his own. What land he appropriated to others was to be appropriated in Lobengula's name . . .". Substitute the words "in Lobengula's name" for "with Lewanika's approval" and this Lewanika concession would appropriately fall within the Privy Council's ruling.

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[1] See Law Officers' Opinions, May 15th 1914, Vol. VII, 1905-1918, Miscellaneous No. 177, p. 3.

[2] A.C. [1919] 211 at p. 237.

In fact the British South Africa Company did recognise that this Concession did not grant any substantive land rights. Thus the Company in 1904 did ask for and obtain Lewanika's approval when granting some farms to "good settlers". Because of this limitation in the 1900 Concession, the Company subsequently in 1905 obtained two grants of land as "a free gift" from Lewanika. The Company needed this land for disposition to an increasing number of settlers, who were flowing up north following the construction of a railway northwards from Bulawayo (in Southern Rhodesia), and the development of townships. [1]

The 1900 Lewanika Concession received the approval of the Secretary of State for the Colonies in the subsequent year. A more extensive Concession granted in 1909 stated: "Lewanika, with the advice and consent of his Council, in consideration of the area reserved from prospecting in the Concession of 1900 being extended . . . agrees to give to the BRITISH SOUTH AFRICA COMPANY for its use - or to dispose of as it may think fit - all the land within the Territory over which he is Paramount Chief, that is to say within the boundaries of Barotseland North Western Rhodesia except that portion within the area reserved from prospecting as above extended . . .". This Concession was similarly approved by the Secretary of State for the Colonies in the following year. [2] It will be observed that this Concession unlike that in 1900 had the apparent effect of

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[1] See T.W. Baxter, "The Concessions of Northern Rhodesia", in Occasional Papers No. 1, National Archives of Rhodesia and Nyasaland, June 1953. pp. 19-21.

[2] For both Lewanika concessions and approval, see H.M. Williams, The Mining Law of Northern Rhodesia, /Pref. Cape Town, February, 1963/, Appendix B, pp. 172-176.

surrendering all land rights in Barotseland North Western Rhodesia (except in the reserved area) to the British South Africa Company. [1] As explained above, under the 1900 Concession Lewanika did not part with his entire interests in the land due to the condition attached that any dispositions by the Company were subject to his approval. The subsequent 1909 Concession does not have a similar condition. Thus the 1909 Concession has provided the basis for the Company's claim to ownership of unalienated land in this part of the Territory.

In 1905 the Company had sought to strengthen its land claims by procuring the transfer of a portion of the North-Eastern territory to North Western Rhodesia. The Company sought this re-adjustment from the Colonial Office allegedly to facilitate the administration of the two territories. Acting under article IV of the North Western Rhodesia Order-in-Council 1899, the Secretary of State for the Colonies duly effected the proposal. [2] This it was claimed had the effect of extending the Company's land rights over an area which under the Lewanika Concession fell within the proviso " . . . or any future extension thereof". [3]

These land rights, as extended, were acknowledged in the recital of the 1911 Order-in-Council and in 1923 at the termination

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[1] Cf., P.E. Slinn, The Northern Rhodesia Mineral Rights Issue, Ph.D. Thesis, University of London, 1974, p. 43.

[2] The boundary alteration was effected by the High Commissioner's Notice No. 88 of 29th September 1905. Cf., J.A. Calder, Colonial Office Secret Memorandum on "BSA. Company's Mineral Rights in Northern Rhodesia and the Jurisdiction of the Barotse Paramount Chief". CO 795/45105/7181 particularly pp. 1-2.

[3] See P.E. Slinn, The Northern Rhodesia Mineral Rights Issue, Ph.D. Thesis, op. cit., p. 43.

of the Company administration were the subject of special arrangements. Under the 1923 Devonshire Agreement the Company's land rights were transferred to the Crown and it was agreed that the Company should receive one half of the sums paid to the Crown under the sale or lease of lands in "North Western Rhodesia (as it existed immediately prior to the amalgamation of North Western and North Eastern Rhodesia in 1911 . . .)". This arrangement was to be effective from 1st April 1925 to 1st April 1965. [1] Although the British South Africa Company pressed the Colonial Office to sanction boundary alternations on the pretext of administrative necessity, the hidden motive was to enhance its mineral claims over areas of the North Eastern territory where it was felt that concessions were vulnerable to strict proof. [2] The Company believed that it would more easily defend its title under the Lewanika Concessions than under the mineral concessions obtained from indigenous chiefs in North Eastern Rhodesia.

J.F. Jones, the joint manager and secretary of the London Board of the Company, wrote the Company Administrator of North Eastern Rhodesia in strict confidence advancing various grounds for the boundary extension. Attaching more importance to the Company's mineral title, he wrote:

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[1] Cmd 1984, clause 3(C).

[2] Cf., P.E. Slinn, The Northern Rhodesia Mineral Rights Issue, Ph.D. Thesis, op. cit., p. 43.

> The title asserted by the Company to mineral rights in North Western Rhodesia is more easily susceptible of strict proof in case of need than to similar rights in North Eastern Rhodesia. The Board attaches great importance to this consideration. 1

Accepting this ground above all other reasons the Administrator replied: "But the fifth reason given appears to be of such weight that the previous four seem hardly worth discussion. I readily accept the statement that the Company's title to mineral rights in North Western Rhodesia is more easily susceptible to strict proof than in North Eastern Rhodesia, as I know nothing of the title under which such rights are held or of the limits of the area over which such title extends . . .". While anticipating no actual challenge to the Company's title in view of Johnston's Certificate of Claim, the Administrator however conceded:

> However this may be, the Board of the British South Africa Company must be considered to know best the grounds on which they claim their rights and privileges and there can be no question that if their claims can be better established by increasing the amount of country included within North Western Rhodesia's boundary that these boundaries should be extended as far East as possible. 2

The Colonial Office was apparently quite unaware that the Company's objective was quite unrelated to facilitating the administration of the two territories.

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[1] See J.F. Jones to Administrator, Strictly Conf. of 13/2/1904. Enclosure 1 in Sir H. Young to Ormsby-Gore, Conf. of 7/8/1937. CO 795/45105/37/5.

[2] See Administrator to Secretary, BSA. Co. of 19/4/1904. Enclosure 3 in Sir H. Young to Ormsby-Gore, Conf. of 7/8/1937. CO 795/45105/37/5.

The 1900 Concession, it will be recalled, applied to "the whole of the Territory of the (Barotse) nation or any future extension thereof". The Company clearly relied on the 1905 transfer of territory to North Western Rhodesia as authority to an extension of the concession area. It is difficult to see how this administrative action would have had this effect, as there was no grant of any exercise of jurisdiction in Lewanika in the transferred area. [1]

This brings us to the wider question of the vulnerability of the Company's land claims in so far as they were based on the Lewanika concessions. It is doubtful whether Lewanika's suzerainty extended to all the areas distant from Barotseland proper on the premise that they were "all subject and dependent territory". The criterion to determine what jurisdiction fell within this expression was debatable. Short of any form of overlordship vested in Lewanika over such territories it is impossible to determine whether he had suzerainty over such an extensive area covering also the copperbelt.

The payment of tribute as indicating conclusively the existence of overlordship has been dismissed. The King of Italy's Award on the Western Boundary of Barotseland in 1905 commented on this:

> Tribute, cannot, as such, be considered as proving authority as Paramount Ruler of him to whom that tribute is paid; in fact, it often happens that a tribe, although independent, pays tribute to the Chief of another stranger tribe, either in order by

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[1] Cf., P.E. Slinn, The Northern Rhodesia Mineral Rights Issue, Pd.D. Thesis, op. cit., p. 43.

> this means to escape being harassed by him and to avoid war, or in order to gain his good will and protection. 1

The 1926 Native Reserves Commission under the chairmanship of Macdonnel, C.J., rejected Lewanika's suzerainty to have been so extensive as to be a justifiable basis upon which land was granted to the Company in the 1909 Concession. This Commission when appointed in 1926 was assigned to demarcate reserves within which Africans were to live along the line of rail. [2] Beside its chairman there were two other members appointed on the Commission. M. Thomson, a magistrate, was appointed secretary to the Commission. The third member was Col. H.M. Hart, a farmer by occupation. The Commission did not strictly adhere to its terms of reference. Thus evidence was also called on the suzerainty of Lewanika over the lands he claimed to have power to alienate and dispose of mineral rights.

On this evidence the Commission made certain observations in its report. Of the purported subject and dependent territory the Commission observed: ". . . Lewanika had relations of courtesy with the Lenje chiefs Sitanda and Mungule but that no suzerainty over these chiefs, or any discoverable relations at all with the Lenje chiefs Chipepo and Mukuwe of the Broken Hill and Ndola Sub-Districts, still less any with the Lamba, Lima, Sewa, Swaka, Soli or Luano tribes". [3] On the basis of these findings of fact the Commission concluded:

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[1] See NAZ/SEC/SVY/9/9/2 Vol. I (26/1) p. 3.

[2] For a detailed account of this Commission, see pp. 228 et.seq infra.

[3] Native Reserves Commission Report, 1926, Northern Rhodesia par. 325.

> It is still more difficult to see how Lewanika could possibly confer on the British South Africa Company . . . the fee simple of all the land in Northern Rhodesia, or of any of it east of the Sala country. His purported grant of it in 1909 was a gift of what he did not possess . . . 1

But even if successful Lozi raids on neighbouring peoples and payment of tribute were the criteria the affected areas do not appear to have extended to the north or to the east of the present day Southern Province [2] and did not certainly include areas of the Copperbelt. [3] Thus it could be said that the validity of the Lewanika concessions as granting land rights outside the area of Lewanika's effective jurisdiction could be questioned on the principle of nemo dat quod non habet (no one can give what he does not have).

(ii) Land rights in North Eastern Rhodesia

As for North Eastern Rhodesia, the Company had never contended that the concessions secured from chiefs ever involved a grant of land rights. It was on this basis that subsequently the Colonial Office adopted the attitude of regarding land in this part of the territory as "native land". [4] There were, however, only two areas

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[1] Native Reserves Commission Report, 1926, op. cit., par. 327.

[2] See map at p. 648, infra.

[3] See M. Mainga, Bulozi Under the Luyana Kings, op. cit., p. 150. Cf., E. Colson, "Modern Political Organization of the Plateau Tonga", African Studies, Vol. 7, Nos. 2-3, 1948, p. 92.

[4] See W.C. Bottomley to Sir H. Young (semi-official) of 24/12/1935. CO 795/45120/3/4. Cf., House of Commons Debates, 25th July 1923, Vol. 167, Col. 503; and MacDonald to Creech Jones of 6/6/1939. CO 795/45120/39/10/3. For a contradiction in this policy, see Colonial Office Minutes of 2/6/1939. CO 795/45120/10.

excepted from this designation. Three freehold estates in the Tanganyika District continued to be possessions of the British South Africa Company. The Company had both land and mineral rights in these freehold estates. The North Charterland Concession area belonged to the North Charterland Company, a company in which the British South Africa Company had shares.

The Tanganyika estates were obtained from the African Lakes Company, a corporation based in Nyasaland, which had managed to secure concessions from indigenous chiefs in the area. On being voluntarily dissolved, (an arrangement initiated by the British South Africa Company), all its acquired lands including the Tanganyika estates were transferred to the British South Africa Company. [1] The concession area involved another arrangement initiated by the British South Africa Company. This area, now in the Eastern Province of the country, at that time fell within the British sphere of influence. As such it was embarrassing to both the British South Africa Company and the British Commissioner in Central Africa Protectorate (Nyasaland) that a German concessionaire had already allegedly obtained both land and mineral rights from Paramount Chief Mpezeni of the Ngoni. This chief was reportedly hostile to any British advancement and thus made it difficult for the British South Africa Company to secure a similar concession from him. [2]

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[1] See A.J. Hanna, The Beginnings of Nyasaland and North Eastern Rhodesia 1859-95, op. cit., pp. 174 et seq.

[2] See E.H.L. Poole's notes, Enclosure in Maxwell to Green of 3/6/1929. CO 795/X35230/29/6.

The German concessionaire Wiese transferred this concession to the Mozambique Gold Land and Concessions Company. He never managed, however, to obtain confirmation of title from Commissioner Johnston. Sir Harry Johnston was the British Commissioner for the Protectorate. The North Charterland concession fell within the North Eastern Rhodesia region and so it was the province of the Commissioner to investigate and if thought fit, approve this concession. Johnston withheld his confirmation on three grounds, namely [1] that (a) there was no evidence of consent on the part of the granting chief and authority on the part of the person who secured the concession; (b) Paramount Chief Mpezeni was not recognised as a chief; and (c) the concession fell within the country covered by the Treaty of 1899 between the British South Africa Company and Chief Mwasi of the Chewa. Barnes, however, refutes that any of the chiefs with whom the British South Africa Company entered into treaties ever laid claim to this concession area which was within Mpezeni's realm. [2] The British South Africa Company having the only recognised claim sought to solve the unsatisfactory situation by initiating the dissolution of the Mozambique Company and having it reconstituted as the North Charterland Company. In consideration of having this new company granted mineral and land rights in the concession area, the British South Africa Company obtained a share-

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[1] See Sir C. Hill, Memorandum on British Central Africa Claims Conf. 6502, Chapter V.

[2] See J.A. Barnes, Politics in a Changing Society, Oxford University Press, 1954, pp. 75-78.

holding interest and the grant was made subject to the latter Company's regulations. [1]

In 1923, at the termination of the Company administration, the three freehold estates in the Tanganyika District were not included in the transfer of land to the Crown. These estates continued to be recognised as belonging to the Company. [2]

While recognising previous Company alienations of land, the 1923 Agreement expressly provided for the North Charterland Concession as well - "As regards the concession granted by the Company to North Charterland Exploration Company the Crown reserves the right to set apart such native reserves in the area granted to the Company as the Crown may deem proper". [3]

Despite the official acknowledgement that apart from the Tanganyika estates and the North Charterland Concession area all the land in North Eastern Rhodesia was "native land", the Company had claimed as the administering authority ownership of the unalienated lands in the Territory. In 1900, a year after the 1899 North Eastern Rhodesia Order-in-Council, the Company's Administrator of the Territory established by regulations a Lands and Deeds Registry. The regulations were purportedly made pursuant to the

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[1] See Enclosures in Maxwell to Webb, Conf. of 21/6/1929. CO 795/X35230/29/8.

[2] Cmd, 1984, clause 3(d).

[3] Ibid., clause 3(e).

power conferred on the Administrator by the 1899 Order-in-Council to make regulations "for the peace, order and good government of all persons within the limits of this Order . . .". [1]

Regulation 2 of the Lands and Deeds Registry Regulations, preceded by the word "DECLARATORY" provided: "All unalienated land in the Territory is vested in the Company . . .". [2] The word declaratory suggests that the British South Africa Company took it for granted that it was owner of beneficial interests in unalienated land. It was practice preparatory to making a grant to a settler for the Company to take possession of unoccupied land "for the purpose of colonisation or agricultural development". [3]

The 1900 Regulations were subsequently repealed in 1905 [4] and new Regulations substituted and the declaratory regulation vesting unalienated land in the Company was not retained. This does not mean that the Company stopped its practice of granting unalienated or unoccupied lands to settlers. On the contrary, the Company still continued with its dispositions of these lands. [5] The Company did

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[1] See Arts. 16 and 17 of the 1899 North-Eastern Rhodesia Order-in-Council.

[2] See Govt. Notice No. 10 of 1900.

[3] See Memoranda by Mr. L.A. Wallace, Relating to the B.S.A. Company's Titles in Northern Rhodesia, London, 1905.

[4] See reg. 2, The Lands and Deeds Registration Regulations, 1905.

[5] See Memoranda by Mr. L.A. Wallace, Relating to the B.S.A. Company's Titles to Land in Northern Rhodesia, op. cit., par. 2. Cf., p. 295, infra.

this with the full knowledge that the Certificate of Claim, [1] with the limited exceptions mentioned, gave no title to the land. Without relying on the 1905 boundary extension (which must serve to indicate that the Company was aware that this could not be a valid basis upon which to assert (land claims) the Company officials took the view that authority for making grants of land was based on the Company's powers of administration exercised on behalf of H.M. Government. [2]

As has been discussed above, practice of this kind in the grants of land raises fundamental questions regarding the origin of title in protectorates. [3] In the particular context of the 1900 Regulations, a further question of vires must be considered. It is doubtful whether the administrative power to make regulations for the "peace, order and good government" of the territory extended to the appropriation to the Company of all unalienated land, to which the Company could lay no claim under agreements with the local inhabitants. Doubt was also expressed in the Colonial Office as to whether the "peace, order and good government" formula could cover the situation of land ownership and transfer since the High Commissioner (and in our case the Administrator) was also bound to

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[1] These were issued under the authority of Sir H. Johnston, Commissioner for British Central Africa Protectorate (Nyasaland), confirming the rights acquired by the Company under the concessions. See pp. 72-73, infra.

[2] See Memoranda by Mr. L.A. Wallace (Chief Surveyor) Relating to the B.S.A. Company's Titles to land in Northern Rhodesia, Fort Jameson, 1904.

[3] See Section B, supra.

respect native laws and customs". [1]

Subsequent Orders-in-Council after 1900 shade no light on the Company's title to unoccupied lands in North Eastern Rhodesia. The 1911 Order (amalgamating the two territories) merely restates the assurance of native rights to land in their occupation and confers a power on the Company to assign sufficient land for native occupation. [2] It was not until 1924 when the Company handed over the administration of Northern Rhodesia to the British Government that a clause in the Order-in-Council of that year apparently granted the Governor power to make grants of land.

> Article 14 of the Northern Rhodesia Order-in-Council empowered the Governor to "make and execute . . . grants and dispositions of any lands . . . which may be lawfully granted or disposed of by His Majesty: Provided that every such grant or disposition be made in conformity either with some Order-in-Council or law for the time being in force . . . or with such instructions as may be addressed to the Governor under His Majesty . . . or through a Secretary of State."

It will be seen that this provision does not expressly vest land in the Governor. Everything pertaining to grants and dispositions of land (and presumably title consequent on the grant) is conditioned on the authority of a subsisting law or Order-in-Council. There is nothing in this provision, it appears, from which could be inferred that unoccupied lands in North Eastern Rhodesia now vest in the Crown. On the contrary, as will have been noted, even the

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[1] See W.R. Johnston, Sovereignty and Protection: A Study of British Jurisdictional Imperialism in the Late Nineteenth Century, Duke University Press, 1973, at p. 272.

[2] See Arts. 40-44, Northern Rhodesia Order-in-Council, 1911.

official view was to regard unoccupied land in North Eastern Rhodesia as "native land".[1] However, in 1928 and 1929 Reserves and Crown land were declared in terms of Orders-in-Council in the East Luangwa and Tanganyika Districts of North Eastern Rhodesia.[2]

At the time of direct British administration (in 1924) the first Imperial Governor continued the Company practice of making grants of land in a form approved by the Colonial Office.[3] Although it could be argued that the Colonial Office consent conferred good title on those who were granted land by the Governor, it would be difficult to argue that this practice involved the Crown in an assumption of title to unalienated land throughout North Eastern Rhodesia.

In the absence of any challenge it appears that the practice inherited from the Company provided the basis for land administration. The Devonshire Agreement had provided: "The Company as from the 1st day of April, 1924, assigns and transfers to the Crown all such rights and interests in lands as it claims to have acquired by virtue of the concessions granted by Lewanika upon which date the full and entire control of the lands throughout North Western Rhodesia as well as elsewhere in Northern Rhodesia shall be taken over by the Crown and thereupon . . . the Crown shall be completely free to administer such

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[1] See p. 62 supra.

[2] For creation of these classes of land, see Chapter 3, pp. 201 et seq., and pp. 239 et seq.

[3] This presumably is what is meant by "with such instructions as may be addressed to the Governor . . . through a Secretary of State".

lands in such manner as the Crown may in its discretion deem best in the interest of the Native population and in the public interests generally". [1]

The Agreement indicates the source of title to land in North Western Rhodesia, namely the Lewanika concessions on which basis the Company transferred its rights and interests in land to the Crown. In respect of elsewhere in Northern Rhodesia (which by inference must mean North Eastern Rhodesia) the Agreement very carefully transferred only "the full and entire control of the lands" to the Crown. Whatever rights the Crown acquired, it is submitted, they cannot be such as would vest title to land in the Crown.

Thus in North Eastern Rhodesia the Company could only transfer to the Crown, such rights as it had, i.e. "administrative rights". But whatever the defects in the source of title as just discussed, these were probably cured by the subsequent creation by legislative action of Crown lands, Reserves and Trust land.

(iii) The mineral concessions and the severance of mineral rights from the land

The grant of mineral rights by indigenous chiefs in both North Western and North Eastern Rhodesia invites an examination of the circumstances of severance of mineral rights from the land. From the view point of a landholder it was important to know what rights in

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[1] Cmd 1984, clause 4(d).

minerals were severed from his title to land. This was necessary because this determined to what extent a landholder's rights were curtailed in the enjoyment of interests in land which would normally include rights in mineral deposits on the land.

This consideration is highlighted by a 1926 case in which the Company sued one Farmstone. The Company issued a writ against Farmstone claiming, inter alia, an injunction restraining him from continued use of limestone situated on his farm. [1] This sparked off such a considerable reaction from both the territory's Government and the settler community that the Company never pursued its cause of action. Murray, a member of the Legislative Council, registered the settler's opposition in the Council -- "If limestone is to be claimed as a mineral, there is no real reason why granite, marble, sand, clay, water and even the air, cannot be claimed to be a mineral. It means that no man will be allowed to make bricks on his farm for he will be using minerals which can be exploited for commercial purposes". [2]

The Company's position was that limestone was a mineral which belonged to it and as such was not willing to have it worked without a permit. As for the Northern Rhodesia Government, although it conceded that limestone fell within the words of the Mining

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[1] For copy of writ, see Enclosure in Goode to Amery, Conf. of 22/1/1927. CO 795/18206/27/16.

[2] See Leg. Co. session with regard to Mineral Reservations in Titles for Land, Enclosure in Goode to Amery, Conf. of 22/1/1927. CO 795/18206/27/16, p. 2.

Proclamation, which purportedly defined minerals ceded to the Company, it advocated for a more accommodating formula allowing private use of the substance.

We might now look at the words of grant in the respective mineral concessions in both North Western and North Eastern Rhodesia.

In North Western Rhodesia, the 1900 Lewanika Concession as supplemented by the 1909 Concession granted the British South Africa Company the right "To search for, dig, win and keep diamonds, gold, coal, oil and all other precious stones, minerals or substances". In North Eastern Rhodesia, the Company's title to mineral rights derives from treaties entered into with various chiefs which were confirmed by Sir Harry Johnston. The Commissioner issued two Certificates of Claim both dated 25th September, 1893 recognising the Company's mineral claims. Certificates of Claim A confirmed "The sole right to search, prospect, exploit, dig for, and keep all minerals and metals" in twelve of the areas where the Company's agents had secured treaties. Certificate of Claim B phrased slightly differently confirmed the right "To search, prospect, exploit, dig for and keep all minerals and metals" in the other six areas where the Company had similarly secured treaties. With these confirmations the entire potential mineral wealth of North Eastern Rhodesia was assumed to have effectively been vested in the Company.

Certificate of Claim A is the more important of the two certificates. It is this Certificate, together with the Lewanika Concessions, which allegedly covered the copperbelt, Zambia's

economic backbone. The Certificate commences with a recital of enquiry before confirming, inter alia, a grant of mineral rights: " . . . I have enquired into the claim of the British South Africa Company . . . to have obtained from a number of independent and ruling chiefs in British Central Africa the following rights and privileges: . . .". Then it proceeds to enumerate the treaties, one of which relates to the present day Copperbelt: [1] "The said rights and privileges . . . being claimed by the said . . . Company . . . in virtue of a number of treaties and compacts concluded by them through their Agents to wit:

No. 10 A Treaty with Mshiri, Paramount Chief of Southern IRAMBA, and of countries lying in the Northern part of the basin of LUNSEFWA River, dated 5th November 1890".

After certifying that there were no valid counter-claims over the land in question and that the grantors were the sole and only rightful owners, the Certificates concluded with a declaration of validity of the rights acquired: "THEREFORE I DECLARE the above mentioned claim of the . . . COMPANY . . . to be established and to be recognised as legal and valid by the Government of Her Britannic Majesty . . .". [2]

The question of severance of minerals from the land can be viewed from three perspectives, namely (a) consent and authority of the grantor (i.e. local chief), (b) the right granted and (c) definition of minerals granted.

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[1] The Copperbelt refers to an area rich in copper deposits extending from Broken Hill (now Kabwe) northwards to the border with Zaire.

[2] For both Certificates, see H.M. Williams, The Mining Law of Northern Rhodesia, op. cit., Appendix A, pp. 167-171.

(a) Consent and authority of the grantor

As for North Western Rhodesia, much has already been said on the authority of Lewanika. It will be recalled that the Lewanika concessions purportedly granted both land and mineral rights. Thus criticism on the authority to grant land rights is applicable with equal force to the grant of mineral rights. It has been observed on Lewanika's authority that it is doubtful that his suzeraignty could have been as extensive as he purported. As for consent it appears that there has been no dispute that this was lawfully obtained. With regard to consent the recital clause in the 1900 Lewanika concession declared: " . . . I Lewanika Paramount Chief or King of the Barotse Nation or people for myself and my heirs and successors and for my people with the advice and consent of the Council of my Nation at a full meeting . . . agreed and do hereby agree for the considerations mentioned below . . .". The 1909 supplementary concession had a similar recital clause. Both the 1909 concessions were duly attested by Lewanika and other relevant representatives of the Lozi people. [1]

Thus severance of minerals by grant to the British South Africa Company cannot presumably be attacked on the basis of lack of consent in respect of the Lewanika concessions in North Western Rhodesia. In North Eastern Rhodesia, however, both the authority and consent of local chiefs have been severely questioned.

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[1] Cf., T.W. Baxter, "The Concessions of Northern Rhodesia", op. cit., pp. 16-19.

It has been observed that Johnston did not in fact follow his procedure of local investigation to ascertain that the vendor or lessor had the right to dispose of the land and to determine the extent of the area, the subject of transfer. With such a relaxed procedure, it has been noted that Commissioner Johnston in fact lumped together fifteen Treaties in one Certificate of Claim, "without determining definitely the limits of each Treaty". [1] Hanna in his book The Beginnings of Nyasaland and North-Eastern Rhodesia also suggests that Johnston's attitude to the Company's claims within its sphere of operations [2] (outside the Nyasaland Protectorate) was one of "liberality and encouragement" appreciating the Company's expensive role "in commencing the development of the Territories over which these claims extended". [3] Summarising Johnston's disposition for whatever agency carried the burden of administration he states that Johnston acted very favourably to the Company in its sphere of operations. [4]

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[1] See Colonial Office Memorandum on Certificate of Claim of 25th September 1893, covering Katanga and Central portion of Northern Rhodesia. CO 795/45105. Cf., Sir C. Hill, Memorandum on British Central African Land Claims. op. cit., pp. 9-10.

[2] Sphere of operations refers to North-Eastern Rhodesia before the British Government through the British South Africa Company had effectively established a protectorate over the region.

[3] See A.J. Hanna, The Beginnings of Nyasaland and North-Eastern Rhodesia 1859-95, op. cit., p. 236.

[4] Ibid., footnote 2, p. 236.

Krishnamurthy agrees with this. With the British South Africa Company's provision of subsidies to Johnston's administration he observes that Johnston was under pressure to issue Certificates of Claim to the Company in recognition of all its claims. [1]

On the treaties themselves, which were purportedly validated by the Certificates of Claim, Krishnamurthy reveals that some chiefs who signed them had no authority as they were "mostly men of mo consequence, and by the nature of the historical situation at that time, their jurisdiction was vague". As for some other chiefs, he observes that they were not chiefs over areas covered by the treaties. Of the more significant Mushili treaty, after a review of other historical facts to the contrary, he raises the doubt "as to whether Mushili had any jurisdiction to grant concessions over the area mentioned in the treaty as the northern part of the basin of the Lusenfwa" as that area "did not include the Copperbelt". [2]

M. Faber, the adviser to the Zambian Government at the peak of the mineral rights issue, comes to the conclusion, after obtaining a sworn affidavit of the only surviving principal witness to the Mushili treaty, that it lacked both consideration and consent. [3]

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[1] See B.S. Krishnamurthy, "The Thomson Treaties and Johnston's Certificate of Claim", African Social Research, No. 8, December 1969, p. 597.

[2] Ibid., pp. 594-595.

[3] See M. Faber, "The Mshiri-Thomson Meeting of November 1890", African Social Research, No. 12, December 1971, pp. 137 and 140. For the Mushili Treaty, see pp. 135-136.

Such have been the doubts cast on the Company's title to mineral rights based on the consent and authority of a local chief. But even if these were to be discounted, the concessions themselves are imbued with difficulties of interpretation relating to what right was conveyed and what minerals are the subject of this right.

(b) The concessions and the right granted

The Lewanika Concessions granted the Company "the sole absolute and exclusive perpetual right and power . . . To search for, dig, win, keep etc." Certificate of Claim A confirmed on the Company "the sole right to search, prospect, exploit, dig for, and keep etc." Certificate of Claim B confirmed a grant of "exclusive rights" on the Company, "solely, absolutely and entirely: to search, prospect, exploit, dig for and keep etc."

The question has been asked do the words in the concessions mean that the Company had a mere right to the minerals or that the ownership of the minerals was vested in the Company, or indeed both? On the face of the documents, Williams, in his Mining Law of Northern Rhodesia is prepared to take the view that the Company had just a mere right to minerals but not the ownership of minerals. In this regard he says:

> . . . on a proper interpretation of the several concessions, what the Company acquired was not the minerals themselves, or the ground in which the minerals are deposited, but the right to go on the land to search for and extract and keep as its own property the minerals so found and extracted from the ground. 1

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1 See H.M. Williams, The Mining Law of Northern Rhodesia, op. cit., p. 149.

This view appears to be supported by the statutory mining law of the time. The Mining Proclamation of 1912 [1] declared in its preamble: "WHEREAS the right of searching and mining for and disposing of all minerals and mineral oils in Northern Rhodesia notwithstanding the dominion or right which any person, company, syndicates or partnership may possess in and to the soil on or under which such minerals and mineral oils are found or situated is vested in the British South Africa Company; . . .". This preamble envisaged the possibility of a situation where land -- the surface and the underneath, is owned by somebody else. It is this possibility which gave rise to the need to acknowledge the Company's right to the minerals underneath which would otherwise be owned by the landowner. But the right to such minerals when the subsoil is already owned can only be the right to exploit and extract the minerals and not ownership of the subsoil.

This preamble is of course only of limited significance as it can only be declaratory of the subsisting position. The Mining Proclamation did not in any of its provisions deal with the question of ownership. Hence only the concessions are the sole source of whatever right was granted. The only case which dealt with the question of interpretation is British South Africa Company Ltd. v. Yeta. [2] In this case the defendant Yeta, successor to Lewanika, granted Gordon James a mining concession to work some mines within the

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[1] No. 5 of 1912.

[2] Civil Cause No. 20 of 1929 (unreported).

area reserved for the chief and his people in the original concessions. The British South Africa Company brought suit against the defendant and the concessionaire to have the arrangement declared void. The Company argued that although the area in issue was reserved for prospecting at the instance of the Company, the Company had the sole right to prospect for minerals. This right could only be exercised in the reserved area with the consent of the Lozi King who had the discretion of granting or withholding the right. The King's right however did not include a grant of mining rights to other people. The case however ended in a consent judgment declaring, inter alia:

> In the residue of the Territory covered by the said Concessions . . . the sole and exclusive right to the minerals (including the sole and exclusive right of making grants or dispositions of the same) is hereby declared to be vested in the Plaintiff Company and its successors in title and assigns. 1

This passage seems to provide another version on the meaning of title. It is not the mere right to minerals as if it were a mining right but the entire ownership of the minerals which vested in the Company. The right to minerals is inclusive, inter alia, of the right to alienate minerals. The exclusive right of disposition thus appears very consistent with the entire ownership of the minerals. But the above being a consent judgment could only have been binding between the parties to the action. Thus the right granted to the Company by concessions other than the Lewanika Concessions would not be affected by the consent judgment declaration.

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[1] See Judgment of March 1938, par. 5.

Nor did the 1923 Devonshire Agreement recognising the Company's mineral rights throughout the territory define the question of title explicitly. Clause 3(G) of the Agreement stated: " . . . the Crown shall recognise the Company as the owner of the mineral rights acquired by the Company in virtue of the concessions obtained from Lewanika in North Western Rhodesia and concessions in North Eastern Rhodesia . . .". This recognition as is apparent is equally vague for ultimately the question of title had to depend on what interpretation could be placed on the concessions themselves. The vagueness on the Crown's part appears deliberate. Gordon Smith (Attorney-General of Northern Rhodesia) commented in 1930 on this recognition, confining his remarks to the Lewanika Concessions: "It might be noted that the Crown was careful to avoid saying what such mineral rights consisted [sic] or what rights were actually acquired by the Concession". [1] Sir J. Risley, legal adviser, expressing the Colonial Office reaction to the Company's mineral rights entertained even a broader view of the title being open to question by any third party. In 1927, he minuted:

> I do not think that the Crown is under any obligation, under the Agreement of 1923 or otherwise, to give the Company a statutory title as against the world to its mineral rights as described in Section 3(G) of the Agreement . . . If anybody is concerned to question those rights, the Company must defend them. [2]

Whatever of course might have been the official view, this

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[1] See Enclosure 3 in Maxwell to Lord Passfield, Despatch No. 138 of 6/3/1930. CO 795/35505/30 par. 4.

[2] See Minutes dated 14/7/1927. CO 795/X18345/27.

need not necessarily have been the judicial view. Be this as it may, it looks doubtful that Clause 3(G) ever granted anything more than was obtained from the concessions. The Crown merely recognised whatever it was that was acquired. Hence the question concerning exactly what right was acquired still remained open.

In as much as the extent of the right granted was in doubt so the minerals to which the right related remain undefined.

(c) The definition of minerals

Apart from the minerals specifically enumerated, no definition is given to the term "minerals" which all concessions confer on the Company. The only document containing such definition is the 1912 Mining Proclamation already referred to. In its definition section, this statute says of "Mineral" or "Minerals" -- "The words shall be taken and construed in their most general, extensive and comprehensive sense and meaning". Although this definition is not very revealing, the English cases of Bext v. Gill [1] and Lord Provost of Glasgow v. Farrie [2] are quite enlightening. In the first case it was held that the word "minerals" includes every substance which can be got from under the surface of the earth and for a profitable purpose unless there is something in the context or in the nature of the transaction to induce the court to give a more limited meaning. The second case

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[1] 41.L.J.Ch. p. 761.

[2] (1888) 13 App. Cas. p. 657. Cf., the South African case of Brick and Potteries Co. v. Registrar of Deeds, 1903 T.S. 473.

even went further with Macnaughten, L.J. refuting that commercial value should ever be the test. His Lordship stated that he saw no reason why that which was a mineral when commercially valuable should cease to be a mineral when not worked for a profit. With this in mind, his Lordship interpreted the word "minerals" in its widest signification as probably meaning every inorganic substance forming part of the crust of the earth other than the layer of soil which sustains vegetable life. If the 1912 Mining Proclamation were the source of title, this extensive definition of "Mineral" or "Minerals" would have been appropriate. The concessions from which title emanated did not, however, provide any definition. Since, as already indicated, the Mining Proclamation was not the source of title, the definition in it was inappropriate. We have therefore to look elsewhere for a proper test.

The proper test to have determined the issue ought to have been sought in the mining case law of the time. In the Farrie case Halsbury, L.J., laid down the test when he said that in a grant of 'mines and minerals' it is 'a question of fact what these words meant in the vernacular of the mining world, the commercial world, and landowners, at the time when they were used in the instrument'. [1] In North British Railway v. Budhill Coal and Sandstone Co., [2] where the Farrie test was followed, it was held that in the circumstances sandstone was not

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[1] p.81, Supra at p. 669. Cf., the South African case of New Blue Sky Gold Mining Co. Ltd. v. Marshall 1905. T.S. 363.

[2] [1910] A.C. p. 116.

a 'mineral' within the meaning of a section of a statute. In Caledonian Railway v. Glenbuig Union Fireclay Co., [1] fireclay was held to be a mineral with Loreburn, L.C., declaring: " . . . the court has to find out what the parties must be taken to have bought and sold respectively, remembering that no definition of 'minerals' is attainable . . .".

There appears nothing in the above propositions which would make the principles enunciated especially inapplicable to concessions. As a matter of fact, the cases cited are not concerned with a particular document but with the issue whether a particular mineral was conveyed or not. On the basis of the tests enunciated in these cases, it appears fair to state that it is not every inorganic substance in the subsoil that was conveyed in these concessions.

The latest Mines and Minerals Act, 1969 [2] however retains the same definition of "Mineral" or "Minerals". The difference between the position now and that under the 1912 Mining Proclamation is that State title to minerals is statutory. The Company found itself obliged to effect the transfer of title because of the continued contest against the Company's original acquisition of title to mineral

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[1] [1911] A.C. p. 290.

[2] Cap. 329, Revised Laws. Came into operation on 1/1/1970. See S.I. No. 490 of 1969.

rights. [1]

The position now is that there is a clear separation of title to minerals from title to the land in which they may be found. S.3(1) of the Mines and Minerals Act unqualifiedly vests mineral ownership in the President in the words:

> All rights of ownership in, of searching for, mining and disposing of, minerals, are hereby vested in the President on behalf of the Republic.

This vesting is notwithstanding any land rights a landholder may have. Thus subsection (2) of the same provision amplifies:

> The provisions of subsection (1) shall have effect notwithstanding any right of ownership or otherwise which any person may possess in and to the soil on or under which minerals are found or situated.

Thus the landholder clearly holds land rights less whatever minerals there may be on his land.

During the colonial period, however, whatever the uncertainty as to the validity of the Company's claims to mineral rights, the Company continued to assert its rights and to derive benefits from the same. The Company was thus in a position to exert considerable influence on developments in the land tenure system in order to prevent any

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[1] For a summary of mounting opposition, see P. Slinn, "Commercial Concessions and Politics During the Colonial Period: The Role of the British South Africa Company in Northern Rhodesia 1890-1964", African Affairs, Vol. 70, No. 281, October 1971, pp. 375-377. Cf., Leg. Co. Debates, 13th December 1938, session 3rd-21st December 1938, pp. 116-125; and 22nd-24th March 1948, session 6th-24th March 1948, pp. 366-376 and pp. 430-431. For a detailed account of the final crisis and settlement, see P.E. Slinn, The Northern Rhodesia Mineral Rights Issue, op. cit., Chapter VII particularly pp. 265-266. For the Northern Rhodesia Government's stand on the matter immediately prior to Independence, see Govt. White Paper, The B.S.A. Company's Mineral Royalties in Northern Rhodesia, 1964, Govt. Printer, Lusaka.

diminution of its claims to mineral rights. [1] Thus the Company's influence on land policy did not cease with the surrender of its administrative responsibilities in 1924.

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[1] For the Company's influencial role in the development of the land tenure system, see Part II, pp. 199 et seq., infra.

CHAPTER 2

THE NATURE OF INDIGENOUS RIGHTS IN LAND

For half a century judges and colonial administrators have debated the concept of ownership and the nature of title to land under Customary law. In West, East and Central Africa the debate has continued. We can now examine this subject from the earlier viewpoint of indigenous title and the current Customary law relating to land.

A. Approach of judges and administrators

In the Nyasaland Protectorate of Central Africa in 1901 the question of indigenous title to land had invited judicial comment. In the Kombe case the chief's capacity in land matters attracted the following comments from Nunan, J.[1]

". . . The Chief's jurisdiction, even in the theory, is a purely personal jurisdiction over the natives of his tribe. His proprietary rights in the absence of any special treaty stipulations, are rights in the name of his tribe to existing villages and plantations, and the user of unoccupied lands". His lordship viewed the chief's authority as pertaining more to his subjects than over the lands. Specifically denying that a chief can be conceived as landlord, his lordship concluded: ". . . The Chief is therefore in no sense to be considered the

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1 Cox V. The African Lakes Corporation Ltd. at p.19. Cf., p40 supra.

landlord of the land in which he exercises jurisdiction over the natives of his tribe. Even under the native law of the tribal system he would not have been considered the sole proprietor. . .".

Implicit in this appears to be a recognition that a chief is only one such proprietor amongst many others of his people to whatever rights there may be in land. What these property rights were was a question left in abeyance. Reflecting on the nature of these rights in the two mineral rights cases already discussed[1] Nunan, J., distinguished them from an English fee simple, which emanated from Certificates of Claim as the source of title. Answering the question "What. . . is a Certificate of Claim?" in which was recited a grant of the fee simple from Chiefs, Nunan, J., said:[2] "It cannot be a mere official recognition of the existence of a valid transfer of an estate in fee simple from a native chief or chiefs. An estate in fee simple is an entity peculiar to English law and unlikely to be evolved independently by Kapeni or Chisomba. . .".

His lordship appears to be saying that the fee simple estate conveyed derives from the Certificate of Claim and not from the chiefs. This is so because a fee simple estate is an interest which only exists in English law. Implicit in this acceptance is a denial that such an interest can ever exist under indigenous tenure. The Certificate of Claim however could only be a source of title if the Crown had acquired previously absolute title

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1. Paolucci v. The Commissioner of Mines for the British Central Africa Protectorate and The Crown Prosecutor of the British Central Africa Protectorate v The British Central Africa Co. Ltd.

2. At p. 198.

such as by an Act of State. In the absence of such acquisition a Certificate of Claim cannot purportedly convert an indigenous land interest into an English fee simple.

Nunan, J., had occasion in the case of Supervisor of Native Affairs v. Blantyre and East Africa Ltd., to reconcile this contradiction. He held in this case "that chiefs and headmen acting with the consent of their people . . . have the power to make valid agreements even if the same involve the disposition of freehold rights, easements or profits à prendre in the possession of their tribes or villages". But this capacity was for the limited purposes of conveying interests to private persons which had to be confirmed by certificates of claim and of ceding rights to the Crown by treaty. To deny this capacity, his lordship said, "would be to ignore the facts of local tribal and village law and custom, and would at once raise up the ghosts of long decided legal questions involving the titles not alone of every individual holder under a Certificate of Claim but of the Crown itself as landholder in this country under the various treaties with chiefs and headmen".[1]

Imperial considerations once again distracted his lordship's view, for put simply, the reason advanced was one of expediency. It appears most unlikely that a transfer between indigenous parties of a freehold estate under customary tenure could have

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1 at p. 2.

received his lordship's judicial recognition. Neither has the Court of Appeal for Eastern Africa squarely faced the issue of the nature of such title. Addressing itself to the Crown Prosecutor's argument in the two mineral rights cases discussed above[1] that the chiefs in British Central Africa "were not able to understand ownership to land and therefore could not convey it", the court expressed satisfaction that there was evidence to the contrary warranting a conclusion that title to land could be conveyed. The Court concluded that the treaties, Acts of Cession and Agreements made between the Crown and the various chiefs of the region provided "ample evidence that ownership in land was recognised as among the matters within the comprehension of the Chiefs and people so that white settlers might acquire a title to it under native laws".[2] Relying further on the procedure of enquiry into the land claims, the Court observed: "In addition the Commissioner expressly found in every case that the vendors were the 'sole and only rightful owners of the land' dealt with, and it seems to us to be clear that they were sufficiently civilised to be able to give a good legal title to land".

What this legal title meant was apparently not answered. The Court appears to have treated the matter as a question of fact than of law. Relying on the face value of treaties and certificates of claim the Court readily accepted as a fact that ownership of land as described in these documents was "within

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1 see pp. 42-46 and p. 87 Supra.

2 at p. 47.

the comprehension of the chiefs and people". By holding that certificates of claim merely confirmed that which had already been granted, the Court must have entertained an erroneous assumption that the interest recited in the certificates was the same as that conveyed in the original transfer. It is evident that this was their lordships' impression in that the Court never found it necessary to reconcile its understanding of a title, which could be acquired by white settlers under "native laws" and a fee simple estate confirmed by the Certificates. Thus the conclusion is inescapable that in the Court's view title under "native laws" was the same thing as a fee simple estate.

Needless to say the main reason for this judicial misconception arose from the fact that little thought had previously been given to these jurisprudential issues.

In Re Southern Rhodesia in 1919 some further light was cast on the question of title. Their Lordships expressed their disaproval of importing English notions of property into customary law. It was argued that the grantor chief granted by concession all of whatever he had to grant although he had no knowledge of an estate in fee simple. The advice of the Board rejecting this argument was delivered by Lord Sumner: "Their Lordships cannot accept this argument. As well might it be said that a savage who sold ten bullocks, being the highest number up to which he knew how to count, had thereby sold his whole herd, numbering in fact, many hundreds . . .".[1]

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[1] at pp. 236-237.

As to the nature of the indigenous title to land in Southern Rhodesia, Re Southern Rhodesia came out with conclusions which can be criticised. In defining the ownership of the lands commonly accepted as 'tribal' or 'communal' their Lordships insisted that rights within this description, whatever they exactly were, should belong to the category of rights of private property, "such that upon a conquest it is to be presumed, in the absence of express confiscation or of subsequent expropriatory legislation, that the conqueror respected them and forbore to diminish or modify them". For these private rights to be recognised their Lordships were to be guided by the standard of social organisation of the people in question. Only those within the higher ranks of social organisation were to be entitled to exercise private rights. Where a people were found to be on the lower limit of the scale of social organization (such as the "natives of Southern Rhodesia") such private rights in land were denied and the lands deemed to be at the disposal of the Crown on conquest.

Delivering this test, Lord Sumner declared:[1]

> The estimation of the rights of aboriginal tribes is always inherently difficult. Some tribes are so low in the scales of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or legal ideas of civilized society . . . It would be idle to impute to such people some shadow of the rights known to our law and then to transmute it into the substance of transferable rights of property as we know them.

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[1] at pp. 233-234. More recently in the Australian case of Milirrpum v. Nabolco Pty Ltd. 17 F.L.R.141, Blackburn, J., held that the relationship of the clans of the aboriginal natives of Australia to the land was not recognisable as a right of property. For a review of the Privy Council decisions relating to African land tenure, see pp. 227-233.

This Privy Council perception had certainly a bearing on indigenous title to land in territories north of the Zambezi. If the indigenous people of Southern Rhodesia were held to approximate to the lower limit of the scale, it is even more unlikely that indigenous communities of both Northern Rhodesia and Nyasaland could have been viewed as belonging to the higher limit. With the assumed uniform social organisation of the peoples of Central Africa, no indigenous land rights could be recognised or held to be private rights.

Crown assumption of property rights by conquest could not have arisen in both Nyasaland and Northern Rhodesia. Acquisition of territory in both countries was not based on conquest. Thus had the question presented itself, for instance, as to who between the Crown and the indigenous communities owned the lands of North Eastern Rhodesia which were not ceded by treaty, the Privy Council might well have ruled in favour of the latter.[1] The nature of rights over these lands however would have fallen within the description of Re Southern Rhodesia. This conclusion appears unavoidable because the Privy Council's description is based on the scale of indigenous social organisation and not the mode through which the territory was acquired.

In this regard Re Southern Rhodesia still contributed to the lack of understanding of indigenous title. Instead of looking at property rights as they existed, whatever they were,

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[1] Cf., Cmd. 1273, Second Report, p. 2.

the level of social organization was used as the index to the property rights. Whatever the level of social organization, the proper test should have been, it is submitted, that which the Board reserved to a society on the higher limit of the scale of social organization. In this respect the Board observed by way of contrast between the two scales in social organization: ". . . On the other hand, there are indigenous peoples whose legal conceptions, though differently developed, are hardly less precise than our own. When once they have been studied and understood they are no less enforceable than rights arising under English law".[1]

In the Nigerian case of Amodu Tijani v. Secretary, Southern Nigeria[2] the Privy Council took a marked step forward in the appreciation of title under African land tenure. Avoiding the language of the test applied to Re Southern Rhodesia, Viscount Haldane preceded the Board's elaboration on this perplexing issue with the caution: ". . . in interpreting the native title to land, not only in Southern Rhodesia, but other parts of the British Empire, much caution is essential. There is a tendency, operating at times unconsciously, to render that title conceptually in terms which are appropriate only to systems which have grown under English law. But this tendency has to be held in check closely". With this in mind Viscount Haldane stipulated the general rule, ". . .A very usual form of native title is that of

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1 at p. 234.

2 2 A.C. (1921) p. 399 at pp. 402-403.

usufructuary right, which is a mere qualification of or burden on the radical or final title of the Sovereign where that exists. In such cases the title of the Sovereign is a pure legal estate to which beneficial rights may or may not be attached. . ."[1]

Appraising inter alia the unique case of Southern Nigeria, it was recognised that title, "such as it is, may not be that of the individual . . . . . but may be of a community". Expounding on this community title, it was observed: "Such a community may have the possessory title to the common enjoyment of a usufruct, with customs under which its individual members are admitted to enjoyment, and even to a right of transmitting the individual enjoyment as members by assignment inter vivos or by succession".[2] Notwithstanding the obvious contribution such terms as 'possessory title' and 'usufruct' have on the terminological confusion, this was a major breakthrough in the obstacle of having to deduce title only from the view point of English jurisprudence. In this, Nigeria in particular benefited immensely.

This Privy Council decision clearly spelt out the nature of indigenous title to land. The radical or absolute title in land resided in the Sovereign whoever this was. In this particular case the radical title was vested in the British Crown as a result of cession by the predecessor in title,

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1 at p. 403.

2 at pp. 403-404.

(Docemo, King of Lagos). This title was however throughout qualified by the rights of occupation of indigenous communities. Each member of the community had the right to use the land and this right never became extinguished by virtue of the radical title. On the contrary the collective rights of individuals within a community could be "so complete as to reduce any radical right in the Soveriegn to one which only extends to comparatively limited rights of administrative interferences." However the individual's title will be deduced from the community to which he belonged.

Subsequently in another Privy Council decision, already referred to, Sobhuza v. Miller & Others, Viscount Haldane seized another occasion to endorse the basic tenet of Amodu Tijani's case decided five years previously. Delivering the Board's obiter dictum Viscount Haldane declared:[1]

> . . . The notion of individual ownership is foreign to native ideas. Land belongs to the community and not to the individual. The title of the native community generally takes the form of a usufructuary right, a mere qualification of a burden on the radical or final title of whoever is sovereign . . .

This must by now have become the accepted / view of indigenous title. But while this may well have been a more fitting description of title in Nigeria, there was no adequate knowledge of other parts of Anglophonic Africa to justify the extension of the proposition

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[1] at p. 525.

beyond the Nigerian boundaries. In Re Southern Rhodesia the chance was missed which may have revealed variations in the conception of title. In Nyasaland, Nunan, J., certainly would have been disturbed to learn that the chief as sovereign had the radical or final title which was burdened by beneficial interests of various landholders. Nunan, J., as we have already seen, refused to conceive the chief as a landlord whose jurisdiction as sovereign was purely personal. Again the Privy Council was not presented with this situation for comment.

As for Northern Rhodesia, the issue of title was never accorded any elaborate judicial attention. In 1932, The North Charterland Concession Inquiry,[1] although primarily concerned with the rivalry between the North Charterland Company and the British South Africa Company, the judge found it desirable to preface his findings of fact with a comment on indigenous title. The North Charterland Company called for the inquiry. The Company felt aggrieved that certain clauses in the 1923 Devonshire Agreement could have been inserted without its authority whereby the Crown was authorised to demarcate reserves in its concession area. The Company contested that the British South Africa Company which was a party to this Agreement with the Crown had no authority to act on its behalf. The issue of redress for demarcation of reserves without compensation had been barred in previous judicial proceedings on account of Crown privilege.[2]

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[1] See North Charterland Concession Inquiry Report by Maugham J., 13th July 1932, Colonial No. 73, 1932, at p. 4.

[2] See pp. 220 et seq., infra.

Due to this the North Charterland Company pressed for a public inquiry to resolve, among other things, the substantive issue of the British South Africa Company's authority to enter into the said Agreement. The Colonial Office agreed to this request and set up the inquiry on behalf of the Northern Rhodesia Government.

On indigenous title, Maugham, J., relying on the evidence of two government administrators, agreed with Viscount Haldane's proposition in the Sobhuza case as representing the indigenous title to land in the concession area of the territory. His lordship thus observed: ". . . The evidence given before me . . . proved that the ideas as regards land held by natives in the tract were similar to those explained by Lord Haldane in the Swaziland case . . .". Lord Haldane's text of the obiter dictum, with which his lordship agreed, was then quoted verbatim.

In a memorandum prepared for the inquiry, which succinctly summarises the evidence relied on by his lordship, Mackenzie-Kennedy, Chief Secretary to the Northern Rhodesia Government, who was once a Native Commissioner, gave his impressions of indigenous tenure in the territory, excepting Barotseland.

He states there:[1]

> . . . The land . . . as tribal property, is vested in the chief, to be allotted by him in accordance with the needs of the tribesmen, each one of whom was normally entitled to as much as he could make use of, abandoned lands reverting to the tribe to be re-allotted by the chief or one of his ad hoc nominees, whether sub-chief, clan head or village headman.
> . . . While agricultural lands were allotted to individuals, pastoral tracts were used communally. The cultivator acquired a right to the land against all others so long as he made use of it: the gardens lying fallow could not be occupied by anyone else until definitely abandoned. The stock owner acquired no right as against his fellow villagers over his grazing areas . . .
> . . . Unoccupied and waste lands were held for the tribe and rights to grazing, timber and other forest produce, hunting, and fishing rights, the right to use water and to manufacture salt, the right in fact to all Nature's gifts, were held in common.

This provided some insight as to the nature of indigenous title to land in Northern Rhodesia. One can deduce from Mackenzie-Kennedy's text that the chief has what Allott calls "interests of control"[2] while individual members of the community have beneficial rights. The difficulty which arises, however, is whether this can be equated to what Viscount Haldane said in the Swaziland case of Sobhuza v. Miller & Others. Maugham, J., as we have seen, concluded that indigenous ideas of land tenure in the concession area were similar to Viscount Haldane's proposition. This conclusion can only be accepted, it is submitted, if we were to identify the radical title as residing in the chief. If radical title were the same thing as "interests of control", then there would be no difficulty in

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[1] See enclosure in D. Mackenzie-Kennedy to Green of 16/5/1932. CO 795/36290/32/2. pp. 1-2.

[2] See p. 116, infra

holding that such title vests in the chief. If this were the case, it would then be easy to appreciate that beneficial rights of individuals were what Viscount Haldane called "a mere qualification of a burden on the radical or final title of whoever is sovereign. . ." (who in this situation is the chief). To arrive unequivocally at this conclusion, there appears to be need to inquire further into the juristic relationship between a chief and property rights. That the question of indigenous title was outside the terms of reference of the North Charterland Concession Inquiry, provides adequate excuse for Maugham, J.'s brief comment. But a further probe into the relationship of a chief and land rights remains an assignment of this work to be explored more fully later in the discussion of land under customary law.[1]

Indigenous tenure continued to be an elusive subject but in 1945 attracted formal attention. At this time the possibility of the immediate return of Askaris (African soldiers) from the World War prompted the Northern Rhodesia Government to examine measures of providing land both in the rural and urban areas. Above all it was equally felt that no useful long term decisions affecting land could be taken without an understanding of African land tenure which hitherto had been ignored. A Land Tenure Committee was set up which consisted of three members.[2]

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1 See pp. 114 et seq., infra.

2 See General Notice No. 147 of 1945.
For deliberations of the Committee, see pp. 332 et seq., infra.

S. Gore-Browne, member of the Legislative Council representing African interests, was appointed chairman of the Committee. J.S. Moffat, a government officer, was appointed secretary to the Committee. The third member of the Committee was L.W.G. Eccles, Commissioner for Lands, Mines and Surveys. The Committee was charged in its terms of reference to investigate, inter alia, "the systems of land tenure and inheritance prevailing in the native areas of the Territory, with particular reference to the applicability to the conditions brought about by changes in social, political and economic lives of inhabitants. . .".

The Committee's mandate was ambitious but its report was far from being a painstaking legal document.

In this aspect of its assignment, the Committee reported:[1]

> As far as it is possible to generalise, native land tenure in Northern Rhodesia excluding Barotseland, can be described as communal ownership by the tribe vested in the Chief, coupled with an intensely individual system of land usage. Every individual member of the tribe has the right to as much arable land as he needs for himself and his family, and so long as he is making use of this land he enjoys absolute legal security of tenure.

Discarding the European conception of ownership, the Committee observed: "The European conception of individual ownership of land has no part in the traditional system of African land tenure. . .".

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[1] See Report of the Native Land Tenure Committee, Govt. Printer, Lusaka, 1945, par. 1.

The Committee in its findings appears once more to have emphasized an individual's rights guaranteed by absolute legal security. Thus an individual has the right to use the land, probably so long as he or his heirs want to or until he is excommunicated for some serious offence. In these events his land reverts to the chief for re-allocation. Again the chief has "interests of control". But again the relationship of the chief and the land is not amply defined. In the absence of such elaboration it appears difficult to appreciate fully the nature of a landholder's rights i.e. what limitations can be imposed by the chief, if any?

The individual aspect oftenure seems to have been more clearly described only by White, the government Land Tenure Officer, who conducted a painstaking inquiry in all the provinces of the territory except for Barotseland. After such investigation which commenced in 1956, White gives a summary of his findings emphasizing that land is essentially individually acquired and held.[1]

Thus he recorded:

> Specific land rights are acquired and exercised by individuals. Such land rights are attributes of persons, and they emerge as individualistic rights, except in limited cases where some element of lineage land holding is present.

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[1] See C.M.N. White, "Factors Determining the Content of African Land Tenure Systems in Northern Rhodesia", in African Agrarian Systems, D. Biebuyck (ed.), Oxford University Press, 1963, p. 364. For a full account of the investigations in the seven Provinces, see C.M.N. White, Land Tenure Report No. 1 Tonga, Southern Province; Land Tenure Report No. 2. Central Province; Land Tenure Report No. 3. Eastern Province; Land Tenure Report No. 5, Luapulal Province and Northern Province (Bemba Area); Land Tenure Report No. 6, Ndola Rural District (Lamba); and Land Tenure Report No. 7, North Western Province.

Concluding his observations for the territory, White says:

> . . . Consequently in general the sum total of rights which make up the features of African land tenure in Northern Rhodesia can only be regarded as equivalent to individual tenure.

Enumerating some basic common elements in this individual tenure, he comments on acquisition and security of tenure. On the former, he notes:

> . . . an individual establishes rights by opening up land over which no prior individual has already established rights.

On the latter, he says:

> . . . The rights of an individual once established remain permanent unless the individual transfers them to another, extinguishes them by abdondonment, or terminates them by his own death. Rights over fallow or resting land are therefore normal and regular . . .

A recent United Nations Economic Survey of Zambia has also endorsed these general features. On tribal tenure, it has been observed: "The security of tenure provided under tribal customary laws is almost equivalent to the security provided under freehold. Any individual who establishes his residence in a village can acquire customary rights over land, although nobody can lay claim to land over which another individual has established rights. The rights are permanent unless they are extinguished by abandonment or

by death". On the association of the community with the land, it has been noted with some clarity: "Although land is alleged to be held by the community, there is no control in practice over its allocation and use. Under the tribal system the individual often uses his land until the soil is exhausted, when he lays claim to another vacant area . . .". [1]

It emerges clearly from White's observations that the rights acquired by an individual are rights to use the land exclusively, unless these rights are extinguished by either abandonment, transference to another person or death. White is equally emphatic on an individual's means of deliberate acquisition , perhaps, to dispel any suggestion that any kind of property rights reside in a sovereign such as a chief. This in any event is not necessarily a denial that a sovereign may have "interests of control". White goes further, apparently more than anybody before, to indicate an individual's right of alientation as one way of extinguishing asserted land rights. However there is no indication whether the rights of alienation also grants a power to dispose of the land outside the family or tribe. It can be stated here that the right of alienation in some communities confers the power to dispose of land to persons outside the family and, subject to the requirement of residence, to persons outside the tribe. In other communities, however, the right of alienation is restricted to members of a family. This will be discussed more fully in the following section.

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[1] See Report of the UN/ECA/FAD Economic Survey Mission on the Economic Development of Zambia, Ndola, United Nations, 964, paras. 44 and 46 at p. 59.

B. Land under customary law: a comparison of the Ngoni, Tonga and Luvale.

I Background

(i) The Social Structure

The Ngoni, an offshoot of the Zulu of South Africa, [1] now live in and occupy the Chipata District of the Eastern Province of Zambia. Investigations by the researcher were conducted in four chieftaincies -- Mpezeni, Maguya, Sairi and Nzamane. The current and only available statistics on population are, however, not exact because they do not give an ethnic breakdown and as such can only serve as a rough guide. Chipata District comprising of an area of 1,843,000 hectares has a population of 261,070. The density of population per 1000 hectares is 143. Chipata having an urban population of 13,413 leaves a remainder of 202,657 as the rural population. [2] But of this rural population, not all are Ngoni. Barnes [3] puts the total Ngoni population in 1951 at 60,000 with Allan [4] putting the population density in 1945 at 22 persons to the square mile. A more precise survey by Priestley and Greening [5] in 1954-1955, covering three of the chieftaincies in which this work was conducted, gives a population density of 69.5 per square mile and 134.1 per cultivable square mile.

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[1] For a brief account of Ngoni history, see R. Hall, Zambia, London, 1965, pp. 28-30.

[2] See Census of Population, 1969, op.cit., pp. 9-10.

[3] See J.A. Barnes, "The Fort Jameson Ngoni", in Seven Tribes of British Central Africa, E. Colson & M. Gluckman (ed.), Oxford University Press, 1951, p. 195.

[4] W. Allan, "African Land Usage", Rhodes-Livingstone Journal, 1945, No. iii, p. 14.

[5] See M.J.S.W. Priestley & P. Greening, Ngoni Land Utilisation Survey, 1954-1955, Govt. Printer Lusaka, p. 78. Cf., appendices 3 & 4.

The Tonga inhabit a greater part of the Southern Province of Zambia which is 8,528,000 hectares in extent. Parts of the areas covered in this investigation (Mazabuka, Monze, and Gwemba Districts) comprise a total area of 2,370,000 hectares with a total recorded population of 235,827. [1] Of this approximately 17,205 [2] constitutes the latest urban population estimate, with 218,622 being the rural population. None of these figures, however, reveal an accurate total population of the Tonga as not all residents in these areas are of the Tonga ethnic background. The average population density per 1000 hectares can be put at 103. Colson [3] estimated in 1951 a population density of 137.7 per square mile in more fertile parts such as Mazabuka (Mwanachingwala).

The Luvale are to be found in the Zambezi and Kabompo Districts of the North Western Province of Zambia. The present discussion is however confined to the Luvale of Chavuma, a sub-boma within the Zambezi District. The available statistics show the Zambezi District, an area comprising 1,834,000 hectares, to have a population of 61,324. [4] Of this 4,190 [5] constitutes the latest urban population estimate at Zambezi Boma, with a remainder of about 57,134 as the rural population. But here again this does not reveal the

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[1] See Census of Population 1969, op. cit., p. 9.

[2] See Sample Census of Population, 1974, op. cit., p. 5.

[3] E. Colson, "The Plateau Tonga of Northern Rhodesia", in Seven Tribes of British Central Africa, op. cit., p. 100.

[4] See Census of Population 1969, op. cit., p. 9.

[5] See Sample Census of Population, 1974, op. cit., p. 5.

accurate Luvale population as besides the Luvale, there are the Lunda, Luchazi and Kachokwe residing in the Zambezi District. The population density is given as 33 per 1000 hectares.

Despite the absence of accurate demographic data, given a constant increase in the rate of population, the following factors appear to be common in all areas covered:

(a) the population pressure on habitable land is quite high and

(b) the population density on cultivable land is considerably higher than the overall density.

Of these three ethnic groups, the Ngoni are patrilineal in their social structure while the other two are matrilineal. From these features flow a number of characteristics. Among the Ngoni the father is the basis of the social structure. All his issue become attached to him both in place and social identity. This is reflected in the composition of a Ngoni village. Although not all village residents are related, a man resident in a village will invariably have patrikin in the same village. And this is perpetuated by the incidence of virilocal marriages, where on the marriage of every male member the wife, if from a different village, will invariably be brought over to live at the husband's village. Thus Barnes has observed the existence of clusters of huts within a Ngoni village with the occupants being closely related kinsmen or a large body of dependants of a polygamous marriage growing in size as children grow up and marry. [1] The virilocal feature of the marriage

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[1] See J.A. Barnes, "The Fort Jameson Ngoni", in Seven Tribes of British Central Africa, op. cit., p. 210.

although on the one hand a cohesive factor may also be disruptive in that female members of the patrikin are dispersed to their husbands' villages on marriage.

Uxorilocal marriages, where the man moves to a wife's village, have been noted but are the exception. [1] Notwithstanding the existence of such marriages, patrilineality is in no way affected provided that Ngoni marriage requirements have been satisfied. The father still retains the same identity vis-a-vis his issue.

Although the other two ethnic groups share the similarity of virilocal marriages, the basis of their social cohesion is the matrikin. Matrilineal relatives form a social unit, with the Luvale having a more identifiable and durable lineage as the core of their social organization than the Tonga. Kinsmen among both the Tonga and Luvale derive their identity from a common maternal relative. The Luvale trace their matrikin through geneologies and they are known to be able to trace those as far back as 9 to 17 generations. These maternal relatives so traced form a matrilineage. This lineage structure as a distinct social unit becomes revealed at the local village level in the composition of the village which is basically a grouping of matrilineally related people. White in an analysis of 83 Luvale village shows that 80% of the householders are matrilineal relatives of the village head, the balance accounting for adult sons and daughters of the village head or of his brothers who have not yet

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[1] See C.M.N. White, Land Tenure Report No. 3, op. cit., pp. 8-9.

joined their matrilineal kin because their father is still alive, and a small percentage of patrilateral relatives of the village matrilineage. [1] Within such matrilineage could be found three or four generations of matrilineally related kinsmen. [2]

With such identity of kinsmen, the village is equally a basic corporate unit. The significance of this unit is further enhanced by the permanency of villages which is quite evident from the erection of brick houses with corrugated iron roofs. A good number of villages are known to have been on their present sites for the past thirty years.

The Tonga matrikin on the other hand is not a body corporate exhibiting the lineage vertical relationship. Apart from the mere memory of a common maternal relative, kinsmen do not relate to each other through a geneological source. A common maternal relative suffices without any specificity in the vertical geneological relationship. As a result matrilineal relatives are scattered all over the place, most unknown to each other, under the general coverage of 'basimukowa! Only those identifiable through some overt act of providing bridewealth on the marriage of a kinsman or receiving a share of the same, form the loose core of this social unit. [3] The unknown

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[1] See C.M.N. White, Land Tenure Report No. 7, op. cit., pp. 1-2.

[2] See C.M.N. White, "Factors in the Social Organization of the Luvale", African Studies, Vol. 14, No. 3, 1955, p. 99. For a discussion on social organization, see pp. 95-112. Cf., C.M.N. White, Report on a Survey of African Land Tenure in Northern Rhodesia, District Commissioner's file LAN/11/4, Namwala, Chapter VII.

[3] E. Colson, "The Plateau Tonga of Northern Rhodesia", in Seven Tribes of British Central Africa, op. cit., pp. 128-151. For a background account of the Tonga, see pp. 94-161. Cf., E. Colson, "Modern Political Organization of the Plateau Tonga", African Studies, op. cit., 1948, pp. 85-98 particularly pp. 86-91.

disappear into an even more vague category of a clan [1] also known as "mukowa". But clan membership turns out to be nothing more than a supposed matrilineal relation based on the bearing of a common clan name, i.e. the erland totem. This relationship is not of any significance apart from being a common mark within various groups of the Tonga ethnic society.

The matrilineal kinship of any practical significance is the one indicated where kinsmen have actually been identified within a span of life. But the looseness of this entity is further aggravated by its potential physical displacement. The village need not necessarily consist of matrilineal kinsmen. [2] There are no rules determining residence in Tongaland although it often occurs that the personality and character of a headman attract followers mainly matrikinsmen, their spouses and children. Except for the valley Tonga in Gwembe where villages are relatively concentrated and close to each other, the Plateau Tonga villages are scattered and dispersed.

As for political organization, of the three, only the Ngoni are a politically centralised people with Mpezeni their paramount chief at the apex of the political pyramid. The descending order of political authority representative in sub-chieftaincies spread over the

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[1] For definition of "Clan" and "Lineage", see C.K. Meek, "A Note on Primitive Systems of Land Holding and on Methods of Investigations", J.A.A. Vol. III, No. 1, 1951, p. 12.

[2] See E. Colson, The Plateau Tonga of Northern Rhodesia, Manchester University Press, 1962, Chapter VI.

country is subordinate to the paramount chief. Although more pronounced in pre-conquest days, this political hierarchy is still retained albeit modified and for a purpose no longer desirable. Being a military state the territorial polity knew no internal boundaries. The political structure reflected more on coordinated segmentary regiments, each under the authority of a person subordinate to the paramount chief. [1] Residence in this set up depended on allegiance to the paramount chief.

Although both the Luvale and Tonga have chiefs, they have never been known to be politically centralised. The Tonga in particular are essentially acepholous for before the advent of the colonial administration, they had no chiefs. Chieftaincy is a colonial institution.

(ii) Preliminary considerations

In a discussion of this kind conceptual issues relating to the terms law and ownership inevitably recur and hence the need to examine them first in the context of customary law. Ownership as a legal concept varies from system to system. We must therefore set out its primary incidents within the field of customary land tenure. In addition definition of law helps to appreciate which incidents of ownership can be regarded as legal.

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[1] For Ngoni political organization in pre-conquest days, see J.A. Barnes, Politics in a Changing Society, Manchester University Press, 1967, Chapter 2, pp. 29-63.

(a) What is law?

In a work which purports to be on land law, it is important to determine what is law and thereby distinguish it from mere practice. It is not here intended to be unduly restricted by the strict positivist theory of law as the command of the sovereign. In this is not a denial that enforcement (coercion) is necessary to the obedience of the law. Although enforcement is the criterion adopted in this work for the existence of law, the existence of a political sovereign as evidenced in organised and systematic institutions of enforcement is denied as being necessary. Any form of arbitral process, even if it falls short of the modern idea of a judicial institution, suffices to indicate what are enforceable rights.

In this we can only but join in Allott's plea that the presence or absence of judicial institutions as understood in a modern state should not be the criterion upon which the existence of law should be determined. [1] Law does exist (at least among the Akan it did exist) he argues, with the bare existence of arbitral institutions which might not be equated to courts. In arriving at this conclusion he insists that the existence or non-existence of a sovereign is not necessary. In line with this theme, what is here being urged is that, whatever any arbitral process in areas under investigation regards as an enforceable right, is law. Recognition of such rights can emerge from such arbitrations as at village, clan or family level. If such recognition emerges from a local court, which is a duly constituted judicial institution, the task of identifying enforceable rights is even made easier. The only limitation in these courts, however, is

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[1] See A.N. Allott, "Customary Law of the Akan Peoples", African Studies, Vol. 12, 1953, pp. 26-29.

that not too many cases involving land disputes ever reach litigation in open court.

The practical difficulty in what is being urged still remains as how to determine or deduce what are enforceable rights from the various ethnic arbitral processes. This becomes a problem of methodology in a research undertaking like the present investigation. In this work the attempt to identify enforceable rights has been resolved by relying on what people well versed in customary law say is the legal right in any situation arising or likely to arise from a dispute. In so far as their restatements may involve situations on which no known arbitration has taken place, their pronouncements are nothing more than what would most likely be enforced in the event of dispute. This is a similar situation encountered by Schapera in his ascertainment of Tswana law and custom. [1] In the absence of what courts have said Schapera suggests -- "All we can do in such cases is to rely upon probability, for it is reasonably possible to forecast, from the nature of the rule, whether the courts will enforce it or not". He of course acknowledges the weakness of this approach in that "it possibly means the inclusion of some rules the courts actually will not enforce if put to the test . . .". And to this defect may be added Allott's comment : ". . . making law what the courts are likely to enforce, merely postpones the day of decision, or hands it over to the researcher, who becomes a sort of law giver". [2]

This work attempts to mitigate these flaws by relying on

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[1] See I. Schapera, A Handbook of Tswana Law and Custom, (2nd ed.), Oxford University Press, 1955, p. 38.

[2] See A.N. Allott, New Essays in African Law, London, 1970, p. 148.

carefully constituted local panels [1] of knowledgeable persons whose expertise derives from applying customary law both in the traditional context (such as chiefs and headmen) and in modern local courts, and those intimately affected and regulated by customary law in their day to day life. Each panel was selected from a number of villages within the jurisdiction of a local court, hence questions framed and put to it were in part based from perusal of the local court case records. Questions were made as practical as possible so as to minimise the risks of speculation divorcing the propositions of law from the real nature of customary law. This has the added advantage of gauging the similarity of the law as applied by customary courts and practised by the people concerned. [2]

Verification of the panel derived information was in part based on similarities and dissimilarities in the versions of the various panels in any given area. Similarities tended to enhance the most likely proposition while irreconcilable dissimilarities tended to suggest the marked local variations. Although a well composed panel addressed to more practical questions can achieve the desired objective (in fact this has been proved successful in the Restatement of African Law Project established at the School of Oriental and African Studies),[3]

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[1] For samples and notes on the composition of these panels, see Appendix 6. For areas investigated, see map at p.648

[2] For the risk of concentrating on stated judicial rules without consulting practice, see Ideas and Procedures in African Customary Law, op. cit., pp. 11-12.

[3] For an instance of the use of the Panel Method in the Restatement of African Law Project, see N.N. Rubin, "Matrimonial Law Among the Bali of West Cameroon: A Restatement", [1970] J.A.L. Vol. XIV, No. 2, pp. 69 et seq.

the danger of variation between what is said to be done and what is actually done cannot be entirely overlooked. [1] To gauge the versions of panels in light of current practice, random samples of how land has actually been acquired in individual cases were taken. Where these samples do not adequately disclose the current trends in land acquisition, White's findings are primarily drawn in for a fuller appreciation of the situation.

(b) Ownership of land

It appears well settled now that ownership as a legal concept cannot be denied of any legal system by virtue alone that this system differs from the more refined and established legal systems. Indeed even the proponents of a liberal view of ownership such as Honore, who seek to identify the existence of the concept by enumerating the standard incidents of ownership, still concede that the absence of any one or more of such incidents in a given legal system need not necessarily suggest that there is no 'modified version of ownership, either of a primitive or sophisticated sort'. [2]

Gluckman, [3] summing up what can be regarded as the general

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[1] For a critique of the panel method and a suggested combination of this method with other means, see S. Poulter, "An Essay on African Customary Law Research Techniques: Some Experiences from Lesotho", Journal of Southern African Studies, Vol. 1, No, 2, April 1975, pp. 181-193. For a suggested case sample to supplement the panel method as a way of overcoming the gap created by absence of litigation involving land disputes in Zambia, see G.M.N. White, "Research in Zambian Law", a review article, African Social Research, No. 19, 1974, pp. 751-6.

[2] See A.M. Honore, "Ownership", in Oxford Essays in Jurisprudence, A.G. Guest (ed.), Oxford University Press, 1961, pp. 112-113. Cf., S.N.C. Obi, The Ibo Law of Property, London, 1963, pp. 42-43.

[3] See M. Gluckman, "African Land Tenure", Rhodes-Livingstone Journal No. iii, June 1945, pp. 1-2. Cf., M. Gluckman, "Studies in African Land Tenure", African Studies, Vol. 3, 1944, pp. 18-19.

consensus in regard to the concept of ownership in African land tenure, first postulates what ownership consists of:

> In approaching the problem of what is better called tribal tenure . . . we must bear in mind that what a person owns is a right in or over a thing or piece of land, rather than the thing or land itself . . .

He continued:

> In describing systems of African land tenure it is therefore necessary to describe the right which each social group, or each social personality, has in land . . .

The assignment hence is merely one of identifying the person or persons, corporate or incorporate, and the interest in land claimed. Bentsi-Enchill asks in this regard "Who holds what interest in what land?" [1]

Our task in this examination is therefore an identification of the appropriate land controlling or owning person, group or authority, if any, and that type of interest with which land is attributed.

The concept land ownership under Zambian customary laws is often blurred with loose descriptions such as the chief or headman owns the land or the headman allocates the land. [2] Thus it has been

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[1] See K. Bentsi-Enchill, "Do African Systems of Land Tenure Require a Special Terminology?", J.A.L. [1965] Vol. 9, No. 2, p. 116.

[2] See "African Land Tenure in Northern Rhodesia" enclosure in G. Clay (Provincial Commissioner) to all District Commissioners of 30/7/1953 in District Commissioner's file LAN/11/4, Namwala. Cf., C.M.N. White, "Terminological Confusion in African Land Tenure", J.A.A. Vol. X, No. 3, July 1958, p. 125; E.W. Smith & A.M. Dale, Ila Speaking Peoples of Northern Rhodesia, Macmillan, London, 1920, Chapter XV; and C. Gouldsbury, "Notes on the Customary Law of the Awemba and Kindred Tribes", Journal of African Society, Vol. XIV, No. LVI, 1914-1915, p. 377.

said of the Ngoni "All rights in land in theory belong to the paramount chiefs". [1] It has equally been said of the headman "In the villages, distribution, by way of covering approval, is undertaken by the Headman . . .". [2] Such terminology ought to be treated with caution. The headman being a traditional leader of the people often has so many ill-defined functions that might make him look like a landlord. This is more so in those functions with an apparent relation to land holding. Thus when a village headman is consulted by a village resident before cultivating land, the consultation creates a prima facie impression that the headman is the owner of land.

It is important in identifying the land owning unit or entity to ascertain the exact legal import of a headman's or chief's status vis-a-vis the ownership of rights. In this we may very well adopt Allott's distinction between "interests of benefit" and "interests of control". [3] The former pertains to the enjoyment of rights in land and the latter to the regulation of these rights. Thus the headman or chief may impose regulations in the acquisition or use of land but this does not necessarily entail a beneficial interest in the land. Neither the headman nor the chief can claim to have rights over land which they could use or exercise to their individual benefit by virtue only of their control functions.

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[1] See M.J.S.W. Priestley and P. Greening, Ngoni Land Utilisation Survey 1954-1955, op. cit., p. 22.

[2] See C.G. Bradley (District Commissioner, Fort Jameson), Customary Law as regards Native Land Tenure, 1938, District Note Book, NAZ/KDG5/1/Vol. 5.

[3] See A.N. Allott, "Theoretical and Practical Limitations to Registration of Title in Tropical Africa", in Seminar on Problems of Land Tenure in African Development, Afrika-Studiecentrum, Leiden, 1971, p. 3.

Gluckman, giving his impression of land ownership in parts of Zambia including Tongaland, suggests that land holding takes the pattern of a graduated hierarchy of estates [1] (later amended to a series of estates) [2] whereby descending estates are derivative from and subordinate to previous estates. Thus he saw a primary estate from which derived a secondary estate and hence a tertiary estate at the bottom of which is an estate of production. White on the other hand has quite plainly refuted the existence of Gluckman's hierarchy in all areas of the country except among the Lozi in Western Province, where he did not undertake any investigation. Commenting specifically on the role of the Tonga headman to dispel any hierarchy of estates theory, White says: [3]

> Here we have no hierarchy of estates; the Tonga had no traditional authorities to allocate land in any case, and the Tonga headman of a village does not allocate land to his villagers, and his only participation in the acquisition of land is to provide information on whether or not existing rights are already enjoyed by an individual in a piece of land which another wishes to acquire.

In his findings on the Ngoni, Tonga and Luvale, among others, White did not discover a political superior-chief or headman, who had

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[1] See M. Gluckman, The Ideas in Barotse Jurisprudence, Manchester University Press, 1965, Chapter 5.

[2] See Ideas and Procedures in African Customary Law, M. Gluckman, (ed.), Oxford University Press, 1969, p. 57.

[3] See C.M.N. White, "Terminological Confusion in African Land Tenure", J.A.A. op. cit., p. 125.

any powers of a grantor retaining a reversionary interest. [1] On the Ngoni political centralism he notes: [2] "Although there is such a strong sense of centralised political control among the Ngoni, this does not affect the allocation of land, and land is not allocated either to villages or individuals by any authority . . .". With regard to the Tonga White's view is supported by the social anthropologist Colson whose works also disclose no relationship between a political superior and land ownership. [3] Barnes, writing on the Ngoni, also corroborates this. Although he does not specifically dwell on the relationship of political authority and land allocation, he does not note any land acquisition besides individual clearing of unclaimed virgin bush without any resort to a headman's or chief's

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[1] See C.M.N. White, "A Survey of African Land Tenure in Northern Rhodesia", J.A.A. Vol. 11, No. 4, p. 174. Cf., C.M.N. White, Land Tenure Report No. 1, op. cit., p. 4; and "Land Tenure" in the Report of the Rural Economic Development Working Party, Govt. Printer, Lusaka, 1961, pp. 122-123.

[2] See C.M.N. White, Land Tenure Report No, 3. op. cit., p. 5.

[3] See E. Colson, "The Plateau Tonga of Northern Rhodesia", in Seven Tribes of British Central Africa, op. cit., pp. 119-120. On the Valley Tonga prior to resettlement, see E. Colson, The Gwembe Tonga, Manchester University Press, 1960, pp. 82-87 particularly p. 83; and E. Colson, "Land Rights and Land Use among the Valley Tonga of the Rhodesian Federation", in African Agragrian Systems, D. Biebuyck (ed.), I.A.I., 1960, p. 141. For the post resettlement period in the retention of the same land laws not recognising the chief or headman as a landowning authority, see E. Colson, "Land Law and Land Holdings Among the Valley Tonga of Zambia", South-western Journal of Anthropology, Vol. 22, No. 1, Spring 1966, p. 3.

permission. [1]

In so far as White's denial of the existence of a land allocating authority can be qualified as meaning that neither the chief nor headman has "interests of benefit", it must be accepted as being more accurate than Gluckman's hierarchy or series of estates viewpoint. It may well be that Gluckman equated inadvertently "interests of control" at various stages to ownership of rights. Such a graduated hierarchy or series of estates to be in existence, there would certainly have to be a land owning authority which would have to make an initial grant, i.e. secondary estate, without divesting itself of all proprietary rights. In a grand total sample of 1208 taken in all three areas covered under this investigation in 305 cases unclaimed virgin land was initially acquired by the present landholder without any specific grant or allocation from any person or authority. In the 20 cases where permission to cultivate particular parcels was given by the headman, the latter was not acting as a land-owning authority. [2]

But even in instances of private grants between persons where one surrendered all his interests to another by transfer of the land, there was no single instance encountered from which the inference could be drawn that the residual allodial title vested in the original grantor entitling this grantor to a reversion on the extinction of

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[1] See J.A. Barnes, "The Fort Jameson Ngoni", in Seven Tribes of British Central Africa, op. cit., p. 211.

[2] See Appendix 2, figs. i-iii.

the grantee's interests. [1] The test of a reversionary interest appears very necessary to sustain a theory such as that advanced by Gluckman. A descending interest being derivative in nature must at one stage revert to the granting estate. One such instance when a reversionary interest can be shown to be in existence is when the landholder abandons his land rights. Indeed Asante observes of stool land in Ghana that the recurrence of reversion of abandoned land, or land for which a deceased holder left no successors, to the stool enhanced the conclusion that the stool had the allodium with the subject merely having a beneficial right of user. [2]

Except for the Luvale, in a situation of abandoned land, both among the Ngoni and Tonga the land seems to revert to a pool of unclaimed land and not to any landowning authority. Halooba v. Headman Hingombe [3] a case involving Tonga parties shows how unlikely a reversion is. The plaintiff in this case left his land vacant when living in town. On his way back he found the defendant headman cultivating the same land without his permission. The plaintiff demanded that the defendant headman vacate his land. The defendant however resisted the demand insisting that it was his land. Although it is not clear from the court record what the defendant's ground of insistence was, it appears that his claim could only have rested on a claim to a reversionary interest. In upholding the plaintiff's claim the court

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[1] For the number of such grants, see Appendix 4, figs. i-iii.

[2] See S.K.B. Asante, "Interests in Land in the Customary Law of Ghana -- A New Appraisal", U.G.L.J., Vol. VI, 1969, pp. 107-108.

[3] In the Siamusonde Local Court, "B" Grade, Case No. 19 of 1975 (unreported).

bluntly put it that the headman had no kind of ownership whatsoever in the land that belonged to an individual village resident.

In Mwindwa's[1] case which came before the High Court the court did not take the opportunity to settle the question of whether a reversionary interest can ever be retained by the headman. In this case the plaintiff was claiming, inter alia, for an injunction restraining the defendant headman from continued ploughing of his land. The defendant headman alleged that since the plaintiff left the village on his own accord, the land, automatically reverted to him (the headman) who was entitled to allocate it to others or to possess it himself. The Court finding abandonment of the land not proved granted the injunction sought. On the more fundamental issue of the alleged reversionary interest, the Court merely confined its observations to the fact that the headman took the land to himself when there were settlers who required land. This case is, however, noteworthy for the contradictory evidence that was adduced in the matter of a reversionary interest.

The defendant's version was supported by one of the assessors called by the Court who cared to express opinion on the matter. This assessor said: [2]

> . . . When a man moves from a village the land he was ploughing or the land he was given to settle (on) . . . remains the property of the headman. It is the headman who is going to be approached to allocate land.

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[1] Discussed in Chapter 7 with regard to the jurisdiction of the High Court to administer customary law. (See p. 424), infra.

[2] at p. 6.

Chief Ufwenuka, who although not called as a witness by the Court but was treated as a man well versed in the relevant customary law, pointed out that when a headman allocates land it is not his land as such to give. [1] Of these two opinions it is suggested that Chief Ufwenuka's expression is preferable. The assessor's opinion draws apparently no distinction between the Headman's control functions over land ownership of the same. To the extent therefore that the assessor's statement in referring to the land as the "property of the headman" might attribute a right of benefit to the headman, it is not an accurate proposition of the customary law.

We may therefore conclude that in the areas under discussion neither the chief nor the headman is a land owning authority from whom all estates are derived. And indeed there is no other land owning authority such as would justify the view that ownership of land involves a descending series of estates. Hence when one acquires land what is obtained is not a lesser interest in the estate subject to some other superior interest. The case of Namangoma v. Chongo [2] involving Tonga litigants supports this proposition. In this case the plaintiff's claim was that the land in issue was his as he obtained it from his deceased brother. The latter was given the land by the defendant's father, which was the basis of the defendant's counter claim. The defendant contended that by virtue of his relationship to the original grantor he still retained an interest to cultivate the

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[1] at p. 3.

[2] In the Mwanachingwala Local Court, "A" Grade, Case No. 10508 of 1974 (unreported). Cf., the court's recognition of a land-holder's rights in a boundary dispute case of Makando v. Chali. In the Katimba Local Court, "B" Grade, Case No. 170 of 1974 (unreported).

same land. This argument would have been sound if what the original grantor gave away was a lesser interest than that being claimed by the plaintiff. The court had no difficulties in accepting the plaintiff's title although it considered it equitable to have regard to the relationship between the parties and ordered a partition of the garden between the two.

It must be emphasised however that the absence of an ethnic or political land owning authority does not mean that neither the chief nor headman has any administrative and control functions over land within his jurisdiction. Thus there are instances where a headman may withhold permission to cultivate a piece of land. These include: where the land involved falls within a grazing area, or is part of a bush from which firewood is collected, or indeed vacant land which still has an owner. All these lands fall within the headman's sphere of control -- "interests of control".

However, the insistence of political or ethnic authorities such as chiefs and headmen that they own land has reportedly resulted in some actual allocations and dispossession in parts of the Southern Province. [1] This introduces a new feature in the customary land tenure which calls for recognition or disapproval of that purported land owning authority. Customary law not being static, it can be argued, ought to adapt to

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[1] See C.M.N. White, Land Tenure Report No. 1, op. cit., p. 2. Compare this with Banda v. Headman Mukanile, a case arising from Chipata where the defendant headman totally refrained from pleading any special land rights attaching to his office on an allegation by the plaintiff that he was being refused further extension of his field. In the Nzamane Old Local Court, "B" Grade, Case No. 65 of 1974 (unreported).

changing circumstances including those of a political nature. It is however as well to recall the very basis of validity for the existence of a custom -- habitual obedience by those subject to it. The Privy Council dictum in Eleko v. Government of Nigeria [1] re-emphasizes this -- "It is the assent of the native community that gives custom its validity".

Thus unless it can be shown that allocation and dispossession of land is fortified by established usage, the purported ownership by these authorities is inconsistent with customary law and unrecognised. To put it more favourably from the point of view of a landholder, it can with confidence be asserted that a person who acquires land independently of an ethnic authority obtains good title even if subsequently challenged by such authority.

Although it will have been gathered that the maximum possible interest in land, to put such land to any individual use, can vest in a particular individual, this title to land does not necessarily deny the existence of other concurrent interests. In this regard the Luvale provide a remarkable contrast from both the Ngoni and Tonga. The Luvale lineage has a unique claim to any of the land in the occupation of a lineage member. A parcel of land although individually acquired cannot among the Luvale be disposed of outside the circle of relatives, and if disposed of to an outsider, the lineage (effective members being the matrikin resident in the

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[1] [1931] A.C. 662 at p. 673.

village) has a right to dispossess such outsider of the land.

A Luvale resident in a village can clear and open virgin bush over which there is no previous claim and hence assert land rights over that parcel of land. Having so acquired the land he can put it to his individual use and vis-a-vis non-lineage members he is the proprietor notwithstanding his temporary absence from the village. [1] In the case of Samaleka v. Mukangwe [2] the court had occasion to recognise unequivocally the plaintiff's first right of cultivation over the defendant's subsequent assertion of a similar right.

Notwithstanding such apparent individual ownership, the Luvale assert that land acquired by an individual is 'family property' belonging not only to the landholder but to the entire range of his relatives resident in the village. What is meant by this is that once an original landholder's interests in the land become extinct, more commonly on death or indeed abandonment, the land reverts to the lineage from within which an individual lineage member may assume effective occupation and thus own all the previous rights. The right of dispossession is a power intended to preserve and protect a contingent future interest in a given parcel of land for any relative within the lineage of relatives.

The prohibition of transfers of land outside the lineage is apparently supported by a sample of grants of land which are

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[1] See Makina v. Chisengo. In the Chavuma Local Court, "A" Grade, Case No. 155 of 1973 (unreported).

[2] In the Chavuma Local Court, "A" Grade, Case No. 96 of 1973 (unreported).

exclusively between relatives -- both patrikin and matrikin -- within a village. In a total sample taken of 382 gardens, all 52 grants were between relatives. [1] White in his fieldwork among the Luvale at Chavuma records only 10 cases of transfers in a sample of 23 gardens and all were between relatives with one to a patrikin and the rest to matrikins. Commenting on the restriction of transfers to outsiders, he says: ". . . The nature of Luvale village structure naturally operates to limit the frequency of transfers of land to others than members of the same lineage". [2] It is worth noting that while White acknowledges such restrictions, he does not go all the way to suggest that they are prescriptive. He does not however expound further on the legal significance of the restrictions.

The existence of redeemable sales such as Simmance has termed "redeemable purchase" among the Kikuyu in Kenya [3] could have enhanced the Luvale lineage claim. A redeemable sale involves the sale of land for a consideration which on being repaid by the seller to the purchaser at a future date entitles the seller to repossess his land. Such a concept intended to retain land for the lineage when need arises was not and has never been detected among the Luvale.

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[1] See Appendix 4, fig. iii.

[2] See C.M.N. White, Land Tenure Report No. 7, op. cit., p. 11. Cf., C.M.N. White, "Factors Determining the Content of African Land Tenure Systems in Northern Rhodesia", in African Agrarian Systems, op. cit., pp. 369-370.

[3] See A.J.F. Simmance, "Land Redemption Among the Fort Hall Kikuyu", [1961] J.A.L. Vol. 5, No. 2, pp. 75 et seq.

But even granted de facto transfers outside the lineage as indeed will be shown in the case of sales, this, it is submitted, is not fatal to the assertion of the existence of lineage property. If the lineage in such cases of transfer acquiesces or indeed omits to enforce its claim, the lineage claim does not become non-existent in all situations of transfer.

In examining this aspect of Luvale land tenure it might be useful to draw comparisons with the West African family property concept. The fact that the West African family is more definite and identifiable, such as a father's immediate children, [1] than the Luvale lineage need not detain us if only it can be accepted that the term 'family' [2] is relative connoting a group of persons related to one another in any particular way. What is important in this analogy is the means by which family property does arise, who the intended beneficial owners are, and what the nature of the property interest is.

In West Africa, family property often arises on the death when the deceased's intestate estate devolves on all the surviving children in undivided shares. [3] Once this property has so devolved no individual beneficiary can have dealings in such property inconsistent with the joint interests of others. Thus any one individual beneficiary cannot dispose of any share of the family property unilaterally

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[1] For the Nigerian family, see B.O. Nwabueze, Nigerian Land Law, Nwamife Publishers, Enugu, 1972, p. 35. Note that it is only recently that the term family is being confined to an individual's children and grandchildren.

[2] For definition of family, see C.K. Meek, "A Note on Primitive Systems of Land Holding and on Methods of Investigations", J.A.A., op. cit., p. 13.

[3] See T.O. Elias, Nigerian Land Law, op. cit., p. 117

without the consent of others. It is important to note that disposition is not prohibited or restricted to any group of persons. What is needed in any kind of alienation is the joint consent of all members of the family. Death among the Luvale is also such an instance on which land may devolve on a specific individual lineage member (deceased's heir), failing which the land reverts to the lineage (that is if all lineage members already have land and have no immediate need for this land). In so far as on devolution the land does not vest in undivided shares on more than one beneficiary, there is a breakdown in the analogy distinguishing the Luvale position from the concept of a joint family property.

There are, however, a number of similarities. The consent factor in alienating family property in West Africa shares a resemblance with the restriction to transfer land to any non-relative amongst the Luvale. The power to restrain a lineage member in divesting property from the control of the lineage has in it, it is submitted, an implicit and corresponding power that with the consent of lineage members such property can be transferred. It is of course true that there is no evidence of such power having been exercised, but should consent of the lineage be obtained in any such transfer, it does not appear that such a transaction could fail to transfer an absolute interest purported to be transferred. The lineage will be giving all that it has to give. Even in West Africa it can be said that family consent in the disposal of family property has been exercised due to the need for land alienation. If such need were not recognised, it is equally conceivable that the family would have power of granting consent although not actually exercised.

Another point of resemblance is the fact that even in West Africa joint ownership of family property does not necessarily entail joint enjoyment or exercise of a property interest such as manifested in joint exploitation of land. While a beneficiary may have an interest in the family property, the actual physical exercise of a land interest might be at the disposal of another. [1] This appears to be the case with the Luvale where an individual lineage member exercises all the rights and interests in the land with only a reversion still remaining in the lineage. The actual physical possession of a given parcel of land with the attendant enjoyment of rights and interests may pass from one to another member of kinsmen but the reversionary interest still subsists in the lineage. It must however be conceded that this is merely an apparent similarity without any corresponding legal connotations. Thus, in the West African sense, although the actual exercise of a land interest may be at the instance of one, the vesting of title in such property takes effect at the same time on all the beneficiaries. The type of interest involved here does not arise at some future date and is not contingent upon the extinction of one beneficiary's undivided share if ever this is at all possible. As for the Luvale the reversion is necessarily a future interest and does not vest immediately and concurrently in the lineage and any possible beneficiary is unascertainable until after the event of the reversion. If concurrent and immediate vesting is the essential criterion in the creation of family property, then this aspect of Luvale tenure cannot be regarded as such property.

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[1] In the case of occupying a family house, see Ijale v. Lawal 1967 N.M.L.R. 155 (S.C.N.).

It is however possible to view the Luvale lineage property as a variant of the West African concept without necessarily derogating from it. It may well be suggested that the exercise of a right of property can be either immediate or successive by all entitled. In either event the asset still remains family property because its utilisation is at the instance of a particular class of persons. The indivisibility of the joint interest where the vesting is immediate, is merely one mode of effecting this utilisation.

The import of ownership under Luvale land tenure can further be examined by looking at the aspect of the physical acquisition of land by an individual. As has been noted already, an individual village resident amont the Luvale is free with his own labour to clear and open a virgin bush. In the West African sense, land so obtained is self-acquired property which falls outside the restrictions imposed on family property. Thus a landholder who has self-acquired land has the freedom of alienating his land to anyone and in any manner. If land so acquired among the Luvale were to be regarded as self-acquired property, then it could not be family property by the West African analogy. But even in West Africa, however, there are instances where self-acquired property has been deemed or presumed to be family property. The intention of the acquirer to create family property and provision of auxiliary services with the assistance of other members of the family in the acquisition or creation of property have been regarded as such circumstances warranting the presumption.

Posing a situation where one builds a house on communal land,

Nwabueze remarks -- "Here it is relevant to consider whether the builder intended the house as his own private residence or whether he meant it to be a family house for himself and his brothers. If the former, then the house belongs to the builder individually . . .".[1] Restating the Nigerian land law as to intent in this regard, Nwabueze concludes [2] --

> If . . . the circumstances indicate that the house, although built by a single member who happens to be wealthier than his brothers or kin, is meant to provide a home for the family, then it is family property.

In Ghana in the building of a house it has been held that "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 a family house". [3] These two propositions of land tenure in West Africa may cast some light on this particular aspect of Luvale land tenure. Provision of labour on the part of relatives once one amongst them is opening a field is not at all unusual in a Luvale community. This ,however, does not appear to be an entirely satisfactory explanation of the concept of Luvale lineage property for on the other hand instances are not unknown where a man clearing a bush does so without any manual assistance from his kin. Despite this, lineage control over alienation extends to this type of land. Intention on the part of the landholder that the land be lineage property appears to be a more sound basis upon which

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[1] See B.O. Nwabueze, Nigerian Land Law, op. cit., p. 46.

[2] Ibid., p. 47.

[3] Cadjoe v. Kwatchey (1935), 2 W.A.C.A. 371 (Ghana).

to found the kins' assertion of having a proprietary interest in the same land. The intention is to be inferred from the landholder's submission to lead a village life in the village in which his kin also reside. This life is not independent of other family members but interdependent creating a coherent well-knitted social unit of individuals related to each other. This submission to a village community of relatives entails a joint assumption of privileges, rights and liabilities pertaining to all kinsmen. Hence acquisition of an asset is a contribution to the lineage pool of assets to which one is ipso facto entitled to enjoyment, but not to the extent of divesting the asset from potential lineage claim.

It is significant to note that restrictions on land transfer among the Luvale only apply to that land which falls within the village precincts. Thus if one acquires land outside any village no restrictions are imposed on his right of ownership. He can do to this land whatever he desires to do beneficially or wastefully. Indeed land in this case can be alienated to anyone and in any manner. It may here be added that restrictions on land transfers on the one hand and the absence of restrictions on the other apply both to crop fields as well as any form of permanent structure erected on the land such as a dwelling house. The absence of restrictions in the other case, it is submitted, can only be founded on the intention of one not to have that land which he has acquired or a house that he has built to be lineage property. This intention is manifest on the part of one divorcing himself from the village community life of relatives. In so doing one effectively ousts the

lineage monopoly and prerogative over what would otherwise be lineage property. [1]

Thus the Luvale lineage property can be viewed as a kind of family property showing some corresponding basic features of such property as conceived in West Africa. This is revealed in the context of the village social corporate unit of relatives. Where there is joint provision of labour in the acquisition, this may be a factor to be relied on in identifying the acquired object -- land, as lineage (family) property. Where such is lacking, submission to the said corporate unit is a sufficient index of intent that what might otherwise have been self-acquired property is lineage property.

The alternative view of looking at this type of tenure is to regard the land as individually owned with restrictions imposed at the instance of the lineage in the manner it is to be alienated. Thus it has been observed of the Sonjo in Tanzania (mainland) that although cultivated land is individually owned, transfers from owner to owner can only be made subject to specified conditions under which the landholder does not permanently part with his rights so as to retain the land for future lineage needs as new generations come to maturity. Under such restrictions an original owner can sell the land while retaining the option to buy it back for the same price that he received

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[1] It has been observed of the Shambala of Tanzania that one's alienation from a family and hence the lineage puts one in a position to assert individual and exclusive rights to self-acquired land. See E.V. Winans, "The Shambala Family", in The Family Estate in Africa, R.F. Gray & P.H. Gulliver (ed.), London, 1964, p. 50.

for it. [1] This is in fact similar to Simance's concept of "redeemable purchase". These restrictions, however, appear distinguishable from the Luvale position which apparently enforces by sanction that no transfers outside the lineage should ever take place. This strongly suggests a property interest of the lineage. Among the Sonjo, lineage members such as sons appear to have no enforceable rights against a land-owning father who in theory can deny them any prospective share in his land.

Thus Gray observes the absence of any legal rights in the sons with regard to the father's land when he says: "It is not wholly satisfactory to say that the sons have rights to this land and that the father has an obligation to provide it, for there is not legal procedure to which they can have recourse for securing their claims". [2] Hence if the father decided to part with his land to an outsider, sons would have no enforceable right to reclaim the land. The Shambala, also of mainland Tanzania, appear to have taken the point further as Winans notes that "land pioneered by a man appears unencumbered by lineage rights and is thus open to alienations without lineage permission". This recognition appears unequivocal as he further observes that chiefs and their councils have refused to nullify any inter-vivos transactions over such land to outside the lineage such as characterised in the image of the father. [3]

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[1] See R.F. Gray, "Sonjo Lineage Structure and Property", in The Family Estate in Africa, op. cit., pp. 240-241.

[2] Ibid., p. 242.

[3] See E.V. Winans, "The Shambala Family", in The Family Estate in Africa, op. cit., pp. 49-50.

A Shambala lineage has however enforceable rights over land alienated to an outsider if the holder's rights derive from such land having devolved to him by inheritance. Any such outside transaction can be repudiated by lineage members of proper standing on the basis of unexhausted residual rights existing in the same land. [1] The Luvale right of repudiation as we have seen extends to any category of land owned by a lineage member within the village precincts.

The difficulty thus of viewing Luvale tenure as being restriction on alienation is that underlying the restriction is an enforceable property right -- the reversion. If one concludes that it is in the nature of a restriction, one would expect it to be in the form of regulation in land utilisation. Rather than attempting to define the nature of the restriction, we would do better, it is suggested, to consider its effect. So long as it subsists with the land, it is submitted that it is a concurrent interest realisable in the future on the extinction of a landholder's tenure.

We may proceed to look at further aspects of concurrent interests qualifying a landholder's rights in all the three ethnic groups under discussion. One such instance of similarity in all three is the right of one spouse in the field of the other. All three practise virilocal marriages in that on marrying a woman, the woman must move to the man's village. During the subsistence of the

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[1] See E.V. Winans, "The Shambala Family", in The Family Estate in Africa, op. cit., p. 49.

marriage, if a woman has no field of her own, and she rarely has a field of her own, she is entitled to cultivate her husband's field or be given one by the husband. [1] Apart from the right of cultivation, the wife acquires no better or superior title to that of the husband. The field continues to be the husband's while she has at the same time a subsisting right of cultivation during the life time of the marriage. So the husband's right of title to the field and the wife's right of cultivation subsist concurrently. She, however, forfeits the right on the termination of marriage.

Although uxorilocal marriages are rare, as will be further discussed later, the husband's right in the wife's field at the wife's village has similar characteristics as in the virilocal marriage. Thus the husband has a mere right to cultivate the field while title to the land remains in the wife. A marriage is uxorilocal when the husband moves from his village to live with the wife at the latter's village. [2]

Another notable existence of a concurrent interest is that among the pastoral Ngoni and Tonga. After harvest amongst these cattle rearing people, cattle can graze in any field notwithstanding that the

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[1] For the Ngoni, see J.A. Barnes, Marriage in a Changing Society, Rhodes-Livingstone Papers No. 20, pp. 42-43. For the Tonga and Luvale, see C.M.N. White, Land Tenure Reports Nos. 1 & 7 op. cit., pp. 11-12 and p. 3 respectively. Among the Lozi failure by the husband to provide a garden for the wife is a ground for divorce at the instance of the latter. See M. Gluckman, Essays on Lozi Land and Royal Property, op. cit., p. 24.

[2] For a definition of the terminology "virilocal" and "uxorilocal", see M.G. Marwick, "The Modern Family in Social Anthropological Perspective", African Studies, Vol. 17, No. 3, 1958, p. 147.

owner of this field is different from the owner of the cattle. [1] Recognition of this right has very recently been recorded in the case of Captain Mbewe v. Njalikwa & Another, [2] arising from Chipata. In this case the plaintiff was suing defendants, the owners of cattle which destroyed and ate heaps of the maize crop on the plaintiff's farm. The farm was situate in a tribal area. Defendants did not deny the damage but put up the defence that according to custom and usage in the area known to the plaintiff, the destruction complained of was after the harvest period when cattle are let loose to graze in any field. The defendants argued that plaintiff's failure to complete the harvest in time, let alone to fence the farm to keep away cattle, was negligence and the sole cause of damage. Accepting and confirming the custom, the learned magistrate ruled: "The fact that the farm is situated in a tribal area and that such a custom exists in that area is clearly established by the evidence . . .". Satisfied that there was statutory provision to enforce the observance of customary law, his worship concluded: [3]

> . . . Under the provisions of section 16 of the Subordinate Courts Act Cap. 45, the obligation is cast on the court to give due recognition to existing customs and usage . . . In this particular case, it has been clearly within the knowledge of the plaintiff, that such a custom existed in the area, and it would be his own duty to prevent damage being done to his property by cattle who are let loose.

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[1] Cf., E. Colson, "The Role of Cattle Among the Plateau Tonga of Mazabuka District", Rhodes-Livingstone Journal, No. xi, 1951, pp. 29-30 and J.A. Barnes, "The Fort Jameson Ngoni", in Seven Tribes of British Central Africa, op. cit., p. 214.

[2] Civi Case No. SJ/138/74 (Chipata Resident Magistrate's Court) (unreported).

[3] at p. J.2.

It may be added that although the plaintiff's knowledge appears to have been assessed on a subjective basis, it would have made no difference that he actually was not aware of the custom if in the circumstances he ought to have known. Although the learned magistrate does not expressly consider the two types of property interest as co-existent, the effect of recognising such a custom without denying the plaintiff's right of property is to let both these rights subsist side by side and concurrently in the same parcel of land.

The more troublesome type of concurrent interest to characterise, however, is where village residents enjoy some rights not to the exclusion of others in land which is apparently wasteland. Such is the position over communal grazing areas and the wild forests where fruits can be picked up or indeed the extraction of iron ore in areas which have previously been regarded as open for all. While such interests can be enjoyed without restriction, the difficulty lies in identifying who has the ultimate or radical title in such areas. Accepting the premise, as has been urged, that no political or ethnical authority has any right of ownership over any land, the allodium in this land appears to rest in the community whose members only have a lesser right of enjoyment.

Bentsi-Enchill's proposition of allodial ownership [1] seems a

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[1] See K. Bentsi-Enchill, "Do African Systems of Land Tenure Require a Special Terminology", J.A.L. op. cit., pp. 120-121. (Bentsi-Enchill's terminology on ownership was never discussed at the 8th International African Seminar. See Ideas and Procedures in African Customary Law, op. cit., p. 58). For a qualification of Bentsi-Enchill's proposition in its relative application to African societies, diverse in social structure, see R.W. James & G.M. Fimbo, Customary Land Law of Tanzania, op. cit., pp. 5-6.

helpful concept to pursue in a search to identify the appropriate title to such land. The right by a village resident to appropriate some of nature's fruits is not exclusive of others, who similarly have an equal right -- not lesser and not superior. This right therefore appears to fall short of a plenary title, which denotes the fullest cluster of rights necessary for the existence of allodial ownership. Since the exercise of such a right at the instance of a village resident is dependant on membership of a village or ethnic community, it would appear that only that community is appropriately placed to assert allodial ownership. This type of ownership therefore can only possibly pertain to the community in which it must rest. This conclusion would be more than justified if the said community was a corporate unit exhibiting overt acts of regulation in the exercise of such rights. There appears however no specific regulation in the appropriating of such interests by community members although absence of regulation need not necessarily imply the lack of a power to regulate.

The Suku of the Congo (now Zaire) provide a remarkable illustration of such allodial ownership. [1] It has been observed that a lineage community owns the surrounding forests, well and clearly delimited by natural frontiers, over which hunting rights have been successfully asserted often by the right of first occupation. This lineage ownership entails free hunting by members of the lineage.

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[1] See I. Kopytoff, "Family and Lineage Among the Suku", in The Family Estate in Africa, op. cit., pp. 92-93.

Although there is no need for other lineages to obtain hunting permission from the owner lineage, and indeed there is no prohibition to hunt by these others, the owner lineage enforces its right of ownership by collecting a portion of the meat from any game caught in its forests by hunters of other lineages.

No such overt manifestation by exacting a hunting tribute has been observed in the village communities of the three Zambian ethnic groups under investigation. It is however suggested that notwithstanding the absence of overt assertions of a community's ownership over its wastelands, the allodial ownership attributed here to such a community is a dormant one. It is classified as dormant because of the likelihood of its expression whenever occasion arises. Thus whenever there is an alien intrusion on the interests of a community, the allodial ownership could become actively expressed by such community denying the alien the right of participation. The community's disapproval of intrusion might equally take the form of resentment or ejectment of the alien.

But these expressions as reflecting the existence of an allodial title have to be interpreted with caution because as White warns in acknowledging that they might imply such title, the expressions might be "motivated by such considerations as land shortage or fear of it, and even jealousy of more enterprising and successful agriculturists". [1] The point to be emphasised nonetheless is that in the absence of such extraneous motivations, it must

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[1] See C.M.N. White, "Land Law and Administration in Zambia", Intern. Assoc. of Legal Science, Editionis C.P. Maisonneuve et Larose, Paris, 1971, at p. 169.

still be possible for such expressions to be a reflection on the existence of the community's allodial title.

The alternative viewpoint may well be just a presentation of the property rights as they exist. As has already been seen, each village resident has or owns a right to exploit the natural fruits in wasteland. In this each village resident has an equal right. The utilisation of these rights is thus concurrent; and hence it may be suggested that an aggregation of these rights is what constitutes ownership of wastelands.

II Modes of Acquiring Land

It is here proposed to discuss the various modes of acquiring land under specific categories denoting a common feature or features in these modes. All modes of acquisition which entail vesting of ultimate or radical title in a landholder without being subordinate to any superior interest will be discussed under the category of original acquisition. Those modes which entail enjoyment or exercise of a lesser interest in that the interest is conditioned or dependent on a superior interest will fall under derivative acquisition. [1] Thus "derivative" for present purposes denotes here whence the lesser interest flows. [2] Inheritance not properly falling in any of the two categories, in that a portion of an estate may have conditions attached to it, while the other portion may exclusively vest in an

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[1] For a similar treatment of the subject, see K. Bentsi-Enchill, Ghana Land Law, op. cit., pp. 10-12. Cf., A.N. Allott, "Acquisition and Alienation of Rights in Land", in Readings in African Law, E. Cotran and N.N. Rubin (ed.), Vol. 1, 1970, pp. 356-358.

[2] Obviously "derivative" can also mean acquiring the absolute (permissible) title by a derivative mode.

heir, is dealt with separately.

(i) Original Acquisition of Land

(a) Clearing of a virgin bush

In the exercise of this mode of acquisition, one need only move onto a virgin bush and clear it to assert a claim over it so long as there is no one who has previously already asserted a claim of original occupation. [1] This mode of acquiring land has often only been conditioned on such landholder being a member of the village community in the area in which the virgin parcel is situated. If one is not a member of the village community, correspondingly there is no entitlement to acquire land in such a manner without first seeking permission from the headman to be granted a residence permit. The grant of permit however, as earlier indicated, does not mean that the headman has any beneficial interest in the land in question.

In one case arising on appeal from the Chavuma local court, [2] the magistrate's court at Zambezi was called upon to resolve the issue of residence where a club house was to be built in the headman's area without his prior permission. The learned magistrate there ruled that such permission was necessary for a non-resident although the grant of permit did not entail that the headman owned the land. After consulting the assessor on the matter of customary law concerning land and property, the learned magistrate said:

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[1] For the sample on this mode of acquiring land in all the areas, see Appendix 2, figs. (i)-(iii).

[2] Chavuma Local Court, Case No. 73 on appeal to the Subordinate Court of the Second Class for Balovale (now Zambezi) District (unreported).

> . . . Any new person wishing to build would properly ask the headman where he can do so . . . Now I am satisfied that in this case the plaintiff/respondent is the headman of his village and that the place where the club house was to be built is under his jurisdiction according to custom, he being the headman. I do not though concede that the land concerned is the plaintiff/respondent's own land whereby he has sovereign rights over it . . .

Finding no permission sought, the learned magistrate proceeded to record the headman's right to grant or withhold such permit in the words:

> I therefore consider that the plaintiff/respondent being a headman should first be requested if the club house concerned can be built. I am quite satisfied on the evidence I have heard and with the evidence recorded by the lower court that such permission was not asked. I consider he rightly refuses now if he should so wish and that if those concerned in putting up of the building are not satisfied with his refusal they should appeal to the Chief for his ruling . . .

Although this ruling is on the role of residence in Luvale tenure, it is suggested that its amplification of customary law is equally relevant to both Ngoni and Tonga in so far as residence and the headman's power to grant or withhold permission to non-residents is recognised. The use of the term "sovereign" in denying that the headman owns the land is however ambiguous. There appears to be no other sense in which the headman could exercise a power of granting permission than in the discharge of his sovereign rights. The exercise of such a power, it is submitted, is political and hence pertains to sovereignty over an area in which his jurisdiction is beyond doubt. What the learned magistrate appears to be saying is that the headman can only exercise sovereign rights over his own land

but such land he does not have. If he owned such land, in the sense that he had proprietary rights over it, then presumably he would have sovereign rights. It is submitted that what the learned magistrate was attempting to avoid is a recognition of sovereign rights as implying ownership of land in the proprietary sense. This impression is erroneous although it suffices that he acknowledges that no such ownership can be attributed to the mere status of being headman. Thus the magistrate could have very safely designated the headman's power as falling within his sovereign rights without necessarily entailing ownership.

Granted residence, one can like any other resident, acquire land in a similar manner. In some areas, however, residents in another village can acquire land in a different village falling within the same territorial domain of a chief. This is more noticeable in Chief Chongo's area of the Southern Province than in any other place. Thus this appears to be more of an exception than a general rule. The only explanation for the departure from insisting on residence appears to lie in the closeness of the villages to each other which apparently prompts acquiescence from the headman of the area concerned.

It has been observed of the Ngoni that the unitary state of the political structure knew no internal boundaries and as such had a bearing on landholding in that a Ngoni subject could till any land in whichever chieftainship. [1] At a village level this has shown

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[1] See C.M.N. White, Land Tenure Report No. 3, op. cit., p. 3.

itself in the intermingled state of gardens of villages in proximity with no definite area being associated with any particular village. [1]

Now the position has changed due to the diminishing influence of the political structure and to land shortage. Boundaries between villages and chieftaincies are being consciously observed and any transgression is likely to invite redress. The case of Mbewe v. Nkhoma [2] quite clearly signals this change in conditions. In this case the plaintiff brought suit against the defendant for being in possession of his field. The defendant's answer was that he had been given the field by someone who had stated that the land did not belong to anyone. This apparent grantor was previously resident in the chieftaincy where the field in issue was situated but had since moved to another chieftaincy. In a disapproving tone the court put the question to this apparent grantor: "How do you give the maize farm to another person when you do not stay in . . . Maguya's area?" In its judgment the court disapproved the transaction although it ordered the partitioning of the field between the two disputing parties.

The only limitation to this mode of acquisition is the increasing scarcity of land. Once so acquired, however, as has already been discussed, a landholder's rights are exclusive but qualified only by

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[1] See J.A. Barnes, "The Fort Jameson Ngoni", in Seven Tribes of British Central Africa, op. cit., p. 211.

[2] In the Maguya Local Court, "B" Grade, Case No. 10 of 1971, (unreported).

subsisting concurrent interests. So well pronounced are these rights acquired by first occupation that amongst the Ngoni and Tonga, where shifting cultivation has been more in practice, a land-holder continues to retain his rights over previous sites. These are known as "Matongwe". [1]

(b) Outright grant of land by one person to the other

This involves an absolute transfer of all the interests the grantor may have had in land without a retention of any kind of interest. The grantor is in effect substituted by the grantee. Although such transfers will often take place between relations, there is no requirement, except for the Luvale, that the grantee should be related to the grantor. In a sample of grants taken in all the three areas, [2] there is a thorough indication that these are between relatives with only a very negligible percentage of grants in Chipata to non-relatives.

Although as has been earlier indicated that a recording of such transfers between relatives in Chavuma may be corroborative of the restriction of land to within the lineage, the fact that there are similar transfers elsewhere in the country might suggest repudiation of such corroboration among the Luvale. Among the Ngoni and Tonga transfers of land between relatives has nothing to do with

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[1] Cf., J.A. Barnes, "The Fort Jameson Ngoni", in Seven Tribes of British Central Africa, op. cit., p. 211; and D.W. Conroy, "The General Principles of Land Tenure", in Land Holding and Land Usage Among the Plateau Tonga of Mazabuka District, A Reconnaissance Survey, 1945, W. Allan, D.U. Peters, G.G. Trapnell (eds.), Oxford University Press, 1948 (Rept. 1970), pp. 102-103.

[2] See Appendix 4, figs. (i)-(iii).

restriction in transfers to non-relatives. It can therefore be said that the similarity in the pattern of transfers to relatives amongst the Ngoni, Tonga and Luvale is a mere reflection of the village composition and need not necessarily suggest that there is a rule on the restriction of land transfers. A rebuttal of this inference in relation to the Luvale can only be sought in the right of the lineage to dispossess anybody outside it of land granted by a lineage member.

The effect of absolute transfer appears well recognised in all the areas although as noted among the Luvale transfers of this kind should be between relatives. White does also specifically acknowledge this mode of transfer among the Luvale. [1]

As for the Ngoni and Tonga, [2] recognition of such transfers is unequivocal. Supporting the Ngoni position is the case of Kampala v. Zulu.[3] The plaintiff in this case brought suit against the defendant for a declaration of exclusive ownership in the land in issue. The plaintiff alleged that he was granted the land by the defendant upon which grant he managed to obtain a government loan to be expended on cultivation. Apparently attracted by the improved state of the land, the defendant alleged in turn that the grant was

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[1] See C.M.N. White, Land Tenure Report No. 7, op. cit., p. 11.

[2] See D.W. Conroy, "The General Principles of Land Tenure", in Land Holding and Land Usage Among the Plateau Tonga of Mazabuka District, op. cit., pp. 98-99. Cf., C.M.N. White, Land Tenure Report No. 1, op. cit., p. 12.

[3] In the Nzamane Old Local Court, "B" Grade, Case No. 152 of 1970, (unreported). Cf., M.J.S.W. Priestley & P. Greening, Ngoni Land Utilisation Survey, 1954-1955, op. cit., p. 22; and N.S. Coissoro, The Customary Laws of Succession in Central Africa, Lisboa, 1966, pp. 222-223.

only for a year's period and hence his entitlement to reclaim it. The plaintiff's version was supported by a government officer who approved the loan, who stated that the loan would never have been authorised had it not been on the understanding that the defendant's grant to the plaintiff was absolute. On this evidence the court upheld the plaintiff's claim ordering the defendant to vacate the land for the plaintiff.

In these transfers whenever they take place, it must be pointed out, that where residence in the village is a necessary condition in holding or acquiring land, a transfer to a new resident will have to be preceded by grant of permission to a prospective landholder to reside in the area where the land is situate. In other words the requirement of having to obtain a residential permit in the case of a stranger cannot be avoided by accepting a grant of land from the grantor, who himself is a village resident.

These land transfers are in the nature of a gift and as such there is no consideration in the strictest sense. If the term consideration is to be used loosely, it only exists in the social context of the relationship between the grantor and grantee. Thus sub-division of land by the father to an adult son falls quite squarely within this type of transaction. It must, however, be emphasized that the father is not legally obliged to make such grant nor the son entitled as a matter of right to receive the

grant. Matos' [1] suggestion in this respect, when writing on the Ngoni of Angonia, is that the father will invariably make such a grant to the son as a way of strengthening social ties.

(c) Sale of land and the concept of sale

Although there are indications that sales involving land do take place, what is meant by sale of land in Zambian customary law concepts has not yet been satisfactorily resolved. In all the areas toured under this investigation it is insisted, and there is thorough unanimity in this, that land cannot and is not sold. What is sold,however, are improvements on land such as permanent fixtures, i.e. buildings. In this it is said what is sold is not the land but the thing itself (the house), to be reimbursed for expenses incurred and the labour employed. It is adamantly denied that the bricks, the roof material, the window frames and cement bought can by any stretch of imagination be regarded as part of the land.

Among the Ngoni Barnes has observed: [2]

> . . . Rights in land cannot be sold, but only given away, and no presents are given to the donor by the recipient of a garden or garden site. They can only be sustained by continued residence in the locality . . .

This has been subsequently corroborated by Priestley and Greening

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[1] See M.L.C.D. Matos, Portuguese Law and Administration in Mozambique and their effect on the Customary Land Laws of Three Tribes of the Lake Nyasa Region, Ph.D. Thesis, University of London, 1969, p. 205. For how a man uses land as an asset in asserting his authority over his wife and sons, see E. Colson, "Social Change and the Gwembe Tonga", Rhodes-Livingstone Journal, Vol. XXXV, No. 35, 1964, p. 10.

[2] See J.A. Barnes, "The Fort Jameson Ngoni", in Seven Tribes of British Central Africa, op. cit., p. 212.

who in their survey have noted: "Land itself has no monetary value and cannot be bought, rented or sold, nor may gifts take the place of a monetary transaction. Lands or rights to land can only be given away". [1]

Conroy, refuting allegations of sales of land among the Tonga, summed up his research findings: [2]

> . . . The idea of land purchase as we understand it is entirely foreign to Tonga thought and custom. All chiefs and councillors are emphatic that land sales do not occur and would not be tolerated. They all gave the same reply, that if such a case came to their notice they would fine the seller and order the return of the purchase money but, they say, no case has ever come before their courts. This was unwittingly confirmed by an Eurafrican farmer in the Reserve who complained somewhat bitterly that he had been trying to purchase land from the Tonga for many years but that no one would sell . . .

Many years have lapsed between these observations of earlier authors and the present time. It is now openly admitted that although land itself cannot be sold permanent fixtures can. It appears doubtful that these early revelations of the absence of sales could be stretched to exclude transactions involving permanent fixtures from the sale of land. On the conceptual issue the definition of land is still lacking. White has quite recently wrestled with the concept of sale within the context of the Tonga customary land tenure. Disapproving the distinction between bare land and permanent fixtures

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[1] M.J.S.W. Priestley & P. Greening, Ngoni Land Utilisation Survey 1954-1955, op. cit., p. 22.

[2] D.W. Conroy, "The General Principles of Land Tenure", in Land Holding and Land Usage Among the Plateau Tonga of Mazabuka District, op. cit., p. 95. Cf., E. Colson, The Plateau Tonga of Northern Rhodesia, op. cit., p. 179.

as a camouflage to accepting sales in the broadest sense, he has reacted: [1]

> . . . This fine distinction is really an attempt to reconcile the traditional conscience about sale of land with the realities of an economic age. A good many Tonga are perfectly aware that these transfers are little different from sales of land . . .

It is submitted, with respect, that White's conclusion is a misunderstanding of the Tonga concept and indeed of customary law at large. In the traverse of sales of land is a significant revelation of the view that permanent fixtures or improvements to land are not part and parcel of land. This cannot fully be appreciated if viewed from the English concept of land [2] which finds no difficulties in defining land as including permanent fixtures. Thus it is now well accepted in African land tenure that while the ownership of a tree may vest in one person, the land on which the tree stands vests in the other. [3] This shows that the land and the tree are severable and hence amenable to separate ownership. Thus the sale of a tree is not the sale of land.

Similarly in the Tonga situation the analogy can be drawn in the permanent structure (house) being the equivalent of the tree.

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[1] See C.M.N. White, Land Tenure Report No. 1, op. cit., p. 13. Cf., C.M.N. White, "A Survey of African Land Tenure in Northern Rhodesia", J.A.A. Vol. 12, No. 1, 1960, pp. 3-4.

[2] For definition of land as including permanent fixtures in English Real Property Law, see E.H. Burn, Cheshire's Modern Law of Real Property, op. cit., pp. 111-116.

[3] For this acceptance in Zanzibar, see J. Middleton, Land Tenure in Zanzibar, Colonial Research Studies No. 33, p. 21. For the West African position, see T.O. Elias, The Nature of African Customary Law, op. cit., p. 166 and R.J.M. Swynnerton, "Natural Resources that Govern the Future", African Affairs, Vol. 65, No. 258, January 1966, p. 44. For a similar meaning of land in customary law, see R.W. James, Land Tenure and Policy in Tanzania, op. cit., p. 39.

The sale of such fixture just like the sale of the tree need not mean that the ground on which it rests is also sold. The fact that a permanent fixture is not severable from the land to which it is attached is no doubt a sound basis on which to regard a fixture as part of the land for all practical purposes. But this in itself is not sufficient justification, it is submitted, for failing to recognise in law the two distinct states of a fixture and the earth on which it stands. Indeed it is arguable that although physical severance is not possible, the cash exchange is a sufficient substitute to severance particularly when what is being claimed is the fixture and not the ground. From the seller's viewpoint severance is effective on receipt of a cash exchange which is the equivalent or presumed/equivalent to the fixture.

White deals with this concept of fixtures in an attempt to obtain further darity in his particular observation of the Tonga. White, however, is still satisfied that the Tonga experience with neighbouring European estates has imparted on them sufficient understanding to know that such transactions are sales of land. [1] It is worth noting ,however, that White does not reconcile his conclusion with the case he has recorded [2] where the chief's court held the sale of land, upon which were no permanent fixtures, invalid. In that case he records that X transferred his land to Y for a sum of money and both parties privately regarded it as a sale. Subsequently X returned and demanded to resume the land on the grounds that he

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[1] Discussion with C.M.N. White on 5/3/1975.

[2] See C.M.N. White, Land Tenure Report No. 1, op. cit., p. 13.

had only lent it. When the matter was referred to the chief's court, the court declared the sale invalid and ordered X to return the purchase price to Y and Y to restore the land to X.

If anything this case shows consistency with the Tonga view that bare land is not a saleable commodity. Mwape v. Phiri [1] is another illustrative case from Southern Province from which can be deduced the customary law concept. In this case the plaintiff sold the defendant a grocery store situated in Chief Monze for a substantial sum part of which was paid by the defendant. The plaintiff was now suing for the outstanding balance. Recognising the sale on the evidence adduced, the court ordered the defendant to pay the outstanding balance. It is significant to note from the case record that the court never seems to have treated the matter as involving a sale of land. The court reacted in a manner not different from any other ordinary case of contract where money is owing. The court was primarily concerned with the outstanding balance and not the subject matter of the sale. The reaction of the court would apparently have been the same had the sale involved cattle. This shows the court's categorisation of the issue as it conceives permanent fixtures under customary law. Such fixtures are quite distinct from the land and hence the sale of a building is not the sale of land.

It might of course be insisted, and quite reasonably, that

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[1] In the Mayaba Local Court, "B" Grade, Case No. 28 of 1974, (unreported).

in so far as the building structure and the ground on which it rests vest in one identifiable proprietor, the indivisibility of the two involves a transfer of land by sale. To this however can be answered, quite consistently with our argument, that the consideration of the sale does not take into account the ground although the effect of the transaction is to transfer the ground together with the structure.

Thus in respect of bare land, it can be stated with confidence that sales have not been recognised under customary law as an accepted method of transferring land rights. Economic pressures due to scarcity of land will no doubt be forthcoming but as of now the impact of such pressures never seems to have resulted in recognition of bare land as being a saleable commodity.

With regard to sales of improvements which are recognised, it is worth looking again at the Luvale to appraise the lineage claim that land cannot be transferred to an outsider. Two conflicting views emerge; one more consistent with the lineage claim and the other a reconciliation of the traditional status quo and the realities of a cash economy. The first view is that like all restrictions of transfers of land, improvements or structures on land cannot be sold to a purchaser outside the lineage. The second view is that such sales could be transacted with anybody resident in a village so long as priority of sale is given to a relative.

Illustrative of the first view is a rare case arising in Swanakaumba village where on the death of one leaving a brick house,

the deceased's relatives resident in the village resisted all moves from prospective purchasers to purchase the house. It was insisted that the house could only be taken over by any relative who might be forthcoming as those in the village already had their own houses. [1] The second view appears to be based on the fiction that priority having been given to a relative who fails to take up the offer, the sale can then be offered to a non-relative because the inability of the relative to proceed creates a situation similar to one where there are no relatives in existence.

On the occurrence of these sales to non-relatives and the lack of consent from the lineage to sanction such sale transfers, White observes: [2]

> Transfers of land to persons outside a matrilineage for a cash consideration are common at Chavuma where sale of land appears to have reached a more developed form than in most parts of Northern Rhodesia. Both surplus gardens with crops and surplus resting land are sold in this manner and prices are high . . . . . Despite the fact that land has in some respects acquired a close association with matrilineage, the rights of individuals to sell appear to be strong enough to enable them to do so without obtaining the consent of their head . . .

The two views expressed, it is suggested, do not necessarily indicate local variations. It is a mere reflection of the impact of a cash economy. Both acknowledge the existence of sales with the first view apparently embracing the apprehension of the threat to the lineage. The second view appreciating the effect of change

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[1] Confirmed by the second village headman Samununga Lufupa on 16/6/1975.

[2] See C.M.N. White, "A Preliminary Survey of Luvale Rural Economy", Rhodes-Livingstone Papers No. 29, p. 33.

attempts to justify it consistently with the expectations of the lineage. In this predicament, the question whether the lineage has any proprietary rights is once again revived. But as urged earlier a transfer of land outside the lineage is not necessarily inconsistent with the property rights of the lineage. The lineage can sanction or refuse such transfer. The absence of formal lineage consent as White notes does not mean, it is submitted, that such consent cannot be inferred. The lack of action by a lineage in such transfers appears to be acquiescence and this in itself is sufficient to validate a sale transaction. It may well be that the lineage will hardly react and if this is the case so does the lineage facilitate alienation.

Before concluding on sales, it is well to look at the possibility of other related transfers where, although there is no cash consideration, such consideration may be in kind, i.e. barter exchange or provision of manual services in exchange for land.

transfer of land in exchange for goods

If sales of land are vigorously refuted, it is less likely that a barter exchange could be recognised. This in fact is nothing more than a sale of land with the provision of consideration this time being in kind. In all the areas this mode of transfer has been denied for the same reasons as sales of bare land.

In one rare instance however coming from Chavuma, this mode of transfer has been accorded judicial recognition. In the case of

Ndonji v. Makiko [1] involving Luvale parties, the plaintiff, a deceased's young brother brought suit against the defendant for consideration still outstanding in a cassava garden deal between the late brother and the defendant. The plaintiff's elder brother had agreed to sell a cassava garden to the defendant in exchange for a bull, two blankets and a piece of cloth. The defendant never gave these things in exchange for the said garden even after the plaintiff's brother's death. Upholding the plaintiff's claim the local court ordered the defendant to pay a sum of money in lieu of the items of exchange for the garden.

In view of what has already been said on sales of bare land, this case appears to be at variance with customary law. It might of course be viewed also as heralding the recognition of such sales. But till there are many more of such decisions it would be unsafe to conclude that this is an adequate reflection on the current changes in customary law. It would have been illuminating if the relationship of the parties was known, but the court record does not suggest that title to land was in issue.

transfer of land in return for services

White records this mode of tenure as being quite usual amongst the Tonga and adds that such a transfer is not regarded as a sale of land. He cites the following instance as being characteristic of such deals -- "A man who is moving to new land may arrange with another to open up the new land for him as a labourer and

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[1] In the Makinjila Local Court, "B" Grade, Case No. 5 of 1975 (unreported).

offer him some or all of the old land which he is giving up". [1] In areas where investigations were conducted this method of transfer inter-vivos was again only acknowledged among the Tonga in the Southern Province.

But even in the Southern Province, indications are that there is no uniformity in this method of exchanging land. In the Monze area (in chiefs Monze, Ufwenuka and Chongo) this mode of transfer is said to be non-existent and unrecognised as it is the equivalent of selling land. In the Mazabuka area (in chiefs Naluama and Sianjalika) on the other hand, this is recognised as a normal and usual way of transfer. In Sianjalika's area it was insisted that this is not a sale of land but a way in which parties can help each other. The Gwembe valley (chiefs Munyumbwe and Mweemba) comes between the two above extremes in that although such transfers are recognised, it is only for a temporary period dependent on the continued availability of the services. The transfer, it is insisted, cannot be on a permanent basis. This appears to be one of the first signs or indications of a lease in that there is a temporary loan of land in return for the provision of services.

The contrast between these areas is remarkable in that the explanation may only be sought in the scarcity of land and different stages of agricultural advancement. In the indicated Gwembe areas it may mean that there is an increasing importance being attached to agriculture -- hence the temporary nature of the transfer to ensure

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[1] See C.M.N. White, Land Tenure Report No. 1, op. cit., p. 13.

continued provision for agricultural exploitation. With the increasing scarcity of land and the desire for agricultural advancement, it does not seem entirely unlikely that the Mazabuka area may have to resort to such types of transfers of land. Similarly it does not appear unlikely that the aforesaid Monze areas may have to follow suit.

Despite the denial of land sales, admission of the likelihood of such transfers would appear to justify viewing this situation as a preceding stage to cash sales of bare land, Substitution of manual services by a cash consideration will realise this. The cash conversion is not inconceivable if what a farmer may wish to do is replace manual services by purchase of permanent farming implements for which the sold or leased parcel of land provides the cash.

The situation, however, does not appear very clear for although transfers of land in exchange for services are said to be recognised not a single actual case was encountered. It may be that this is a case of what the Tonga people would like to see but is not yet effectively put into practice.

(ii) Derivative Acquisition of Land

(a) Landholding in a virilocal and uxorilocal marriage situation

The institution of customary marriage has had the greatest influence on the derivative nature of land rights acquired by the wife in the virilocal marriage and the husband in the uxorilocal marriage. [1] In the type of marriage practised, the Ngoni, Tonga

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[1] For a definition of the terminology "virilocal" and "uxorilocal", see pp.135-136, supra.

and Luvale share a similarity in that they are all virilocal with uxorilocal marriages being the exception. [1]

What is intended here is to examine the derivative nature of land rights acquired by either spouse which are conditional or dependent on the subsistence of the marriage, and relate marital status to the capacity of a spouse to own land. We can now consider the property incidents of each type of marriage in its turn.

Virilocal marriage

Often a woman in this type of marriage will be cultivating the same field with the husband. The husband may have already acquired a field before marriage or may acquire one on marriage. In either event, the field belongs to the husband and the wife has merely a right of cultivation. On the cessation of the marriage the wife forfeits her right to cultivate [2] and is only entitled to a half share in the crops in the event of divorce. [3] Her right to cultivate the husband's field only subsists during the life time of a marriage.

It is not unusual, however, for a married woman to have another field ("ntema" among the Tonga) in addition to that of the husband. The ownership of this type of field is determined by the mode of acquisition. If the husband cleared the bush for her ("kugonkela"

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[1] For a sample of these marriages, see Appendix 5, figs. (i)-(iii).

[2] For a sample of wives' land rights dependent on the subsistence of the marriage, see ibid.

[3] Cf., J.A. Barnes, Marriage in a Changing Society, op. cit., p. 44; and C.M.N. White, Land Tenure Reports Nos. 1 & 7 op. cit., p. 11 and pp. 3-4 respectively.

among the Tonga), the field belongs to the husband. If the husband parcelled a portion of land to the wife, such parcel of land still remains the husband's.

On the whole it appears well settled and accepted among all three ethnic groups under discussion that where a married woman acquires land on her own initiative independently of the husband, she has exclusive rights of ownership to that land notwithstanding the dissolution of the marriage. Two recent cases -- one from Southern Province and the other from Chavuma underscore this acknowledgement. In the first case of Hamuvumbe v. Kauluka, [1] the plaintiff brought suit against defendant for cultivating a field which was not his but the plaintiff's. The field in question once belonged to plaintiff's maternal uncle. On the uncle's death, plaintiff's mother took over the field. This mother remarried to one of the defendant's relatives. On the mother's death, the plaintiff took over the field with the defendant apparently asserting a claim to the field on the basis that the woman had been married to his relative. The court ruled in favour of the plaintiff without specifically discussing the plaintiff's mother's ownership. But the court's satisfaction with the case history of the land is, it is submitted, a tacit recognition of the mother's ownership exclusive of the husband (defendant's relative). The ownership transmitted to her from the predecessor in title was never questioned as would have been expected had it been dependent on the husband by virtue of the subsequent marriage.

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[1] In the Munyumbwe Local Court, "B" Grade, Case No. 238 of 1973. (unreported). For an acknowledgement of married women's rights over self-acquired land as contrasted with rights dependent on husbands among the Valley Tonga, see E. Colson, "Land Law and Land Holdings Among the Valley Tonga", Southwestern Journal of Anthropology, op. cit., pp. 2-3.

Makina Mutokoma v. Linongo Peza, [1] the second case involving a Luvale divorced couple is an even better illustration. In this case the plaintiff husband brought suit against the defendant wife for recovery of the cassava garden and compensation in lieu of sharing cassava crops all consumed by the defendant wife. The plaintiff alleged that he had bought the field from one Samutala, who was not even called as a witness, an omission on which the court placed some emphasis. The defendant wife, on the other hand, contended that the garden was hers even long before the marriage. She said that she expended her own money in hiring someone who cultivated the field for her without any assistance from the husband. It was subsequently revealed on further inquiry that the marriage was virilocal. Although the defendant wife came from a different village, the field was first given to defendant's brother by the headman when the brother sought permission to reside in this headman's village. On the brother's death the defendant took over the field. [2]

Accepting that the field was acquired by the defendant wife independently of the husband, the court dismissed the plaintiff's claim and upheld the wife's property rights in the court's own language -- ". . . the garden the whole of it belongs to the woman". Among the Tonga, however, more than among the Ngoni and Luvale it is said that even when the wife clears the bush on her

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[1] In the Chavuma Local Court, "A" Grade, Case No. 79 of 1972 (unreported).

[2] Interview with Headman Mutonga on 16/6/1975. Headman Mutonga gave the brother the field.

own or through hired labour, if the husband took part, tacitly or overtly, in the location of the site, the field still belongs to the husband. This Tonga proposition, however, appears to have no authoritative basis. It is submitted that it is nothing more than a gesture of male chauvinism. In any event it did not obtain the consensus of the female members of the panels who were inclined to regard such land as self-acquired property.

In some of the Tanzania customary laws, from where rationalisation might be obtained for such an assertion of right on the part of the husband, the basis seems to be that joint acquisition of property by a couple does not entitle the wife to a share on divorce if her contribution to the acquisition and development of the said property arose from performance of her duties as a wife. [1] Although to deny the wife a share in this situation might be regretted, the husband's claim is underlined by his actual joint contribution in acquiring the property, unlike the Tonga husband whose purported claim is entirely based on the mere participation in the location of the site.

It is thus important to note that title to an interest in land which a married woman holds during the subsistence of a virilocal marriage is not necessarily derivative and dependent on the husband's title. In this regard White's study in the Eastern Province is unclear when he gives the impression that it is any interest

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[1] See Iddi v. Ali s/o Mpate (1967) P.C.C.A.81/1966, (1967) H.C.D.49; and Khadija Salehe v. Ali Kondo (1964) P.C.C.A.26/1964 quoted in R.W. James & G.M. Fimbo, Customary Land Law of Tanzania, op. cit., pp. 259-260.

in land which is "vested wholly in the man" [1] in a virilocal marriage. It must however be added that the forfeiture of land rights by the woman in the virilocal marriage as discussed is not altered by virtue of the fact that the spouses come from and live in the same village. [2] It may also be added in passing that the corresponding capacity of an unmarried woman to acquire and hold land in her own right is unfettered. Such cases are however rare because an unmarried woman will invariably be dependent on her parents during minority and on the attainment of majority she will have been married. [3]

Although as has been discussed, in principle a married woman has the capacity to acquire and hold land, [4] in practice however this capacity is severely curtailed. The major limitation arises from the reluctance of a husband to let a wife have her own field -- a situation regarded as potentially threatening his authority. [5] The

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[1] See C.M.N. White, Land Tenure Report No. 3, op. cit., p. 5.

[2] For a breakdown of land rights in an intra-village marriage situation, see Appendix 5, figs. (i)-(iii).

[3] In Chipata out of a total sample of 508 gardens, there was only 1 unmarried woman who was cultivating the same garden with her mother.

In Southern Province out of a total sample of 318 gardens, only 1 belonged to an unmarried woman who was granted by an uncle before he died.

In Chavuma out of a total sample of 382 gardens, only 3 belonged to unmarried women. Of these 1 was obtained by bush clearing and the other 2 through inheritance from father and maternal uncle respectively.

[4] For a general recognition of individual property rights of wife and husband in a marriage, Cf., C.M.N. White, "Matrimonial Cases in the Local Courts of Zambia", J.A.L. op. cit., p. 254.

[5] Cf., J.A. Barnes, Marriage in a Changing Society, op. cit., pp. 42-43; and E. Colson, "Social Change and the Gwembe Tonga", Rhodes-Livingstone Journal, op. cit., p. 10.

second factor hinges on the role of residence in landholding. In a virilocal marriage, on divorce, the wife is expected to return to her parents' village leaving her self-acquired land behind. Since by this she ceases to be a resident in the village where the land is, the headman in instances where residence is necessary can quite properly object to her continued cultivation. Thus unless there is acquiescence or waiver of the requirement for residence, such a woman could find it impracticable to realise her rights. A similar obstacle would not arise if the spouses are of the same village or the woman owned land during her marriage which is in her own village. [1]

Uxorilocal marriage

Similarly, as in the virilocal marriage, the man in this instance suffers the same disabilities over any parcel of land that might have been acquired through the wife such as a grant by the in-laws. On the dissolution of the marriage the man forfeits his land rights. His property rights are derivative from the wife and dependent on the subsistence of the marriage.

But like the wife in the other marriage, the man can acquire land in the wife's village quite independently of the wife. On the dissolution of the marriage he is entitled to retain such self-acquired land. But this right is limited, as we have seen in the case of a wife, by the requirement of residence. In addition to this

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[1] For the sample of such landholding, see Appendix 5, figs. (i)-(iii).

there is also the social embarrassment of divorce which may compel him to abandon the land. Be this as it may, in principle however, he has the right to retain his self-acquired land. [1] In this regard similar remarks as those in the virilocal marriage are pertinent to White's assertion that in uxorilocal marriages in Eastern Province, "land rights are wholly vested in the woman". [2]

(b) Gratuitous loans of land

The term "gratuitous loan" is preferred to lease to describe the temporary lending of land without any consideration or conditions attached. Thus land can be loaned by one person to the other without any payment in cash or in kind. [3]

In all the rare cases of such loans encountered there are no indications of any conditions attached by the grantor in such a land deal. Repossession by the grantor of the loaned land however at the expiration of the loan period can only be after harvest so as to allow the temporary occupier to reap the crops. Where however the loan period is not definite, it is necessary for the person who lends the land to give notice of intended repossession at the end of the next harvest and before the sowing period.

Among the Luvale, it was suggested that this method of

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[1] For land held by husbands quite independently of wives in uxorilocal marriages, see **Appendix** 5, figs. (i)-(iii).

[2] See C.M.N. White, Land Tenure Report No. 3, op. cit., p. 5.

[3] For the number of loaned land in the sample, see Appendix 4, figs. (i)-(iii).

alienating land was the only approved and usual one in cases where the borrower was not a member of the lineage. The suggestion is of course quite consistent with the insistence that land cannot be disposed of to outside the lineage. Of the only three cases of loans recorded in the Chavuma area however, two were between matrikins and one was by a headman to a person who had recently come to reside in his village. White on the other hand finds the loaning of land among the Luvale quite uncommon in contrast to transfers by gift or sale. But of the loans he encountered he notes that they were between persons matrilineally related. [1]

However consistent the lending of land might be with the lineage claim, it appears quite evident that there is no hard and fast rule regulating between what type of persons such transactions could take effect. It appears loans could be granted to either a relative or a person entirely unrelated.

(iii) Inheritance

It is here proposed to look at the devolution of property of an intestate deceased. Succession to status does not fall within the theme of this discussion and as such is only incidentally considered in so far as it may relate to the acquisition of proprietary interests in the estate. Succession to status occurs when one

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[1] See C.M.N. White, Land Tenure Report No. 7, op. cit., p. 11.

succeeds to the office of chief or headman or when one replaces the deceased husband by remarrying the surviving widow. The term inheritance is preferred to succession to maintain the distinction between acquisition of property and succession to a specific status. [1] In discussing inheritance it will be related to the entire property -- personal property as well as land left by a deceased person. These two types of property interests are dealt with simultaneously because rules of inheritance governing distribution follow, with minor variations, the same line irrespective of the property.

In this, testamentary disposition does not deserve any specific attention because it is subject to the same rules as intestate inheritance. Any attempted testamentary disposition by the deceased under customary law will not be followed to the extent that it is inconsistent with the rules of intestate distribution. Thus although in one rare case from Chipata in Re Deceased Native Estate [2] the then District Commissioner in his judicial capacity purported to enforce the will of deceased testator, it is submitted that the enforcement was irregular. Among the Tonga the absence of testamentary disposition is even well evidenced by the manifest fear of witchcraft which might arise by sanctioning the making of wills. Fathers fear that by making wills in favour of their sons they may soon be victims of the intended beneficiaries, who might wish to get rid of them to realise the benefits. But sons in turn also fear that as

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[1] For the confusion that may arise in using the terms inheritance and succession interchangeably, see "Succession and Inheritance" in Ideas and Procedures in African Customary Law, M. Gluckman (ed.), op. cit., pp. 48-55.

[2] Chief Sefu, 31/8/1935. Fort Jameson District Notebook NAZ/KDG/5/1/Vol. 1, p. 230.

beneficiaries they may become victims of the deceased matrikin, who would have been entitled to inheritance had it not been for the will. [1]

Hence what is being discussed is primarily the rules of inheritance in an intestate estate. We may now proceed to consider the intestate estate of a married man.

(a) The intestate estate of a married man

When a man dies intestate leaving children and a widow, his entire estate devolves on a specific heir in whom the property vests for his use and distribution to other relatives beneficially entitled to a share. There is a more marked distinction in the selection of an heir between the Ngoni, on the one hand, and the Tonga and Luvale on the other. The Ngoni rules are more rigid by contrast as will appear in the following discussion.

Classes of possible heirs

The Ngoni being patrilineal, inheritance on a man's death is essentially on the principle of primogeniture. This literally means that inheritance is by the first born son. Primogeniture in the context of Ngoni customary law, however, has a special meaning reflecting the institution of polygamy and the patrilineal social structure of a Ngoni family. In this context primogeniture means the following:

(1) inheritance of a man's estate by his eldest son, where all his children are born of one and the same wife;

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[1] See E. Colson, "Possible Repercussions of the Right to make Wills Upon the Plateau Tonga of Northern Rhodesia", J.A.A. Vol. II, No. 1, January 1950, pp. 33-34.

(2) inheritance by the eldest son of the senior house, where children are born of various wives in a polygamous marriage; and

(3) inheritance by the eldest male person who by virtue of belonging to a class of paternal relatives can be described as deceased's nearest blood relation.

The second meaning of primogeniture -- inheritance by the eldest son of the senior house arises from the recognition by Ngoni law of polygamy. In such a case inheritance is by what may be called the "principle of inheritance by houses". Seniority of houses is determined by the sequence in time within which different wives get married to the same husband. Thus the first wife married to a man creates the senior house and the following wives married to the same man create junior houses in their order according to the respective dates of marriage. For purposes of inheritance, it is the eldest or only son of the senior house, and not the eldest son of a father (assuming there is such a one in other houses), who inherits the father's estate. This is the case for example where the only son in the first house is the last born amongst older children who are all daughters whereas the first born child in the second house is a son and as such older in age. If there is no son in the senior house, an heir will be sought in the next senior house which has a son. It is only then such a son can inherit the father's estate in preference to the first senior house.

To this general rule however, there is a competing rule, which

albeit being in the minority, states that failing sons in the first house, the next eldest daughter of the same house inherits. The genesis of this rule is that inheritance is by the first house till all children of the house are extinct. In its application to a very limited area of Ngoniland, this competing rule must be acknowledged but not without exposing its inconsistency with the male bias of the patrilineal social structure. The male heir is in all instances preferred to female heirs. Hence the youngest male heir in a house has priority over any other eldest daughter. The logical sequence of this male bias which underlies the general rule would appear to be that the eldest or only available son in any subsequent house should be preferred where no male heir exists in the first house.

The Tonga and Luvale on the other hand have a wider class of possible heirs because no one person can, within this class, claim an entitlement to being such heir. Both people as has already been stated are matrilineal in that descent runs through relatives on the maternal side. In theory anyone among these relatives is a potential heir if certain prescribed conditions of selection can be satisfied. Among the Tonga this matrilineal group of relatives is called the "mukowa". And so all relatives of the deceased who are traceable through the deceased's mother belong to this matrilineal kin group. The Luvale matrikin as already indicated is in this respect more exact and broader because of the memory of geneologies of common maternal relatives. The Luvale however differ in their class of heirs from the Tonga in that descent shifts to the paternal side of the deceased when there is no available maternal issue. In this shift children of

the deceased find themselves drawn into the class of heirs, albeit quite remotely. The Tonga mukowa, however, expressly excludes children of the deceased for these are only members of the mother's kin group.

Administration of the estate

Choice of an heir among the Ngoni and Luvale is made by senior members of the deceased's family where these are available and elderly men of the village (called "madoda" among the Ngoni). This choice among the Tonga, however, is the exclusive prerogative of the "mukowa". The choice of an heir among the Ngoni alone of the three ethnic groups is automatic on the adult eldest sane male child. Ngoni law does not in this regard recognise disinheriting an heir merely because he is of unsuitable character. It is boldly stated in justifying this position: "Akacheneka chuma ni chuma chake" -- If he (the heir) abuses the estate it/his own property.

Notwithstanding the variation noted above in respect of inheritance in a polygamous marriage, the Ngoni provide a unique situation in restating rules of inheritance. Rules for the choice of an heir can be restated thus:

1(a) the eldest son inherits where all the sons of the deceased are both of the same mother.

(b) Where the deceased is survived by sons born of different wives, the eldest son of the senior house inherits.

Supporting the principle that the eldest surviving son inherits a father's estate in Re estate of Mekelani Mphanza [1] the first son of

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[1] In the Mpezeni Local Court, "B" Grade, Case No. 50 of 1975. (unreported).

the deceased, who was survived by nine children and a widow, was appointed administrator. The family verdict supporting the son's application was delivered to the court by deceased's brother. Similarly in Re estate Penya Daka, [1] the only surviving son of deceased was appointed administrator. Illustrating the principle of the preference for male issue notwithstanding that there is a senior surviving daughter is in Re estate of Jeffrey Msoni. [2] In this case the son was appointed administrator instead of the daughter.

It is pertinent here to note whether or not "heir" and "administrator" are necessarily the same under customary law. An administrator is under customary law distinguishable from an heir in that the former (who may be a group of persons) looks after the deceased's estate until the decision has been made on whom the same devolves. In cases coming before the local court however, an administrator is the same as the customary law heir because the decision of appointment or selection of an heir by those responsible will already have been made before the application to the court is made. An heir having been so determined, application to a local court for appointment of the heir as administrator is resorted to as the only procedure within this court's jurisdiction to realise the estate.

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[1] In the Chipata Local Court, "A" Grade, Case No. 143 of 1970 (unreported). Cf., in Re estate of Saulos Sakala, in the Chipata Local Court, "A" Grade, Case No. 90 of 1973 (unreported); in Re estate of Chipeta Abinala, in the Maguya Local Court, "B" Grade, Case No. 68 of 1975 (unreported); and in Re estate of Isaac Nyawale, in the Chipata Local Court, "A" Grade, Case No. 73 of 1973 (unreported).

[2] In the Nzamane Old Local Court, "B" Grade, Case No. 41 of 1973 (unreported).

Hence reference to administrator in local court cases cited denotes heir under customary law.

2. Failing sons, the eldest daughter inherits. This is in accord with the preference given to the children before the next male issue can be sought. Thus in Re estate of Isaac Zulu, [1] the 19 year old daughter of deceased, being the only surviving child, was appointed administrator.

3. Failing daughters, the eldest brother of the whole blood inherits. Thus in Re estate of Martin Daka, [2] the eldest surviving brother of deceased was appointed the administrator of the intestate estate as the deceased was survived only by a widow who had no children.

4. Failing brothers of the whole blood, the eldest sister inherits. Thus in Re estate of Gaston Ngwenya, [3] a sister was appointed administrator where the deceased brother died intestate being survived only by a widow.

5. Failing sisters of the whole blood, then the father inherits. The two recorded cases on this descent, in Re estate of Alikanjelo

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[1] In the Chipata Local Court, "A" Grade, Case No. 69 of 1974 (unreported). Cf., in Re estate of Damson Musale, in the Chipata Local Court, "A" Grade, Case No. 138 of 1974 (unreported).

[2] In the Chipata Local Court, "A" Grade, Case No. 1 of 1974 (unreported).

[3] In the Chipata Local Court, "A" Grade, Case No. 162 of 1970 (unreported).

Tembo [1] and in Re estate of Samson Daka [2] are most unsatisfactory. The court records do not indicate why the father was preferred, i.e. whether all the eligible issue prior to the father was extinct or just unavailable. The panel derived information is, however, unanimous on the father's eligibility to inherit in the absence of sisters of the whole blood.

6. Failing father, the mother inherits. This is apparently a departure from the principle of patrilineal descent. But among the Ngoni such inheritance by the mother is not regarded as a departure, because a woman's persistent stay at her husband's village even after the husband's death is interpreted to mean willingness on the part of such widow to belong to the husband's paternal line. Hence if the husband is dead, such a woman is brought within this paternal line for purposes of inheritance for being the only surviving person closely related to the deceased son. The remaining male heirs in the paternal line are not as close blood relations of deceased as the mother. They are only given priority if the class of blood relatives is exhausted.

In Re estate of Gerson Milanzi [3] the mother was appointed administrator of the estate of the deceased son who died unmarried. The District Secretary's supporting note recorded that the mother

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[1] In the Chipata Local Court, "A" Grade, Case No. 101 of 1974 (unreported).

[2] In the Chipata Local Court, "A" Grade, Case No. 91 of 1973 (unreported).

[3] In the Chipata Local Court, "A" Grade, Case No. 96 of 1972 (unreported).

was found to be the rightful heir after conducting local investigations. In all likelihood this seems to suggest that all other possible heirs were not available for had it been otherwise, the mother could not have been discovered as the rightful heir.

7. Failing the mother, any surviving eldest paternal male relative of the deceased inherits. In this category fall paternal uncles and their male issue and indeed a brother's male issue.

8. Failing all issue (a situation conceded as most rare and certainly not in the memory of most), the chief takes over the estate as bona vacantia.

Practical illustrations of the last two rules are lacking due to the improbability of such a situation ever arising. In principle, however, these appear to be rules which could quite conceivably be employed.

Rules of inheritance among the Tonga and Luvale are more fluid with an apparent shift from matrilineal emphasis appearing. The shift among the Tonga is more remarkable because they have been known to be strictly matrilineal while the Luvale, notwithstanding being matrilineal, have been bilineal in instances where the most immediate maternal relatives are extinct. For the Tonga there is little justification in an attempt to restate the order of priority in the selection of an heir because the class of heirs is not closed or specific. Selection of an heir is by the "mukowa" and an heir is selected from within the "mukowa" itself. There is no heir apparent till the election of an heir is complete.

In this situation the most that we can do is to indicate the criteria for electing an heir. In the election of an heir good character is the primary consideration. Thus seniority in itself is not a necessary condition although it might coincide with good character. With good character being the primary factor, the following is a tentative guide to the election of an heir:

1. Nephews and brothers are preferred to any other relative of the deceased.
2. Males are preferred to females.
3. An exceptionally good charactered female could be chosen if there are no male candidates available.
4. A female candidate could be chosen heir if she has a male minor to whom she would have to surrender on his attainment of majority.
5. Where succession to status, i.e. replacing deceased husband by remarrying the widow or widows, may have to occur simultaneously with inheritance of the estate, the candidate must first be eligible for the remarriage.

The Luvale like the Tonga also insist on good character but this criterion appears to be applied to specific persons in the matrilineal descent group in their order of priority. In the appointment of an heir the following factors seem to be most relevant:

1. the most suitable candidate is preferred and seniority is not necessary;
2. males are preferred over females although in the case of the latter marriage is not necessarily a bar to appointment;

3. children of the deceased by virtue of belonging to the mother's side are only considered as a last resort in the absence of all possible heirs; and in the case of a polygamous marriage, it is the most suitable child in any house who is appointed; and
4. relatives on the paternal side may be considered only in the somewhat remote circumstance of there being no relative on the deceased's mother's side.

With these considerations in mind, the order of priority to which the test of good character -- suitability, has been applied apparently follows the principle that "descent is from head to feet". The order of descent is thus:

1. Primarily a nephew inherits.
2. Failing nephews, a niece inherits.
3. Failing nieces, a maternal uncle inherits.
4. Failing uncles, a maternal aunt inherits.
5. Failing aunts, a brother inherits.
6. Failing brothers, a sister inherits.
7. Failing sisters, the mother inherits.
8. Failing mother, the father inherits.
9. Failing father, a son inherits.
10. Failing sons, a daughter inherits.
11. Failing daughters, any relative from the maternal side particularly acquainted with deceased during his lifetime inherits.
12. Failing any such maternal relative, any relative from the paternal side inherits.

13. Failing all relatives, the chief takes over the estate as bona vancantia.

It must, however, be pointed out that this hierarchy of heirs cannot be taken too rigidly. The requirement as to suitability, and the changing social conditions, as will appear when we look at current trends in the law, make the slide in the scale of heirs all the more flexible. The important thing to bear in mind is that the Luvale are essentially matrilineal and accordingly to identify the class of relatives from which an heir may be selected.

The heir's duties and distribution of the estate

The heir's obligations among these three ethnic groups of people vary particularly with regard to the place of the deceased's children in the social structure. Among the Ngoni the rule attached to intestate inheritance is "with property also pass to him (the heir) the deceased's obligations to his family and dependants". It is therefore his duty to maintain the dead man's dependants and all those for whom the deceased stood in loco parentis. In so far as this involves putting the estate to proper use in meeting these obligations, it is well to ask whether this is enforceable under customary law. The question now appears moot as statutory enforcement has been provided. In Re estate of John Jere [1] the mother of the deceased invoked the statutory provisions [2] by seeking that deceased's

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[1] In the Chipata Local Court, "A" Grade, Case No. 423 of 1972. (unreported).

[2] The relevant provision of the Local Courts Act, Cap. 54, Revised Laws, is s.36 which states: "

(2) Whenever a local court has made an order under subsection (1) appointing an administrator of a deceased's estate, the court may --

(a) revoke the appointment of such administrator for good and sufficient cause; . . .".

son be removed as administrator, having been earlier so appointed, for utterly neglecting deceased's dependants in his abuse of the estate. The son was accordingly removed by revocation of his order of appointment.

It could be said, however, that such enforcement is confined only to cases where the local court made an order of appointment of an administrator, and hence cases where there is no such order cannot be similarly enforced. Be this as it may, even in cases of appointment of an heir outside the court, relatives could enforce the heir's obligations by making a fresh application to a local court to have somebody appointed administrator in the place of the heir. One obvious reason in support of such application would be abuse on the heir's part in the discharge of his obligations.

As for the Tonga, although insistence is on matrilineal inheritance by the "mukowa", relatives of the deceased such as children and father who are not members of this kin group have a recognised and enforceable share in the estate. Under Tonga law once an heir has been appointed, unless he is only succeeding to the deceased's status (Kulyaizina which entails remarrying of the widow or widows), he inherits the entire estate which he is obliged to distribute to those entitled. The distribution follows this proportion: [1]

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[1] Cf., E. Colson, "Possible Repercussions of the Right to Make Wills Upon the Plateau Tonga of Northern Rhodesia", J.A.A. op. cit., pp. 27-30 particularly p. 30.

(i) one share to be given to the father of the deceased;

(ii) one share to be given to all the children of the deceased, and in the event of there being more than one house, one share to be given to each of the houses; and

(iii) the remainder and larger share to be retained by the heir to be distributed in part to the "basimukowa" -- members of the matrikin.

In Lwando Mainza v. Kanene Hatwaana [1] the plaintiff son sought to enforce the children's share in the estate of the deceased father. The plaintiff son embittered by the defendant heir's refusal to give children their share complained that children had employed their labour jointly with the father to realise the wealth which now formed deceased's estate. He complained further that even fields were denied them although issue was confined to the personal estate. Recognising the children's share, the court ordered that children be given a quarter of the estate forthwith.

As for the Luvale, both children and the widow do not feature anywhere in participating in the share of the estate. Children are strictly a concern of their matrikin.

In all the three areas however, although the widow has no entitlement in the deceased husband's personal estate, her right to land is recognised and enforceable. A widow is entitled to retain the crop fields, and the house she occupied during the lifetime of

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[1] In the Mwanza Local Court, "B" Grade, Case No. 64 of 1975 (unreported).

the husband. The only condition attached to this is that she should continue residing in the husband's village. [1] She need not have children although if she has, this enhances her claim and may in fact be the inducement to remain at the husband's place to bring the children up if they are still infants. If the widow remarries outside deceased husband's family, she forfeits her preferential rights in land left by the husband.

Among the Ngoni, however, a special kind of garden called "Dimba" -- which a man often clears in dambos so as to facilitate irrigation throughout the year is excepted from the category of the land which the widow may inherit. White does acknowledge that Dimba gardens among the Ngoni are inherited patrilineally. [2] These are inherited by the heir to the deceased estate. These gardens are not included in the crop fields because they are by their very nature a man's occupation. Fencing of the Dimba garden, guarding it from cattle and monkey destruction are typically a man's business.

(b) The intestate estate of a married woman

When a married woman dies intestate, her estate is primarily the subject of distribution amongst her relatives. There is no particular preference of certain relatives although her immediate family such as mother and father will invariably get a lion's share. This is so because any of the deceased woman's property will often be in the custody of her parents. Among the matrilineal Tonga and

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[1] For a sample of widows' landholdings dependent on staying at the husband's village, see Appendix 3, figs. (i)-(iii).

[2] See C.M.N. White, Land Tenure Report No. 3, op. cit., p. 13.

Luvale, children of the deceased woman are included in the category of matrikin. The status of a married woman while still living, as seen earlier, is such that her capacity to acquire property is practically limited -- hence the reflection in the undefined state of customary law. On her death her estate consists often of nothing more than what share of family belongings the husband decides to hand over to her relatives. Even where the deceased woman was, as we have noted, a holder of a preferential right to crop fields and the house she occupied during her husband's lifetime, these do not constitute her estate. This property will on her death be disposed of in accordance with the rules of distribution which would have applied had she forfeited or abandoned the said preferential right. Thus the heir to the deceased married man's estate becomes entitled to both house and crop fields. The justification for this position is obvious: conditions upon which the widow became entitled to this portion of her husband's estate no longer exist with her death.

As women, however, begin to have access to personal acquisitions, there is every reason to believe that a larger estate which invites distribution will have to be distributed along the same patrilineal or matrilineal lines as in the case of a married man. Thus in the case of a Ngoni woman inheritance would have to be through the father's line to include possible heirs such as brothers, sisters, paternal uncles, etc., excluding of course the children. In the case of the Tonga and Luvale, inheritance would have to be through the mother's side such as nephews, maternal uncles, etc., and including

children of course. In this event it would appear that children would have the priority to inherit so long as the requirement of good character is satisfied.

(c) The intestate estate of an unmarried woman

Her estate will generally follow the same pattern as that of a married woman save that the emphasis in the distribution of her estate is equally to both her mother's and father's sides.

In the event of having begotten a child, if such child has attained the age of majority, the child will be preferred as the sole heir of the deceased woman's estate.

(d) The intestate estate of an unmarried man

If the estate is not large enough, distribution among relatives often without any specific order or priorities suffices just as in the case of married and unmarried women. But should the estate be large enough, appointment of an heir will follow the same pattern as in the case of a married man. It is here important to emphasize that amongst the patrilineal Ngoni where children have the priority, any such child of an unmarried man, who can be proved to be his issue will have similar priority. Such proof may involve payment of "chidumo" (compensation for making an unmarried girl pregnant) and the keeping of the child at the man's village.

(e) Current trends in the law of inheritance

While Ngoni law still maintains the most visible consistency

in patrilineal descent in matters relating to inheritance, [1] Tonga and Luvale law reveals a most remarkable shift from matrilineal to patrilineal emphasis. Also affected among the Tonga is the role and composition of the matrikin group -- the "mukowa". The role of the "mukowa" in matters of inheritance is diminishing remarkably and the Tonga practice is certainly not in rigid conformity with what is asserted to be the law. The courts' reactions in line with current Tonga practice seem to herald a new era of departure from past tradition reflected in the laws of the time. The "mukowa" has become a fiction under which any two or three close relatives of the deceased assemble and make binding decisions in respect of an heir and distribution of the estate.

One of the most illustrative instances is the inheritance of the estate of the late chief Naluama of Mazabuka [2] where a sister and nephew of the late chief appointed the eldest of the three nephews heir. The fields of the late chief continued to be cultivated by the children and the widow. It is worth noting that these are not all the members of the "mukowa" who are eligible to take part in the electoral process. An extreme instance of the complete substitution of the "mukowa" occurred in Sikuteka village, chief Mweemba in Gwembe. [3] On the death of an elder brother, there being no "basimukowa", who were at the time in neighbouring Rhodesia, Y a headman being eligible for candidature as the only surviving senior man called

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[1] For an earlier recording of the Ngoni Customary Law on this subject, see "Notes with reference to Succession or Inheritance" (and cases cited therein), Fort Jameson District Note Book, NAZ/KDG/1 Vol. 1. Cf., generally, inheritance, Appendix 3, figs. (i)-(iii).

[2] Interview with successor chief Naluama on 10/5/1975.

[3] Interview with Headman Sikuteka on 30/4/1975.

village residents in his own village to settle the matter of appointing him successor to the office and heir to the estate. And he was accordingly appointed and confirmed as such successor and heir. Y's grandmother was the elder sister to the grandmother of those in Rhodesia.

In Mwanachingwala's area of Mazabuka, as an exception, the exclusive authority of "basimukowa" in the appointment of an heir has been denied. It is there asserted that any appointment needs the consent of the father of the deceased, and the lack of such consent is absolutely fatal to any purported election. The father's consent is only dispensed with if he is not alive. It will have emerged by now, that a deceased's father is not a member of the deceased's "mukowa" and normally would have nothing to do with the election of an heir. Although this assertion is not in conformity with what has been asserted elsewhere in the Southern Province, it is surprisingly supported by some of the recorded practices outside the area. This is revealed in the persons who have taken part in the appointment and the person actually appointed. Thus in Re estate of Ladislaus Kabwata, [1] the applicant, a nephew of the deceased, was supported inter alia in his application to be appointed administrator of deceased's estate by the father of the deceased. In his supporting evidence, the father boldly adduced -- "I have chosen the applicant to be appointed as administrator. Nobody will claim that the applicant is not fit for appointment".

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[1] In the Monze Local Court, "A" Grade, Case No. 70 of 1975 (unreported).

In one of the most remarkable cases to come before a local court, in Re estate of Motson Lwiindi, [1] the father of the deceased, apart from taking part in the appointment deliberations, was the applicant seeking to be appointed administrator of his deceased son's estate. In this the applicant father was supported by his brother-in-law, deceased's maternal uncle, and the wife, deceased's mother. The court did accordingly grant the appointment. Similarly in Re estate of Regina Namamba [2] the father sought to be appointed administrator of his deceased daughter's estate. In this application he was supported by the wife, the mother of the deceased, and by a daughter, the young sister of the deceased. The application was again granted accordingly.

In these cases it is important to note that besides the father, those supporting his application are what constituted the "mukowa" for purposes of inheritance. This serves to indicate that the "mukowa" is becoming more of an immediate family concern. With regard to the shift from the exclusive matrilineal descent, of which the appointment of a father as administrator serves in part as such indication, children of the deceased are also coming up seeking such appointment. Thus in Re estate of Moses Mbete, [3] the first son of the

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[1] In the Mayaba Local Court, "B" Grade, Case No. 89 of 1974 (unreported).

[2] In the Monze Local Court, "A" Grade, Case No. 256 of 1974 (unreported). Cf., in Re estate of Kamu Muchindu, in the Mazabuka Local Court, "A" Grade, Case No. 742 of 1974 (unreported).

[3] In the Monze Local Court, "A" Grade, Case No. 221 of 1974 (unreported).

deceased sought to be appointed administrator and in his application it is significant that he was supported by deceased's maternal uncle (who himself could have sought such appointment). The applicant's brother, one of deceased's sons, also supported the application. The court did not hesitate to grant the son the appointment sought.

The trend towards preference for children appears to have gained significant judicial recognition in Mukachisala Lubala v. Mambaamba Muyangwe [1] a case which came before the Monze magistrate's court. The court was squarely confronted with the issue of children's rights vis-a-vis the "mukowa". The case was between neighbouring Ila parties and not Tonga. Its importance, however, lies in the fact that it deals primarily with the same issue on a broader basis. The decision if accepted as law would have ramifications on the whole subject of inheritance in customary law. In this case the plaintiff's claim was that the defendant being a woman could inherit her father's estate because her sex precludes her from administering affairs of the family properly. In this the plaintiff supported his claim by relying on the decision of other persons in the family who preferred one Harrison, who was the defendant's sister's son. The defendant on the other hand, contended that she was the rightful heir to her father's estate because she was lawfully elected.

In assessing what was the right custom to be upheld, the learned magistrate, adopting the English test, listed the following

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[1] Case No. 1Y/LA/19/70 (unreported).

requisites to be satisfied:

(a) it must be immemorial;

(b) it must be reasonable;

(c) it must have continued without interruption since its immemorial origin; and

(d) it must be certain in respect of its nature generally as well in respect of the locality where it is alleged to obtain and persons whom it is alleged to affect.

Finding all the above conditions satisfied except for (b), the learned magistrate held:

> . . . The only question is whether this custom has been reasonably followed in this case. The family group that supports the plaintiff's claim has no doubt violated the existing custom by appointing one Harrison, a grandson of the deceased and a nephew of the defendant after the defendant had been elected simply because she is a woman. The custom would still be unreasonably exercised if Harrison was appointed over the defendant in the first place. How could a grandchild enjoy the estate of the deceased over his children? Such a custom which would throw unjust or disproportionate burden on certain people for the benefit of the money-hungry individuals cannot be upheld. Whether or not a custom is reasonable is a question of law for the court.

In applying the test as laid down by the learned magistrate, it is submitted that the same conclusion could have been more appropriately arrived at by applying the statutory test for the recognition of customary law which requires such law, inter alia, not to be repugnant to justice, equity, or good conscience. [1] There is more justification in applying this test because it is the only

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[1] See s. 16, Subordinate Courts Act, cap. 45, Revised Laws.

legislative guidance, and in this it dispenses with what are quite irrelevant conditions for the recognition of customary law. In a sense, however, the test of reasonableness is synonymous to justice for that which is unreasonable would certainly be repugnant to justice. The criterion of immemorial antiquity, although insisted on in respect of custom under English law, has been abandoned in respect of African customary law. [1] Immemorial antiquity in any event does not seem an ideal test for a type of law experiencing radical changes being exerted by the various social and economic circumstances. In Zambia the behaviour of local courts, where this has been observed, has been to treat immemorial antiquity as traceable from the distant past. [2] As to certainty, that goes without comment as being necessary for purposes of ascertainment.

For what the decision is worth however, it is significant in that the court is exercising its proper powers of recognition or disapproval of a custom. In so far as a custom, such as the one under consideration, can occasion undue hardship to socially displaced children in depriving them of any property interest which they would otherwise have enjoyed had it not been for the death of the father, it is submitted that the learned magistrate's holding is a proper

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[1] See A.N. Allott, "The Judicial Ascertainment of Customary Law in British Africa", (1957) 20 M.L.R., p. 246. Cf., A. St. J.J. Hannigan, "Native Custom, its similarity to English Conventional Custom and its Mode of Proof", [1958] J.A.L., Vol. 2, No. 2, p. 104.

[2] See M. Gluckman, The Judicial Process Among the Barotse of Northern Rhodesia, Manchester University Press, 1955, p. 244; and J.A. Barnes, "History in a Changing Society", Rhodes-Livingstone Journal, No. xi, 1951, pp. 5-6.

application of the test "not repugnant to justice, equity, etc.,". Children in modern conditions are socially displaced because those of their matrikin on whom they are supposed to rely are not only unascertainable but too far away to provide any maintenance.

If this decision were to be given its full effect, it would negate the "mukowa's" claim to have exclusive preference over a deceased father's children. The place of the court which made this ruling is, however, too low in the country's judicial hierarchy to be of binding effect on courts subordinate to it, i.e. local courts. And indeed in this regard local courts have continued to entertain applications for the administration of the estates from persons who are entitled within the realm of the "mukowa". Thus applications for appointment of administrators from these persons have been granted. [1] This, as earlier indicated, entails a recognition that the persons appointed are heirs under customary law.

With the noted variation in the Tonga law of inheritance, it seems fair to conclude that although the "mukowa" purports to have the exclusive role in matters of inheritance, its significance continues to be whittled. In any event the "mukowa" being a loosely defined group of kinsmen scattered all over lacks the capacity to reassert its authority in all circumstances. Thus not being a corporate unit its extinction, marking a complete dislocation of the

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[1] See for example, in Re estate of Stephen Mungaila, in the Katimba Local Court, "B" Grade, Case No. 150 of 1974 (unreported); in Re estate of Ester Ngoma, in the Monze Local Court "A" Grade, Case No. 64 of 1974 (unreported); and in Re estate of Chindololo Sande, in the Mazabuka Local Court, "A" Grade, Case No. 920 of 1974 (unreported).

old social order, is merely a question of time. The situation is so fluid that not even Coissoro's [1] enumeration of principles of electing an heir from within the "mukowa" in the order of precedence can any longer be treated as thoroughly valid.

The Luvale, no less than the Tonga, have also responded to the changing social conditions, and this is also revealed in decisions of the local courts. A remarkable case evidencing the change or swing from matrilineal descent is in Re estate of Livele Njombi. [2] In this case the election, preceding the application for the appointment of an administrator, centred on the first son and a brother of the deceased. One, Cheche, another brother of the deceased giving the family verdict in his evidence in support of the son's application before the court said: ". . . The vote was between the said Administrator and Wilson, the brother of the deceased. But Noah Nyakaola had a majority of people than Wilson. In fact the . . . Administrator is a good man in character -- that is why we appointed him". Supporting this testimony was another brother, Samulanda, who added: ". . . Administrator is a good man both in character and kindness. We chose him to take over the possession(s) of the deceased". On this evidence the court did not hesitate to appoint the chosen candidate administrator of deceased's estate.

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[1] See N.S. Coissoro, The Customary Laws of Succession in Central Africa, op. cit., p. 80.

[2] In the Chavuma Local Court "A" Grade, Case No. 1 of 1973. (unreported).

In Re estate of Petulu Lufunda [1] and in Re estate of James Chilila, [2] the course has similarly been followed where children of the deceased have been preferred to deceased's maternal relatives. In the former case, the first son of the deceased in a family of four surviving children was chosen heir and he sought to be appointed administrator. Of significance in the application for appointment was that the applicant heir was supported, inter alia, by a nephew of the deceased, who presumably would have been entitled to priority under matrilineal descent. The nephew in his evidence expressed the family's consensus as to the good behaviour and character of the applicant. In the latter case the consensus of the family expressed by the applicant's mother (who it must be noted does not belong to deceased's matrikin) was on the choice of the first born daughter of the deceased.

In two other notable cases -- Re estate of Stephen Mbilishi [3] and Re estate of Hudson Luneta, [4] the mother and father of deceased sons respectively were elected heirs prior to lodging their applications for appointment as administrators. According to matrilineal inheritance, the mother is of course quite entitled.

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[1] In the Chavuma Local Court, "A" Grade, Case No. 6 of 1974. (unreported).

[2] In the Chavuma Local Court, "A" Grade, Case No. 5 of 1974. (unreported).

[3] In the Chavuma Local Court, "A" Grade, Case No. 4 of 1974. (unreported).

[4] In the Chavuma Local Court, "A" Grade, Case No. 2 of 1973. (unreported).

In the instant case, however, she was given priority over more distant maternal relatives which ought to suggest emphasis on the more immediate family. The father, in the latter case, could also be considered as illustrating the bilineal nature of Luvale inheritance. This, however, does not appear to be the case because maternal relatives who could claim priority were not extinct. These two cases must serve to suggest also that the hierarchy of priorities amongst a class of heirs cannot be treated too rigidly as earlier urged.

Along this change in inheritance, the more traditional line of descent also reappears. Thus in Re estate of Josiah Ndonji [1] the brother was elected heir and consequently obtained the appointment of administrator. The criterion of election here according to the supporting witness, who produced a confirming letter from the village headman, was the honest character of the applicant. Similarly in Re estate of John Kalulu, [2] the sister of the deceased was elected heir prior to seeking appointment as administrator. An example illustrating the classical inheritance law is the case of Levu Kapyololo v. Peji Samalata [3] where a nephew of deceased maternal uncle brought suit against defendant, father of the previous wife of

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[1] In the Chavuma Local Court, "A" Grade, Case No. 2 of 1974 (unreported).

[2] In the Chavuma Local Court, "A" Grade, Case No. 1 of 1975 (unreported).

[3] In the Chavuma Local Court, "A" Grade, Case No. 37 of 1975 (unreported).

the uncle. The plaintiff nephew sought a refund of the dowry which was still outstanding long after the dissolution of the marriage during the uncle's lifetime as money due to the estate. The court upheld the plaintiff nephew's claim.

As for the Ngoni law, although there is more consistency, there is, however, also some change in respect of a widow's rights. Although her preferential rights have been confined to land, increasingly widows are also asserting claims to the personal estates of deceased husbands. The courts have upheld such claims. In Re estate of Steven Mvula, [1] a wife sought to be appointed administrator of her deceased husband's estate. The husband was in addition to the widow survived by five other children, apparently all infants. Brothers of the deceased were living in towns along the line of rail. Her application for appointment was granted. In Re estate of Adamson Soko, [2] the wife also sought to be appointed administrator. Her application was supported, quite significantly, by Paramount Chief Mpezeni. The deceased was also survived by nine children. Although the court record does not indicate whether the children were infants, it is very likely that this is so for the mother would not compete against an adult son with the support and approval of the Paramount

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[1] In the Chipata Local Court, "A" Grade, Case No. 77 of 1973 (unreported).

[2] In the Chipata Local Court, "A" Grade, Case No. 83 of 1973 (unreported). Cf., In Re estate of Anderson Kangulu, in the Chipata Local Court, "A" Grade, Case No. 81 of 1972 (unreported); and in Re estate of Marian Ngoma, in the Chipata Local Court, "A" Grade, Case No. 116 of 1974 (unreported).

Chief, who himself is quite conversant with the undisputed place of the son in Ngoni law. In Re estate of Sitambuli Chefu [1] however, all children having predeceased the father, the widow sought to be appointed administrator as heir to deceased husband's estate. The application was duly granted.

In these apparent variations in the customary law, local courts appear to have adopted a wise course of action. In accord with the provisions of the Local Courts Act, local courts entertain applications from "any properly interested party" in the estate. [2] In this, local courts rely entirely on the evidence of the applicant who has to be supported by a number of relatives with a proviso that the order of appointment is delayed from taking effect immediately so that if there is opposition this can be lodged. [3] In the court records perused, no such opposition ever seems to have been lodged.

This approach is commendable in that local courts cannot be charged with encouraging and making a law which does not necessarily correspond to people's practice. In Chipata it was emphasized that although the local court is aware that under Ngoni law as has been known over the years, there is no place for the widow to inherit the

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[1] In the Chipata Local Court, "A" Grade, Case No. 90 of 1972 (unreported).

[2] See s. 36(1), cap. 54, Revised Laws.

[3] For practice directions in this regard, see Intestate Succession in Local Courts, Judicial Circular No. 7 of 1967.

husband's estate in preference to paternal relatives, the only way out of the predicament is to ascertain the family desire on the matter. If the family approves that the widow should inherit, it is not for the local court to substitute this expressed desire. [1] In the absence of any opposing applications, the expressed family desire for the widow to inherit must be an accurate reflection of current trends in the customary law.

In concluding on the customary law of inheritance we might urge that trends in the law invite attention should overall land reforms be contemplated by Government. It is necessary in such reforms to reflect also current developments in the customary law. [2] Two major impressions should be noted in the customary law of inheritance. The rules of inheritance primarily do not recognise the need to distinguish between the personal and real property of the deceased which forms deceased's estate. And the recognition of the immediate family as opposed to the extended family has had the effect of influencing the shift from matrilineal to patrilineal inheritance.

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[1] Interview with Local Court Justices -- A.P. Phiri (President) and B.C. Tembo, 23/7/1975.

[2] For the appeal for legislative reform in this regard, see Chapter 10 at p. 602

PART II

DEVELOPMENT OF THE LAND TENURE SYSTEM: 1924 - 1975

In this part we look at the development of the land tenure system in the territory. The review covers both the colonial and post independence periods. In the former period (1924 - 1964), we trace the policy of land reservation for the two racial groups - namely the Europeans and Africans. All the factors behind this policy and its implementation, culminating in the creation of Reserves, Trust land and Crown land, are explored. The post-independence period (1964-1975) evaluates how much of the colonial heritage has been retained or modified.

CHAPTER 3

'NATIVE RESERVES' -- 1924-1934

The factors influencing land policies in the early colonial period were fourfold - these were the interests of (a) the Imperial Government (b) The British South Africa Company or its assignees(c) The European settlers and (d) the African population. At times these interests might all conflict one with the other, at times, though rarely, they might all be co-incidental. On the whole, however, the Imperial Government, the British South Africa Company and the settlers were all interested in the economic development of the land. It was the pursuit of this common interest that led to conflicts with the interests of the indigenous population. The British South Africa Company gradually lost its power base; later still the voices of the settlers became less frequently heard as Africans obtained more political power. At all stages, there was strict control of land by the State, but the influencing factors changed as the power bases changed, so that today the State, instead of heeding the interests of the British South Africa Company or the settlers, is concerned to give priority to the needs of the indigenous population.

In the early days of this century the policy of land reservation could be seen either as the desire for racial segregation or as a genuine attempt to accommodate the varying economic and social interests in land.

The South African model since 1903 had become representative of the former as Lord Hailey has written: ". . . Land distribution now became an important aspect of the policy of segregation which has since held the field in the Union. . . ."[1] Whether this was to be the rationale of the scheme in Northern Rhodesia could only be tested against the background of experience. Mackenzie-Kennedy, when a Native Commissioner in the territory, expressing unofficial views, but nonetheless reflecting the thinking of some officials, appeared to distinguish the territory's scheme. The emphasis, he insisted, was on providing permanency of land rights for the African, without which real progress was impossible. But he also wished reserves to have access to civilisation.[2]

This, however, did not give a comprehensive picture because it ignored the place of European interests which was an important factor in the development of the policy of reserves. The first such scheme was to reveal, inter alia, the significance of European interests.

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1 See Lord Hailey, An African Survey, Oxford University Press, 1938, at p. 721. Cf., pp. 805 et seq. For the origin of the South African pattern of reserves, cf., Lord Lugard, The Dual Mandate in Tropical Africa, op. cit., Chapter XV, pp. 302-332.

2 See Mackenzie-Kennedy "On the Improvement of Native Village Life and Kindred Topics" Paper read at the General Mission Conference of Northern Rhodesia held at Kafue in June 1924, pp. 6-7. CO 795/6.

A. The East Luangwa District Reserves: The Pioneer Scheme

This part of the territory, now part of the Eastern Province, has been of much concern to the British South Africa Company during its period of administration because of the features which distinguished it from the rest of the territory. The absence of a land tenure system added to the anxiety of a European farmer with increasing cattle stock. This was coupled with the imminent growth of African population. This increase in African population had precipitated the demarcation of a provisional reserve as early as 1904.[1] Dissatisfied with the adequacy of the arrangement from the view point of the African population, the High Commissioner for South Africa did not approve the proposal.[2] With this set back the removal of Africans into the provisional reserve could only be effected on unofficial footing as there was no legal backing for such removal.[3]

The problem had merely been deferred and on the assumption of direct British rule there was a compelling need for determination of policy.

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1 See Report of the Land Commission (East Luangwa District) Fort Jameson (now Chipata) Feb. 29th, 1904. Appendix to North Charterland Concession Inquiry Report, op. cit.

2 See High Commissioner for South Africa to Administrator, Northern Rhodesia, Despatch No.39 of 1915, Appendix to the North Charterland Concession Inquiry Report, op. cit.Cf., ibid., Resident Commissioner, Northern Rhodesia to High Commissioner, Despatch No. 28 of 1915.

3 See Memo by Richard Goode (Deputy Administrator) to High Commissioner No. 57 in Appendix to the North Charterland Concession Inquiry Report, op. cit.

(i) Policy of land reservation on assumption of direct British Administration

Stanley, the territory's first Imperial Governor, did not take long in deciding on a policy of creating reserves for the Africans.[1] In this he was well equipped with his experience in the administration of the Bechuana Territories as High Commissioner and as Resident Commissioner for Northern Rhodesia in Salisbury (Southern Rhodesia).[2] Stanley stated that demarcation of reserves in this area was prompted: (a) by a need for an assurance that there would be sufficient suitable land for permanent occupation by Africans, as population there was more dense than elsewhere in the territory; and (b) the need to give the North Charterland Company definite knowledge, to which they were entitled, of what land within the concession was at its disposal for its own purposes.[3]

The Colonial Office reaction to the idea was not adverse. On the other hand the Colonial Office was more inclined to maintain no marked difference in policy between this district and neighbouring Nyasaland as suggestions to facilitate partition of Northern Rhodesia could be carried out. The Nyasaland idea was very attractive to the Colonial Office. Though still in its formative stage, essentially the idea was that the country was a native territory and Europeans' presence was to be treated as

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1 For Stanley's first hint on this policy, see Minutes of an "indaba" held at For Jameson (now Chipata) on 12/7/1924. Enclosure in Stanley to Thomas, Despatch No. 215 of 2/8/1924. CO 795/2269/24. Cf. The Livingstone Mail, Thursday, July 31, 1924.

2 Cf., R. Palmer, "Land in Zambia", in Zambian Land and Labour Studies, vol. 1, A Palmer (ed.), National Archives Occasional Paper No. 2., 1973, at p.58.

3 See Stanley to Thomas. Despatch No. 233 of 10/8/1924. CO 795/2269/24/2.

exceptional.[1] Nevertheless the Colonial Office was not insistent on this, as it was satisfied that a policy of reserves would achieve the same object, the difference being one of emphasis only. This emphasis, although not fully appreciated at the time, was certainly significant for in it lay the attraction for settlers.

A Native Reserves Commission was appointed on 10th October 1924, with these terms of reference:

> To examine the Native Reserves within the District, having special regard to the sufficiency of land suitable for agricultural and pastoral requirements of the natives, including in all cases a fair and equitable proportion of springs or permanent water and bearing in mind not only their present requirements, but their probable future necessities consequent on the growth of native population. . . .[2]

The composition of this Commission consisted of Macdonell C.J., a judge of the High Court; J.N. Phipps, a local European farmer; and E.H. Poole, a District Commissioner. In seeking approval from the Colonial Office, Governor Stanley advanced reasons for appointment of these members to the Commission.[3] He felt that Macdonell, C.J., had suitable judicial standing which warranted making him chairman of the

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[1] See Minutes of Downie of 8/9/1924. CO 795/2269/2.

[2] See Govt. Notice No. 153 of 1924. For Colonial Office approval of terms of reference, see Teleg. No. 46189 of 1924. CO 795/2269.

[3] See H.J. Stanley to Secretary of State J.H. Thomas, Despatch No. 233 of 10/8/1924 CO 795/2269/2.

Commission. Phipps was preferred as being probably acceptable to both the local European community and the North Charterland Company. Poole, from the Northern Rhodesia Government's point of view, was deemed suitable as a government administrator in the District, being well equipped with knowledge of local Africans[1] who could be entrusted to watch vigilantly over their interests.

The Colonial Office accepted the appointments as being based on sound grounds.[2] The Commission proceeded to carry out its work of determining which areas were to be constituted reserves for the indigenous population. In this task it was outside the terms of reference to determine whether reserves were desirable and acceptable or not. Evidence was invited from the North Charterland Company, the local European settlers, and Africans, represented by either chiefs or headmen. The company's evidence was merely one of detailed local data and suggestions which would assist the Commission's work.[3] Both European settlers and Africans adduced evidence in respect of the land they regarded as suitable to meet their requirements.

The only point of difference which emerged was as to the size of these proposed reserves and their location vis-a-vis European settlements. One view well presented by H. Goodhart,

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1 See H.J. Stanley to Secretary of State J.H. Thomas, Despatch No. 233 of 10/8/1924 CO795/2269/2

2 See Colonial Office minutes dated 10/8/1924 CO795/2269/2/

3 For the Company's evidence, see J.B. Bruce, Company Manager, NAZ/ZP1/1/5 pp.96 et seq.

a planter in the District,[1] was to create smaller reserves. This view was shared by many other settlers. Three reasons were advanced for this proposition. The first was that in the event of native trouble it was easier to organise defence for settlers against smaller reserves. The second was that this would permit the formation of continuous blocks of European farms, thereby ensuring that at least each farmer had an immediate neighbour. The third was that this ensured an efficient supply of labour instead of having scattered villages over a larger area. Captain Graham[2] of the Northern Rhodesia Police, however, refuted the arguement with regard to defence. He argued that defence depended on good roads which the District had. Thus if European settlements were on either side of the main roads, he added, in the event of trouble they could be picked up by motor transport to a rallying point in the Fort Jameson township, the centre of the District. In this proposal he was opposed to scattered farms.

African opinion on the other hand favoured larger reserves to maintain ethnic homogenity. In this arrangement they were not opposed to reserves being close to European settlements for purposes of supplying labour. In the supply of labour to European farms the chiefs and headmen saw a source of income for their people.[3]

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1 See NAZ/ZP/1/5 p. 87.

2 Ibid., at p.69.

3 See in particular the evidence of Chief Mkanda (at p.80); and Chief Mwanjabantu (at p. 33).

The Commission resolved this conflict of views by favouring the creation of larger reserves, accepting Captain Graham's argument and African opinion as to ethnic homogenity. In creating larger reserves the Commission sought to avoid disturbing tribes which had already settled in previous provisional reserves.[1] Where, however, the Commission found it desirable to alter the boundaries, it did recommend alteration.

The Commission came out with its report on suggested demarcations with the theme of complete exclusion of Europeans, including missionaries, from the reserves.[2] Its Chairman, Macdonnell, C.J., saw in the reserve an opportunity for the evolution of self government with authority being in the chief and headman. He was anxious to avoid the situation arising whereby missions also could be seen as an authority and therefore be in competition with the chief and headman.[3] In attempting to provide the administrative machinery of the scheme, the Commission seems to have gone beyond its terms of reference: demarcation of adequate land. As to the adequacy of the reserves, this recommendation in respect of one area was vigorously challenged by the Anglican Bishop of the territory.[4] Macdonell, C.J., did not hesitate to concede to the challenge, confessing that the Bishop's revelations had not been brought to the attention of the Commission.[5]

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1 See Native Reserves Commission Report, (East Luangwa District) 1925 NAZ/ZPI/1/1 pars 35 and 36. For the origin of provisional reserves, see p. 201 supra.

2 For the Commission Report, see Despatch No. 403 of 5/9/1925 particularly ss. 73, 74 & 75. CO 795/45621/25.

3 See Macdonell to Green of 30/10/1925. CO 795/49628.

4 See enclosure (2) in Stanley to Amery, Conf.(4) of 5/9/1925. CO 795/45663/25.

5 See Macdonell, C.J., to Green of 7/11/1925. CO 795/49628/25.

This concession can only be taken as the earliest indication that the Commission did not possess adequate facilities to accomplish its assignment.

On the more fundamental issue of exclusion, Stanley vehemently disagreed with the Commission's recommendations. Conveying his disapproval to the Colonial Office, Stanley observed:

> . . . While I agree with the principle that a Native Reserve should not be "a place in which a European can possess or acquire domicile", I am not prepared to go to the length of supporting in their entirety the recommendations . . . I can conceive of circumstances in which the interests of the natives might be prejudiced rather than served by the unqualified exclusion of all Europeans . . .

To the contrary he proposed that "persons other than natives" - (a term referring to Europeans) - should not be permitted to acquire any interest in reserved land except on having satisfied the following conditions:[1]

(1) that prior consent of a local headman or chief be obtained;

(2) that the intended purpose for which land was to be used was clearly defined and the governor satisfied that it was in the best interests of the local population;

(3) that the area in question was not unreasonably larger than was considered necessary for the purpose, and in any event was not to exceed 50 acres without obtaining special prior consent of the Secretary of State;

(4) that the tenure by permit so granted by the governor was not to exceed ten years, and would be renewable on consent being given by the headman or chief; and

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1 See Stanley to Amery, Despatch No. 26 of 12/1/1926. CO 795/X1424.

(5) that the governor would have unfettered discretion to refuse the grant or renewal thereof without furnishing reasons.

His only agreement with the Commission was the government's right to take tracts of land in reserves for government stations.[1]

The policy of segregation, in principle at least, was rejected and this appears to have been the official view of the territory's administration. In this regard Tagart, Secretary for Native Affairs, reviewing the Commission's report shared similar views. Disapproving of segregation, he remarked:

> . . . It might be interesting to experiment with so extreme a policy of segregation, but if it be once admitted that contact at certain points with European civilization is beneficial, it would, it is submitted, be too hard on the native to fetter his Trustees to the extent proposed.[2]

The Missionary view as expressed by the Anglican Bishop was equally hostile to the idea of having missionaries excluded from reserves.[3] This, however, does not appear to have been one major influence behind the Northern Rhodesia Government's rejection of segregation. Independently of this opinion, Stanley had decided against the proposals on the broader basis of prejudice to the African interests arising from indiscriminate exclusion.

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1 See Stanley to Amery, Despatch No. 26 of 12/1/1926, par. 9. CO 795/X1424.

2 See Minute of Tagart, Enclosure in Stanley to Amery, Conf. (4) of 5/9/1925. CO 795/45663/25.

3 Ibid., Enclosure of Memo on the exclusion of European Missionaries from a Reserve.

In presenting the official view Stanley persuaded the Colonial Office to approve the Commission's report as modified.[1] All that now remained was just a formula to implement the modified proposals.

(ii) Formula of reservation and nature of interest intended

Stanley had already indicated his preference for constituting reserves and vesting them in the Secretary of State by Order-in-Council.[2] It was felt in the Colonial Office that no marked difference ever existed between a local ordinance and an Order-in-Council, or indeed in vesting the reserves in the Secretary of State, as opposed to the Southern Rhodesia Order-in-Council of 1920 which vested reserves in the High Commissioner for South Africa. However, Sir J. Risley, the Colonial Office legal expert, was able to interpret the rationale behind Stanley's preference. He thus minuted:

> Although an O-in-C is of course technically no more binding than an Ordinance and is equally susceptible of alteration, I should think that the natives could be disposed to see in an O in C the personal act and guarantee of His Majesty and could feel more secure in their rights than they could under a local ordinance.[3]

Although Green's[4] view was for maintaining consistency with the South Rhodesian model in case the railway strip of Northern Rhodesia was linked to Southern Rhodesia,[5] the consensus of the Colonial Office was in favour of Stanley's

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[1] See Secretary of State to Governor, Teleg. of 12/2/1927. CO 795/18176/16.

[2] See Despatch No. 26 of 12/1/1926, par. 10. note 1, p. 208 supra.

[3] See Minutes of Sir J. Risley of 2/10/1926. CO 795/1424/26.

[4] Green was an officer for African Affairs in the Colonial Office.

[5] See Minutes of Green of 4/10/1926. CO 795/1424/26. Cf., Tait's Minutes of 5/10/1926. Ibid.

proposal. Needless to say Green's anticipation could well have been taken care of by amending the Order-in-Council, and vesting reserves in the two territories, whenever occasion arose, in one authority. The Colonial Office instructed the Governor to proceed with the drafting of the Order in Council.[1]

As to the nature of the land interest to be reserved, Stanley had indicated already a similar preference for a fee simple. He was inclined to create such an interest so as to prevent rendering the entire scheme nugatory due to possible mining operations in the reserves. Thus he informed the Colonial Office of his views:

> . . . we are agreed in thinking that the right reserved to itself by the Crown (in its Agreement of . . . 1923, with the BSA. Co.) to set apart such . . . Reserves in the area of the North Charterland Concession as the Crown may deem proper, must be a right to vest in itself. . . for the purposes of Reserves the fee simple in the land so set apart, as otherwise the use and enjoyment of such land by the natives . . . could be rendered nugatory by mining operations.

To achieve this end Stanley suggested ignoring any insertion of a specific provision in the proposed Order-in-Council reserving the mineral rights in reserves to the North Charterland Company. Ipso facto, it was felt, the company would have been divested of its mineral rights in reserves.[2]

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1 See Amery to Stanley, Conf. of 15/10/1926. CO 795/1424/26.

2 See Stanley to Amery, Conf. of 12/1/1926. CO 795/X1424/26.

The Colonial Office was not disposed to this thinking and did recognise the company's entitlement to mineral rights. Sir J. Risley pointed out that by the 1923 Agreement the North Charterland Company was the assign to the British South Africa Company, which granted the concession to the former. As the 1923 Agreement recognised the entitlement to mineral rights of the British South Africa Company the North Charterland Company's mineral rights were equally recognised. He insisted further that although the Agreement did reserve the right of the Crown to set apart reserves (without specifically providing the means of so doing), this power could only be exercised subject to existing rights in the same tract of land.[1]

This conclusion was no doubt sound as the relevant provisions of the 1923 Agreement did recognise such right to minerals on the part of the British South Africa Company. The latter's rights not being in issue no occasion was presented to determine whether or not such was the effect of the Agreement. On the question of undue interference with land rights in reserves arising from mineral exploitation, the Colonial Office felt that an extension of the existing legislation on mining operation to cover reserves, could adequately contain the feared interference. But it was thought that such extension could be deferred until actual difficulties

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[1] See Minutes of Sir J. Risley of 10/1/1927. CO 795/X1424/26.

were presented. The Colonial Office thinking was communicated to the Governor with instructions:

> . . . Our legal people . . . incline to the view that they (mineral rights) remain with the company, though there seems nothing against extending the existing legislation to prevent undue interference with native rights by mining operations . . .the best course would seem to be to say and do nothing unless and until a concrete difficulty arises in which case the point could be reconsidered.[1]

Apparently giving in on the question of the North Charterland Company's mineral rights, which was not necessarily inconsistent with the fee simple concept, Stanley proceeded to the draft Order in Council satisfied that the 'say and do nothing' suggestion did not prohibit providing regulations in regard to mining operations. Having drafted legislation in favour of giving the Governor power to grant and withdraw permission for mining operations, Stanley submitted the draft Order.[2] The Colonial Office, in keeping with its practice of consultation, availed the two companies concerned of the draft Order and invited their comments.[3]

The British South Africa Company was the first to signal its reaction of dissatisfaction with the draft Order, apparently worried about the precedent that might be set in depriving it of possible minerals in the area not reserved to the North

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1 See Green to Stanley of 18/1/1927. CO 795/X1435/26.

2 See Enclosure in Goode, A/Governor to Amery, Conf. of 29/1/1927. CO 795/18176/27/16.

3 See Green to Secretary, North Charterland Company of 3/5/1927. CO 795/X18345/27/6 and Green to Secretary, BSA, Co. of 3/5/1927. CO 795/X18345/27/7 respectively.

Charterland Company.[1] The Company's reaction was in respect of (a) the vesting of reserves in the Secretary of State in perpetuity without qualification, and (b) the wide powers of the Governor in regulating mining operations. Registering disapproval as to (a), Marshall Hole, the Company Secretary, complained:

> . . . the Draft Order proposes to set apart the areas of all Native Reserves in perpetuity for . . . the Natives without reserving to the owners of minerals the full enjoyment of the rights to which they are at present entitled in those areas.

As to (b) he proceeded:

> Indeed under Clause 4 . . . wide discretionary powers are in effect given to the Governor to prevent prospecting and mining because without the Governor's express permission no person may enter a Native Reserve for the purpose of prospecting or mining there, and such permission once given may at any time be withdrawn.

The protest concluded that the effect of this latter provision would be to diminish the Company's mineral rights in a manner inconsistent with any previous Order-in-Council recognising the Company's rights.[2] The Colonial Office must have been impressed with this line of argument, which admittedly was sound as the Company's title at the time had not been in

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[1] "precious stones, oils or fossil substances" were reserved to the BSA. Co. in the North Charterland Concession. See H.M. Williams, The Mining Law of Northern Rhodesia, op. cit., at p. 155.

[2] See Hole to Under Secretary of State of 12/5/1927. CO 795/X18345/27/29.

question. The Governor was soon consulted for his reply to this argument.[1]

To the Governor this was not an unexpected reaction as he himself had felt apprehensive about the diminishing effect of the provision. Stanley thus opted for a compromise suggesting that the Governor's restrictive power in regulating mining be aimed at keeping out undesirables rather than impede mineral development. He hoped, that if phrased as 'to appear to be aimed at individuals rather than a class of persons', this power 'would be less unpalatable to the Company'.[2] This compromise view was not, however, consistent with the original desire of a fee simple interest to contain interference from mining operations. Undesirables could not pose as much interference as mining operations; and even when there were to be interference, it could only be with regard to the social well-being of the inhabitants.

The substitution appears nowhere close to preserving property interests in reserves. The justification is solely economic: mineral exploitation outweighs preservation of reserves from interference. The compromise certainly appealed to the Company for the relaxation of mining regulation was in

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[1] See Green to Stanley of 28/5/1927. CO 795/X18345/27/10.

[2] See Stanley to Green of 8/6/1927. CO 795/X18345/27/13.

itself a qualification on the right vested in the Secretary of State in perpetuity. A new draft regulation in clause 8, taking into account Stanley's proposal, when put to the Company[1] received unqualified endorsement.[2]

This concluded the issue with the British South Africa Company, but not with the North Charterland Company, which, aware of what had transpired, took a different line of attack. The North Charterland Company sought (a) express recognition of its title to both minerals and land rights in the concession by Order-in-Council and (b) the Governor's power of exclusion to be confined to 'serious misconduct or breach of the Regulations' on the part of such persons regarded undesirable.[3]

The Colonial Office, however, turned down these proposals.[4] As to the recognition of title, it was felt that nothing should be done to cure title which might be null and void for want of registration. The North Charterland Company was not, however, worried with a defect in title due to want of registration. The Company's concern was for the British South Africa Company's title. As grantor of the concession the British South Africa Company's title was vulnerable to challenge. Hence it was felt by the North Charterland Company that once its title, which was obtained from the British South Africa Company, was recognised

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1 See Machtig to Secretary, BSA. Co. of 9/8/1927. CO 795/X18345/27/22.

2 See Hole to Under Secretary of State of 5/9/1927. CO 795/X18345/27/25.

3 See Meldrum to Under Secretary of State of 14/11/1927. CO 795/X18345/27/30.

4 See Machtig to Secretary, North Charterland Company of 6/1/1928. CO 795/X18345/27/38. Cf., Colonial Office reaction in internal minutes.

by an Order-in-Council, it could not subsequently be challenged. As to mining regulation, the Colonial Office considered that the new provision was now adequate for mineral development.

With all these consultations the draft Order-in-Council was finally passed as the Northern Rhodesia (Crown Lands and Native Reserves) Order in Council 1928.[1] Governor Stanley's major theme was thus in large part achieved namely that:

(a) reserves were exclusively for indigenous people excepting instances where acquisition of land therein by 'non-natives' was in the interests of the former, but even then for a period not exceeding five years;

(b) the said reserves were to vest in the Secretary of State in perpetuity by Order-in-Council; and

(c) mineral exploitation, although allowed in reserves, was to be regulated, albeit not very restrictively so as not to interfere with the interests of the inhabitants therein.

A precedent for future demarcations had been set but the effect of the Order-in-Council was put to the test by the North Charterland Company.

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[1] See Enclosures in Hankey (P.C.) to Under Secretary of State of 22/3/1928. CO 795/X35027/15.

(iii) Effect of the Order-in-Council

Giving its first reaction to the East Luangwa District Commission which relied on clause 3(e) of the 1923 Agreement (by which the Crown maintained the right to set apart reserves in the concession), the North Charterland Company attacked the presumption that the British South Africa Company had authority to conclude this clause on its behalf. Registering the company's dissent, Meldrum, the Company Secretary, wrote: "This presumption is not, however, borne out by the facts of the case. My Company was not a party to the Agreement of . . . 1923, and my Board was never consulted upon the terms of the Clause in question by the British South Africa Company, which had no authority to agree the Clause on its behalf".[1] At the time the Colonial Office response to this was sharp and uncompromising. The company was reminded that challenging clause 3(e) brought into issue the very basis of the company's title from the British South Africa Company, a title which was already doubtful. A compromise was reached by the insertion of the clause recognising the concession deal. On the effect of the demarcation of reserves, the Colonial Office letter concluded: "The Company will now be in undisputed possession of over four million acres of freehold land with the advantage of a large and contented native population settled within its boundaries. This should give ample scope for the widest

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[1] See Meldrum to Under Secretary of State of 2/6/1926. CO 795/X4715/26.

development and Mr Amery trusts the success which has hitherto attended their work will continue in the future, now that the questions of their title and of the rights of the resident natives have been definitely settled."[1]

Seeing in this a reassurance of title to their tract of land, the North Charterland Company seemed content by halting any further issue of the matter. The company's decision was communicated to the Colonial Office when Meldrum wrote, ". . . my Board accepts the provision for the allocation of Native Reserves . . . My Board . . . notes that further discussion is not desired of the grounds on which the authority of the British South Africa Company to grant my Company's Concession was considered doubtful. My Board further takes your letter . . . as meaning that, whatever doubts may have been felt in the past as to the validity of my Company's title, that title is now to be taken as recognised and confirmed by His Majesty's Government".[2]

It had taken the company almost three years after the conclusion of the Agreement to raise the issue of the clause but with this letter the Colonial Office was entitled to believe that the reserve scheme was now accepted. This, however, was just a prelude to a bitter dispute which was to establish for the North Charterland Company a reputation of

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1 See Strachey to Secretary, North Charterland Company of 12/8/1926. CO 795/X6023/26. Cf., Minutes of Tait of 5/7/1926. As to title dispute, see Minutes of Green of 30/7/1926.

2 See Meldrum to Under Secretary of State of 10/2/1927. CO 795/18176.

never accepting any issue as concluded. Departing from the Meldrum acceptance, Spiller, a company director, revived the question alleging that the matter could not be considered finally settled when the company shareholders, the chief parties concerned, were not aware of the true facts. He summarised his challenge, which was to occupy the Colonial Office for a couple of years, in the words: "I ask that Clause 3(e) of the Agreement . . . which is admittedly invalid, with resultant effects, shall be expunged. It seems to me incredible that a Minister of the Crown can enter into an Agreement with any unauthorised party to deprive a third party of its property without the third party's knowledge or consent or compensation."[1] At Spiller's suggestion an advisory committee of the company was formed to prosecute the company's cause. Towing the Spiller line, the committee soon addressed the Colonial Office with regard to the unsatisfactory authority to include Clause 3(e) in the Agreement.[2]

It was now clear that the Colonial Office could no longer ignore the issue. Earlier, in 1926, reacting to the company's first objection to the validity of the clause, the Colonial Office appeared to have entertained the idea that such authority was in fact given. At the time the Colonial Office

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1 See Spiller to Ormsby Gore of 5/12/1927. CO 795/X18345/27/33. For the series of correspondence (1924-1928) relating to the claims of the North Charterland Company, see African No. 1123, March 1929.

2 Rowe to Under Secretary of State of 7/3/1928. CO 795/X35027/28/8.

never wished to go into the question of title. Tait, relying on the 1921 British South Africa Company's assurance[1] minuted: "In 1921 they were pressing us to agree to the appointment of the Commission to recommend a final assignment of reserves not only in the Central portion of N.R. but in the North Charterland Company's area and they told us that this was concurred in by the Board of the North Charterland Company".[2] If the Colonial Office felt as Tait suggests that the North Charterland Company had agreed to demarcation of reserves in its concession, this should have been brought to the attention of the company in dissuading it from contending now that there was no authority for the 1923 Agreement. On the contrary when the issue of authority became very crucial subsequently in 1928, Green entertained doubts as to whether the British South Africa Company had obtained authority of the North Charterland Company to enter into the 1923 Agreement. In this regard he minuted that the North Charterland Company should not be held bound by the Agreement.[3]

Sir J. Risley, on the other hand, concerned more with legal issues, seeing that litigation was imminent at the instance of the company, advised against any admissions. He was satisfied that, on the text of the Agreement and the Order-in-Council, as an Act of State, the Crown had good grounds

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1 See BSA Co. letter of 26/5/1921, Africa 1085 p. 257.

2 See Minutes of Tait of 5/7/1926. CO 795/X4715/26.

3 See Minutes of Green of 5/11/1928. CO 795/X35027/28/36.

to support its contention that reserves could be created in the concession area without compensation to the North Charterland Company.[1] On the latter ground he was to be proved right. With a break in correspondence between the two sides, the company's course of action was made well known that suit against the Crown by petition of right was pending.[2] The long awaited test case of North Charterland Exploration Co.(1910) Ltd. v. The King[3] was to settle the issue of the effect of the Order-in-Council made pursuant to the document in dispute - the 1923 Agreement. The Company's argument was now reframed from one of the lack of the binding authority of the 1923 Agreement to derogation from grant.[4] The company argued, as a principle of the common law,that the Crown cannot derogate from the grant of land made to it through the Crown's predecessor in administration, by taking away portions of this land by Order-in-Council. This common law principle, it was insisted, could not be overridden even by the Foreign Jurisdiction Act 1890, under which the 1928 Order-in-Council was purportedly made. The Crown, on the other hand, demurred the petition of right claiming that the Order-in-Council was an adequate answer to the company's claim to the land or compensation in the alternative.

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1 See Minutes of Sir J. Risley of 9/11/1928. CO 795/X35027/28/36.

2 See Edgumbe to Fry of 23/11/1928. CO 795/35027/40.

3 (1930), XIVI T.L.R. p. 566.

4 For the common law doctrine of derogation from grant, see Browne v. Flower (1911) 1 Ch. 219.

Luxmoore, J., finding that the concession area in question was part of H.M.'s protectorate, concluded:

> There can I think be no question that the legislative authority over territory not being part of His Majesty's Dominions but constituting a protectorate of the Crown is the prerogative of the Crown, and that there can be no fetter on such prerogative except as is imposed by the Imperial Parliament.[1]

Rejecting the applicability of the common law principle, his lordship held:

> In my judgement, the doctrine of derogation from grant cannot be applied in the case of a grant from the Crown so as to deprive it of its paramount right to legislate for the Protectorate in which the subject of grant is situate. To do so would be to place the Crown with reference to any land granted by it in an inferior position to that occupied by other owners of land within the same Protectorate.[2]

This case established beyond all doubt the legal effect of the Order-in-Council as being exclusively the prerogative of the Crown. This Order and the reserves it created could not in law be questioned. What the case did not do (and could not have been expected to do), however, was determine the company's earlier contention as to the validity of the 1923 Agreement. The company, realising that the legal battle had been lost, and apparently satisfied that some light had been cast by the Crown's pleadings on the British South Africa Company's purported authority to enter into the aforesaid Agreement, decided against appealing.[3] But this was

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1 at p. 569.

2 at p. 570.

3 See Parker, Garrett & Co. to the Treasury Solicitor of 23/7/1930. CO 795/35491/B/30/30.

not the end of it for the strategy was now changed to one of drawing the issue to public attention with an aim to having a public enquiry.

(iv) The Public Enquiry and the Maugham Report

Spiller, rejecting that the matter was concluded, was quick to lobby Members of Parliament with this message: ". . . Members of the House of the Commons and the public have been consistently deceived by methods alien to the British character". Soliciting a public enquiry, Spiller appealed: "I trust that you will demand an unfettered Enquiry no matter what the consequences may be to the individuals concerned. . ."[1]

The campaign as it turned out was unnecessary for the Colonial Office did not resist and neither is there any indication that it wished to avert a call for such an enquiry. On the contrary, the Colonial Office agreed to the move and a Commission was set up under the chairmanship of a judge of the High Court of England, Maugham, J. The Commission's terms of reference included a determination of question 4 - "whether the North Charterland Company acquiesced in, or accepted the inclusion in the Agreement of 1923, of Articles 3(e) and 3(f) and if so when, how, and in what circumstances?"

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1 See Spiller's letter to Members of the House of Commons of 27/7/1936. CO 795/45006/36/39.

On this question Maugham, J., reported: "I must therefore report that by the letter of the 10th February, 1927[1] the North Charterland Company, being aware that Articles 3(e) and 3(f) had been inserted without authority in the Agreement . . . and that the Company was not bound or affected by the terms of those Articles, did in fact acquiesce to this extent, that the Company accepted the proposed provisions for the allocation of native reserves; in other words, the Company acquiesced in an administrative step based on the assumption that the Crown had the right without compensation to set aside out of the tract such native reserves as it thought proper . . .".[2] His lordship, however, found that the British South Africa Company had no authority from the North Charterland Company upon which it concluded clause 3(e) of the Agreement.[3] The Commission also found that the title to the tract immediately before the date of the 1923 Agreement was vested in the North Charterland Company, but this title was subject to the right of the Crown, contained in earlier Orders-in-Council, to set aside reserves in the concession without compensation.[4]

To the North Charterland Company it must now have been clear that neither good title nor the lack of authority for clause 3(e) was of any benefit in their struggle. The title

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[1] See note 2 at p. 218 supra.

[2] North Charterland Concession Inquiry Report, op. cit., p. 26.

[3] Ibid., p. 21.

[4] Ibid., pp. 20-21.

was an encumbered one being subject to the right of the Crown to set apart reserves whether or not the controversial clause was valid. The effect of previous Orders-in-Council was the same as the 1928 Order. To the Colonial Office and the Northern Rhodesia Government the matter was finally determined by the answer to question 4 as title to the tract never was in issue from their point of view. At the request of the Secretary of State to the Law Officers[1] as to what effect the answer to question 4 (referred to above) had in law, Sir T. Inskip advised:

> In my opinion, it is clear that the answer . . . in law, disposes of the whole of the Company's case. . . if the Company had been in a position to sue the Crown in proceedings in which neither any privilege of the Crown, nor any Order in Council had been relied on the Company would have failed in their Action.[2]

The Northern Rhodesia Government, commenting on the Report, remarked:

> . . . The question of title is not the issue upon which disagreement . . . first became acute. That issue was whether or not the Government had the right to set aside lands within the Company's tract for native reserves without compensation to the Company and that right has now been amply affirmed . . .[3]

The Northern Rhodesia Government's view appears preferable because the tenor of the Colonial Office's conclusion assumes that any court of law would have similarly upheld acquiescence.

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1 See Bushe to Sir T. Inskip of 18/10/1932. CO 795/X36290/32/90.

2 See Sir T. Inskip to Bushe of 26/10/1932. CO 795/36290/32/94.

3 See Kennedy to Sir P. Cunliffe-Lister, Conf. of 26/10/1932. CO 795/X36290/32/97.

The Commission's finding on this cannot, however, be taken as conclusive regarding the circumstances of the case. The company's 1926 acquiescence by letter, it might be observed, was not entirely of its own volition as the Commission itself noted that it was due 'partly to a desire to avoid the costly proceedings which might have been necessary to establish the title.'[1] Earlier acquiescence, (the period between 1923, the year of the Agreement, and 1926) is not conclusive either by the mere fact of silence, as it could very well have been argued that the disadvantage in the Agreement had not yet been appreciated and that this controversy presented the first occasion to protest. The Northern Rhodesia Government's view is more consistent with the legal effect of an Order-in-Council, and Luxemoore, J.'s ruling already on record conclusively indicated, inter alia, the constitutional law theory of the day.[2]

Sir T. Inskip's opinion, however, became the official view of the effect of the Report and Sir P. Cunliffe-Lister, Secretary of State, soon repeated this in a reply to a question in the House of Commons.[3] The Maugham Report conclusively brought a halt to the land row and Maugham, J., in a subsequent

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1 See North Charterland Concession Inquiry Report, op. cit., p. 26.

2 Cf., for example Sobhuza II v. Miller & Others A.C. 1926, p. 518 (discussed in chapter 1), acknowledging the over-riding effect of an Order-in-Council.

3 See House of Commons Debates, 2nd Nov. 1932, Vol. 269, cols. 1764-1766. Cf., House of Commons Debates, 11th March, 1936, Vol. 309, cols. 2109-2110.

reopening of the enquiry, equally dismissed allegations of bad faith levelled by the company against the Crown for allegedly withholding key Crown witnesses.[1]

Both the Colonial Office and the Northern Rhodesia Government abided by the recognition of the company's title and did nothing to interfere with it any further, even when they could have done so. Thus when it was subsequently realised that more land was needed for reserves in 1941, they opted to purchase the company's land for these needs.[2]

During the turbulent years of this land question, enquiry into further areas of reserves elsewhere in the territory proceeded unimpeded. One such area attracting attention was that along the line of rail.

B. The Railway Line Area Reserves

There were no factors brought out by the East Luangwa District Commission to prompt the Government into immediately forming a definite policy on reserves elsewhere in the territory. Thus when asked in the Legislative Council after appointment of this first Commission whether the Government intended to delimit such reserves elsewhere in the country, the Chief Secretary to the Government replied: "It is not thought necessary that Native Reserves should be delimited throughout the whole Territory.

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[1] See North Charterland Concession Inquiry Report by Maugham, J., May 1933, Colonial No. 8, paras. 7, 8 & 12.

[2] See Arbitration on Award in Govt. of Northern Rhodesia v. North Charterland Exploration Company (1937) Ltd. Enclosure in Waddington to Lord Mayne, Conf. (2) of 7/1/1942. CO 795/45006/2/42/21. Cf., O.A.G. to Secretary of State, Teleg. No. 383 of 10/10/1941. CO 795/45006/2/41/12 & Secretary of State to O.A.G. Teleg. No. 329 of 16/10/1941. CO 795/45006/41/2/4/13.

It is recognised, however, that the delimintation of such reserves in certain areas is desirable. The Government hopes to be able to take action to that end before very long, but it is not yet in a position to make a more definite statement".[1]

Prospects of mining development were soon to bring about a formulation of policy, quite apart from the Government's desire to accommodate the indigenous population adequately. When the occasion arose, Stanley announced his policy in a communication to the Colonial Office when he wrote: ". .Briefly, it is to establish Reserves in those parts only of Northern Rhodesia where circumstances, actual or probable, seem to render such a measure desirable in the interests primarily of the local natives and secondarily of economic development of the resources of the Territory."[2] Although this policy places primary emphasis on African interests, European settlement and the economic factor were in fact the predominant considerations. The terms of reference, under which a Commission to inquire into this area was appointed in 1926, made this quite clear. The preamble to the terms of reference of the Commission acknowledges this economic factor in the message - "WHEREAS certain natives of the Territory are or may be affected in their occupancy of land by actual or probable

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1 See Minutes of the Leg. Co., 19th May, 1925 at p. 2. Enclosure in Stanley to Secretary of State, Despatch No. 214 of 23/5/1925. CO 795/27102/25.

2 See Stanley to Secretary of State, Despatch No. 25 of 12/1/1926. CO 795/1423/26.

European settlement along or near the railway line or by actual or probable mineral development along or near the same . . .".

The Commission was then charged to delimit reserves suitable and sufficient for the agricultural, pastoral, industrial and other requirements of the local people, but in so doing it was important "that no avoidable difficulties be placed in the way of the mineral development of the Territory".[1] Commenting on these terms of reference to the Colonial Office Stanley said, ". . . You will observe that actual or probable mineral development is to be taken into account, as well as European settlement . . . Without this amplification of the Reference, the Commission could not deal satisfactorily with the Area for and in which Reserves are necessary".[2]

The Commission consisted of three members. Macdonell, C.J., chairman of the previous Commission, was again appointed chairman. M. Thomson, a magistrate in Broken Hill, a town along the line of railway, was appointed member and secretary to the Commission. The third member was a farmer, Col. H.M. Hart.

In the hearing of evidence from the various witnesses, the Commission did not confine itself to the terms of reference.

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1 For appointment and terms of reference of the Commission, see Govt. Notice No. 89 of 1926.

2 See Stanley to Amery, Conf. of 16/5/1926. CO 795/X4882/26. For the Colonial Office approval of the terms of reference, see Amery to Stanley of 29/6/1926. CO 795/4882/26/2.

All were let say whatever they wished. Evidence of government administrators tended to be a detailed historical review of the territory and an account of the customs and practices of the indigenous people. Evidence of J.E. Stephenson, an early government administrator, was typical of this.[1] Appreciating such detailed local knowledge, the Commission subsequently commented: "The Commission received a good deal of instructed evidence as to these tribes. . .".[2]

As for European settlers, their viewpoint was primarily conveyed by the Farmers Association which had advocated for reserves long before the establishment of the Commission. On this occasion the Farmers Association reiterated its stand that the Government establish reserves instead of having scattered native villages "as farmers suffer great disabilities through their proximity to their farms."[3] Individual farmers who gave evidence before the Commission had very little to add on this beyond expressing their respective experiences. C.M. Landless, a farmer in Lusaka, expressed his knowledge of Southern Rhodesia where the land thought to be unsuitable for Europeans and given to Africans now proved to be good land

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1 See Northern Rhodesia Native Reserves Commission, 1926, Vol. 1 pp.95, 102-104 and p.113. Cf., evidence of L.C. Heath, an assistant magistrate; J.H. Clarke, an early pioneer in the country; and C.F. Molyneux, an assistant magistrate, pp. 147-150, pp. 167-171, and pp 1-3 respectively.

2 Northern Rhodesia Native Reserves Commission Report, 1926, Vol. 1 at p. 33.

3 See Northern Rhodesia Native Reserves Commission Report, 1926, Vol. II, at p. 288.

for tobacco farming.[1] W.R. Harvey,[2] another farmer, took the occasion to resubmit his application for a wheat irrigation scheme which had previously been turned down. C. Carrinus,[3] also a farmer, expressed the view, with regard to three proposed reserves, that the land therein was better suited for European farms.

African opinion, on the other hand, was divided between those who tacitly approved reserves and those who resented being moved again. Headman Kalulu, in the Central Province expressing his own view stated his appreciation that "one day I will have to move into the Reserve."[4] Resentment of the reserves scheme came from Southern Province where people had previously been moved from their areas on arrival of European settlers in the Province. Chief Mwanachingwala uncompromisingly put it: "I was first told to move to west of the Magoye River and I have done it and I do not want to move again . . . I know I am in trouble and I and my people will die as we have no good "Bwana" (white man or official) to look after us. When I was moved before from east of the Magoye, I was told I would not have to move again. I ask why I have been troubled by Europeans like this . . ." Chief Sianjalika, headmen Simonga and Shangwa who were to be similarly affected by being removed from nearby streams expressed the same resentment.[5] Concern for African interests was equally expressed by some

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1 Northern Rhodesia Native Reserves Commission Report, 1926, Vol. II at p. 257.

2 Ibid., at p. 292

3 Ibid., at p. 356.

4 Ibid., at pp. 437-438.

5 Ibid., at p. 439.

government administrators, a local settler, and two missionaries. H.A. Sylvester,[1] a Native Commissioner in the Chilanga Sub-District, expressed dissatisfaction with a provisional reserve which had previously been demarcated for Africans in the area. He felt it could no longer contain a larger population that was being contemplated. J. Brown,[2] an early European settler, expressed similar views with regard to the same area.

The missionary Rev. C. Bert[3] was, however, fearful of contamination of Africans in industrial centres. To avoid this he suggested segregation of reserves from such centres. A fellow missionary, Rev. J. Torrend,[4] was, however, more concerned with African fishing and grazing rights which may have to be given up as a result of demarcation of reserves. Due to the value attached to these rights by Africans, he suggested compensation in the event of Africans losing their rights. E.H. Jalland,[5] a Native Commissioner at Livingstone, emphasized equally the value attached to fishing rights by the local African population.

The Commission in its assignment did exactly what was the essence of the exercise, namely make provision (a) for European settlement and (b) for mining development. As to

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1 Native Reserves Commission Report, 1926, Vol. II. at p. 306

2 Ibid., at p. 325.

3 Ibid., at p. 333.

4 Native Reserves Commission Report, 1926, Vol. III at p. 596.

5 Ibid., at p. 709.

(a) - European settlement, the Commission expounded this principle ". . . if the country on and along the railway is already mainly in European ownership, then it is only the country away from the railway which remains vacant for Native Reserves, and this is where they must be placed".[1] The Commission justified this conclusion on the basis that the railway was built by European capital in an area in which were to be found centres of population and in which almost all farms were European owned, a situation which was unalterable.[2] One concession was, however, granted and that was accessibility of the local population in reserves to the facilities of the railway. This was to be achieved by inclusion in the delimited reserves of lanes or corridors communicating with the railway without having to trespass on European owned land.[3]

As to (b) - mining development, the Commission reported that "The parts of the Territory where mining development is now going on and which are known or strongly suspected to be mineralized, will gradually be freed of native settlement".[4] Primarily concerned with these two factors the Commission did not worry about those places which fell in its area of investigation, where the two factors were not in issue. Thus in respect of such an area - the Feira Sub-District, the

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[1] See Northern Rhodesia Native Reserves Commission, Vol. 1, op. cit., par. 80 at p. 72.

[2] Ibid., at p. 71.

[3] Ibid.

[4] Ibid., par. 83 at p. 75.

Commission observed: "But the Feira Sub-District seems outside the causes which have necessitated the appointment of this Commission. It is far from the railway line and is not affected by European settlement, and from the character and climate it is not probable that it ever will be . . . Nor is there likelihood as far as we can discover, of it being a locality of mining development".[1] The effect of excluding this Sub-District from this exercise was to convert it into Crown land. This is so because all the land outside reserves and not under European ownership was declared Crown land. From the viewpoint of security of tenure, this was unfortunate for the indigenous population in occupation of Crown land. The legal interests in such land must have been obscure for the occupants could only have been either squatters or tenants at will of the Crown. It is to be doubted whether such was the intended result when the consideration that kept on being emphasized was that permanency and security of tenure was of essence to the African population in the land requirements.

In the readjustment of these land interests, the policy was to follow wherever practicable the principle of homogeneity and separation of races. In this respect the Commission recommended: "We are perfectly satisfied that this principle, homogeneity and separation from European localities, is in the interests of the natives themselves . . . They will then be less liable to disturbance and better able to develop on their own lines".[2] The Commission was however quick to qualify itself

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[1] See Northern Rhodesia Native Reserves Commission, Vol. 1, op. cit., par. 11 at p. 10.

[2] Ibid., par. 86.

where industrialisation compelled 'contact or at least contiguity between European and native' such as in emerging urban centres of population.[1] Equally, European involvement in reserves, where this was in the interest of the African, was allowed to continue in deference to Stanley's policy. This of course was not merely a coincidence as Macdonell, C.J., was still fresh with his experience of the 1924 Commission.

In its approach to its task this Commission did not depart from the policy of its predecessor. Segregation was not in all circumstances practicable as new conditions qualifying this principle were further revealed. The only difference lay in factors prompting demarcation of reserves. The 1924 Commission was more concerned with the problem of an increasing African population and the inadequacy of clearly defined land to contain this. This Commission's emphasis was on the provision of land by a further extension of land reservation, for the economic development of the territory. African interests if anything were secondary.

Neither the Colonial Office nor the Northern Rhodesia Government objected to these recommendations. For Stanley, at least, being the pioneer of the whole scheme, consistency in principle between the two Commissions could only have been a realisation of his vision. Unhesitatingly, he approved the recommendations.[3] He, however, did not continue in office

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[1] See Northern Rhodesia Native Reserves Commission, Vol. 1, op. cit., par. 91 at pp. 81-82.

[2] See Northern Rhodesia Native Reserves Commission, Vol. 1, op. cit., paras. 272-275 at pp. 268-271.

[3] See Stanley to Amery, Conf. (3) of 25/7/1927. CO 795/18254/27/17.

to see his brain child mature beyond the acceptance of the proposals. His successor, Governor Maxwell, was nonetheless agreeable to his predecessor's views except for the removal of Africans into reserves where this interfered with the labour supply to European settlers. This was another of the circumstances qualifying the rigid policy of segregation. Maxwell apparently favoured a policy of retention of a labour force where special conditions existed to justify this. In this he thought it advisable to study each local area before effecting removal.[1] This suggestion was sound and well received by the Colonial Office.[2] But if an African was not within a delimited reserve, the anomaly still existed, for his land tenure elsewhere was uncertain. He had either no rights or was a tenant of one kind or another.

As the two governments were in agreement on the scheme, it only remained to invite the reaction of the economic interest group in the area - the British South Africa Company.[3] The Company was in principle agreeable to the scheme on the assumption that in respect of mining operations in reserves, a similar provision to that agreed earlier on in the East Luangwa District would apply. The Company did, however, express concern as to the provision of facilities, ancillary to mining,

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1 See Maxwell to Amery, Conf. of 8/5/1928. CO 795/35130/1.

2 See Amery to Maxwell, Conf. (1) of 11/6/1928. CO 795/X35130/28/2.

3 See Machtig to Secretary, BSA. Co., Conf. of 16/8/1928. CO 795/X35130/28/5.

such as water supplied power which might be difficult to obtain when the water resource was within reserves.[1] Rather than insisting on any legal arrangement for securing such facilities when the need arises, the Company merely pleaded that the same be made available by government in virtue of the latter's administration of reserves.

As for the provision of a similar mining regulation, the Company was certainly right as this was in the contemplation of both governments.[2] The Colonial Office even went further to hold the East Luangwa District provision as a model for subsequent reserves in the Tanganyika District.[3] But as to the ancillary facilities - water supply, provision for hydro-electric and other water using projects, the Governor requested that in accordance with the terms of reference - no avoidable difficulties be placed in the way of mineral development, and all such areas were excepted from reserves.[4] Having made such provision the Governor did not wish to make any further concessions relating to the remaining water resources within the reserves. More concessions it was feared might deplete water resources in the reserves.

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1 See Secretary, BSA. Co. to Under Secretary of State, Conf. of 18/9/1928. CO 795/35130/28/11.

2 For the Colonial Office, see Amery to Governor, Despatch No. 397 of 22/11/1928. CO 795/X35130/0/28/13; and for the Northern Rhodesia Government, see Maxwell to Amery, Despatch No. 11 of 12/1/1929. CO 795/35353/1.

3 See Colonial Office Minutes of 20/11/1928. CO 795/X35169/28/4.

4 See Maxwell to Amery, Despatch No. 11 of 12/1/1929, note 2, supra.

As for the draft formula in the Order-in-Council to implement these proposals, the British South Africa Company saw no objection to accepting the draft even with the observations earlier raised with regard to the provision of facilities ancillary to mining such as water resources within reserves.[1] The Company was, however, to raise on the passage of the draft Northern Rhodesia Supplemented Order-in-Council on January 29, 1929, a point overlooked earlier. It occurred to the Company that in the supply of electric power difficulties could arise, in the absence of any express power, for the erection of transmission lines across a reserve from a point outside it.[2] It was felt that clause 6 of the principal Order of 1928, in setting aside reserves exclusively for Africans could prevent authority being granted for such erections. This appears to have been a sound anticipation because no acitivity could be allowed within reserves except as provided for in the Order.

Upon being consulted for observations,[3] the Governor readily accepted the oversight.[4] It was admitted that although clause 8 could adequately cater for owners of minerals (included were also holders of mining rights), as

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1 See Secretary, BSA. Co. to Under Secretary of State of 14/12/1928. CO 795/X35130/28/18.

2 See Baird to Under Secretary of State of 28/2/1929, CO 795/35253/29/7.

3 See Amery to Governor, Despatch No. 68 of 18/3/1929. CO 795/35253/29/10.

4 See Maxwell to Amery, Despatch No. 216 of 20/4/1929. CO 795/35253/29/11.

that provision was subject to the subsisting mining law which provided for such ancillary needs, a separate power company could be employed to undertake such a job thus necessitating specific provision giving such a power company authority to enter reserves and erect lines.[1] With this recommendation the Colonial Office informed the Company that the Secretary of State would be willing to consider introducing a supplementary Order-in-Council to give the Governor the necessary authority.[2]

With this the rail line reserves became effective in the land reservation policy by the 1929 Supplemental Order-in-Council.[3] The basic legal formula remained in the 1928 Order with this Supplemental Order being merely a description of the areas constituted as reserves. With only the Tanganyika District remaining a policy of reserves had certainly come to be entrenched in the territory.

C. The Tanganyika District Reserves

This district is now part of the Northern Province of Zambia. As early as 1925, during the North Charterland Company concession regime, demarcation of reserves in this area had already been

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1 See Attorney General's Memo of 17/4/1929. Enclosure in Despatch No. 216. note 4, p. 238 supra.

2 See Green to Secretary, BSA. Co. of 27/5/1929. CO 795/X35253/29/12.

3 For the original Order, see Enclosure in Smith (P.C.) to the Colonial Office of 14/2/1929. CO 795/35253/29/3.

conceived at the instance of the British South Africa Company • Chomley, the Company's Assistant General Manager, had sought the appointment of a Commission for the designation of definite reserves in territories covered by the three freehold areas belonging to the Company. Giving the reasons of the Company, he asserted that there was a growing demand for land by settlers and that the Company was anxious to minimise complications that must inevitably follow in light of the experience in the concession area.[1]

In view of subsequent revelations as to European population in this area, it can hardly be believed that European demand could ever have been the compelling factor. By 1928, there was a population of barely 20 Europeans in the district.[2] The true motive was apparent anxiety on the Company's part to secure definite areas which could be assigned to settlers whenever the occasion arose instead of risking the repetition of the concession area experience. By 1927, the Northern Rhodesia Government heeded the Company's request by appointing a Commission to demarcate reserves taking into account possible economic development and an increase in population of Africans in the area.[3]

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1 See Enclosure in Clough to Amery, Despatch No. 413 of 14/9/1925. CO 795/45629/25.

2 See Minutes of Green of 24/9/1928. CO 795/X35169/28/7.

3 See Govt. Notice No. 107 of 1927. For the Colonial Office approval, see Secretary of State to Governor, teleg. of 9/6/1927. CO 795/X21016/4.

The Commission consisted of J. Moffat Thomson, a magistrate in Broken Hill and secretary to the previous Commission; R.W. Yule, an African; and Captain J. Brown, a farmer in Chilanga along the line of rail. Thomson was appointed member and chairman of the Commission on the recommendation of Macdonell C.J., himself unable to take up the appointment. Macdonell, C.J., spoke very highly of Thomson as a member of the previous Commission.[1] Yule, who at the time of accepting appointment was in neighbouring Congo (now Zaire),[2] was considered by the Northern Rhodesia Government as a man who "had a very long experience of Northern Rhodesia both from an administrative and from a business point of view."[3] Brown, who besides being a farmer was chairman of the Cattle Owners' Association and member of the Native Education Advisory Board, was appointed member after all attempts to obtain a local resident of Tanganyika District had failed.[4] Four Europeans who had been approached for the job turned down the offers. All of them except for one refused to accept appointments apparently on account of occupational engagements.[5] The third man approached, C. Grey who at the time was in neighbouring Tanganyika,declined to serve on the Commission on account of having very little knowledge of the district except for few areas and having no experience in the procedure and methods of a commission.[6]

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1 See P.J. Macdonell to Acting Governor of 4/1/1927. NAZ/RC/460.

2 See Yule to Chief Secretary of 5/7/1927. NAZ/RC/460.

3 See Acting Governor to L.S. Amery, Conf. of 2/5/1927. NAZ/RC/460.

4 See Acting Governor to L.S. Amery, Conf.(2) of 1/8/1927. NAZ/RC/460.

5 The three who turned down being appointed on the Commission due to other engagements were H. Rangeley, a farmer in Fort Jameson (now Chipata); Thornton, a farmer in Kasama; and L. Gordon, an employee of a London based company, working in Broken Hill(now Kabwe).

6 See C. Grey to Secretary. Dated 1/6/1927. NAZ/RC/460.

With the three appointments confirmed, the Commission proceeded to Tanganyika District. Evidence was heard from the British South Africa Company, government administrators, a few European settlers, Missionaries and Africans. Opinions expressed were divided into two camps - namely those who supported the reserves scheme and those who opposed it. H. Croad, on behalf of the Company, gave evidence which was mainly provision of local information relating to population, water resources and soil condition. He then suggested which areas should be made reserves, conceding however "that a good deal of the areas are stony or rock and quite useless for cultivation."[1] The land he considered best for European occupation was suggested to be left out of reserved areas. The missionary Rev. Tanguy[2] favoured reserves because he felt this had to precede European arrival in the area for if left too late there was bound to be trouble. He preferred large and tribal reserves. In this evidence, he was supported by his fellow missionary Rev. E. Labrecque.[3]

J.L. Keith and J.H. Venning both in government administration supported the principle of land reservation.[4] Keith, a Native Commissioner in Broken Hill (now Kabwe) and at one time Assistant Native Commissioner in Isoka, backed the idea of African reserves

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1 See NAZ/ZP1/3/2 at p. 14. For the whole of the Company's evidence, see pp. 7-18.

2 See NAZ/ZP1/3/2 at p. 48.

3 Ibid., at p. 55.

4 Ibid., pp. 56 and 85.

based on the growing of crops such as coffee and cotton which were most suitable to Europeans. Such areas he said ought to be reserved for Europeans because Africans were "not progressive enough to compete with Europeans in growing sub-tropical products".

S.P.L. Lloyd, an assistant magistrate, and G.H. Lobb, a farmer in Abercorn, did not think that reserves were necessary at all. Lloyd[1] felt that the entire reserves scheme was premature as this portion of the territory was not sufficiently settled to justify a policy of land reservation. Lobb[2] was even more emphatic when he said: "I should have thought that there was sufficient land for Europeans without having reserves at all . . . and there is any amount of land that Europeans will never take up . . .". Granted the idea of reserves however, he did not favour turning Africans into producers as this would harm labour supply in that Africans would be working for themselves.[3]

African chiefs also joined in this division of opinion with some favouring reserves and others opposing them. Some of those who favoured reserves had no previous contact with European settlements. They were therefore not apprehensive at the idea so long as they were assured of their requirements.[4] Chiefs Chinikila, Chitimbwa, Mpande and Makasa were particularly agreeable to

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[1] See NAZ/ZP1/3/2 at p. 125.

[2] Ibid., at p. 138

[3] Ibid.

[4] Ibid., pp. 256-260.

European settlement. The latter chief was even more attracted by the opportunity of his people to sell their products to settlers and obtain employment which would assure them of paying tax.[1] In this same group of chiefs, however, Zombe[2] disapproved any further European settlement because a parcel of land in his area had previously been given to a European settler without his permission.

The subsequent group of chiefs interviewed proved more resistant to the idea of reserves. The Chairman of the Commission prefaced the hearing with an invitation to chiefs to indicate ". . . what parts of the country they would like to keep" so that the Commission "could, or might be able to recommend these to the Government."[3] The Chairman of the Commission proceeded further to caution the chiefs that if they failed to make these indications, the Commission will be unable to help them by recommendations. Notwithstanding this explanation, Chief Mporokoso led the opposition.[4] He flatly rejected the idea of demarcation when he said: ". . . I cannot agree to divide the land." He preferred individual applications by Europeans who would arrive in the area and only then was he prepared to consider whether he had any land to allocate. Six other chiefs specifically endorsed this position

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1 See NAZ/2/ZP1/3/2, pp. 261-262.

2 Ibid., at p. 258.

3 Ibid., at 338.

4 Ibid., at p. 424.

as an expression of their view.[1] Chief Mukupa added to this: ". . . We cannot do anything before the Europeans come. After they come we could say where we would like them to settle. We have not seen any Europeans coming to settle."[2] Reiterating the same view, Chief Lushinga stated:[3] ". . . I should like to have the chance to talk when the Europeans come to settle. The Boma will call me to talk about giving the land to individual applications . . ." Chief Yombwe summarised the chiefs' views by posing the question before the Commission: ". . . How can one find a place for a stranger when the stranger has not come?"[4]

At the time of reporting its findings the Commission observed in respect of these chiefs: "The intention of demarcating the reserves previous to the appointment of this commission had not been discussed with the chiefs and, naturally, when they heard of the proposal they were taken by surprise and in many instances did not realise to the fullest extent what reserves would mean for them."[5] Whether or not there was need for reserves, the Commission, nevertheless, came out with its report recommending which areas were to be reserved for Africans.

Given that there had been two previous Commissions, this Commission's Report could hardly be regarded as controversial and the Governor did not hesitate to approve the proposals.[6] In implementing the proposal for the removal of Africans into

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1 See NAZ/ZP1/3/2 pp. 424 et seq.

2 Ibid., at p. 425.

3 Ibid.

4 Ibid.

5 See Native Reserves Commission Report (Tanganyika District) 1927. NAZ/ZP/1/3/3 at p. 37.

6 See Maxwell to Amery, Conf. (2) of 30/7/1928. CO 795/35169/1. For the Commission's Report, see Enclosure therein.

reserves, the Commission recommended that this be done with promptness in respect only of those in occupation of the Company estates. As for those on Crown land, removal should only be effected if and when such land was required for European settlement and other purposes. In agreeing with this proposal, the Governor doubted whether "there could be any great demand from settlers for land . . . outside the freehold areas".[1] This showed that a policy of reservation in this area was not necessitated by any circumstances other than the Company's interests. The alternative would have been a constitution of reserved land in the rest of the area outside the Company's freehold. But this policy once defined, was to affect all land, for the forseeable future. With this reaction by the Governor to the Commission's proposal, the Colonial Office felt obliged to assent to the Report.[2] As for the Company, although dismay was expressed at 41% of its entire area being earmarked for reserves, it expressed contentment so long as the effect of the excision was to place it in a position to deal with the remainder satisfactorily. Again, the Company was more concerned with its mineral rights and expressed a similar presumption as before in respect of clause 8 of the

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[1] See Maxwell to Amery, Conf.(2) of 30/7/1928. CO 795/35169/1.

[2] Amery to Governor, Conf. of 15/10/1928. CO 795/X35169/28/7.

principal Order.[1] The applicability of this clause to the Tanganyika District Reserves, was by now, fairly certain, and the Colonial Office had merely to endorse it formally.[2]

When occasion arose to comment subsequently on the draft Order for the area, it transpired that the Company was not entirely satisfied with the adequacy of clause 8 of the principal Order. By clause 4 of the draft Order provisions of the principal Order were to apply to reserves set aside under the draft Order but this was to be "so far as the same are not inconsistent with the provisions of this (draft) Order". On the drafting of the Order, fearing that its mineral rights might be affected, the Company observed: ". . . It appears that clause 8 of the Principal Order dealing with mineral rights might be held to be inconsistent with the 'sole and exclusive use and occupation' which is given to the Natives by the draft Order . . ."[3]

In this observation the Company appears to have been right. Although reservation of land by previous Orders was made in similar terms, provision under these Orders were subject to clause 8. To cure this feared defect only in respect of Tanganyika District, the Company pressed for the inclusion in the draft Order of the following proviso:

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1 See Secretary, BSA. Co., to Under Secretary of State of 18/9/1928. CO 795/35169/28/4.

2 See Green to Secretary, BSA. Co. of 12/10/1928. CO 795/X35169/28/6.

3 See Secretary, BSA. Co. to Under Secretary of State of 31/1/1929. CO 795/35250/29/"A"/1.

> Notwithstanding anything contained in the Principal Order or in this Order and in any regulations from time to time made under either of them the owners of the minerals in Native Reserves described in the Schedule to this Order shall retain and be free to exercise their rights subject to the conditions set out in sub-clause (2) of clause 8 of the Principal Order.

There was of course no sinister motive on the part of the Imperial Government in this drafting oversight.[1] Hence they did not dispute the suggestion and the proviso was included in the new Order, if only to satisfy the Company.[2]

A matter that equally concerned the Company was the supply of labour, if the recommendation as to removal was enforced without exception. Seeking qualification to this to meet its potential needs Baird, the Company secretary, writing for the Company, commented that the provisions "are too rigid and if literally enforced, would prevent the Company or its assignees from employing any native labour on their lands, whether for agricultural or mining purposes".[3] The Company thus suggested that a proviso be inserted to allow employment of Africans which would involve them staying outside reserves. The Company was the moving force for demarcation of reserves in this area, and when it conceded to a qualification of this policy, the Colonial Office could hardly wish to interfere with

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1 For the Northern Rhodesia Government acceptance of the amendment, see Governor to Secretary of State, Teleg. of 16/4/1929. CO 795/X35250/29/5.

2 See s. 3(8) of the Northern Rhodesia Crown Lands and Native Reserves (Tanganyika District) Order-in-Council, 1929.

3 See Baird, Secretary, BSA. Co. to Under Secretary of State of 31/1/1929, note 3 at p.247, supra.

the Company's compromising its own interests. The Colonial Office reply was an invitation to the Company for a draft proviso to be included in the Order.[1] And the suggestion was certainly included in the Order.[2] This provision was more commendable in contrast to similar provision in regard to the rest of the reserves in the territory. It provided a legal basis upon which an African occupying land outside reserves, as an employee, could assert his right of occupation. As already indicated, elsewhere in the territory tenure of land outside reserves was uncertain.

With this, the Stanley scheme, conceived at the time of the assumption of direct British rule, was finally fulfilled. To entrench the scheme over the years, every necessary facility was devised. Primarily the scheme was supported by the policy of indirect rule.[3] Reserves were essentially a permanent habitat of the indigenous population and wherever necessary machinery was sought to keep people away from areas which were not reserved

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1 See Green to Secretary, BSA. Co. of 12/2/1929. CO 795/X35250/29/2.

2 For the original Northern Rhodesia Crown Lands and Native Reserves (Tanganyika District) Order-in-Council 1929, see Enclosure in Hankey (P.C.) to Under Secretary of State of 12/11/1929. CO 795/35250/29/"A"/13. Cf., Supplement to the Northern Rhodesia Govt. Gazette, 27/12/1929. Govt. Notice No. 94 of 1929.

3 For the evolution of this policy and its application to the territory, see NAZ/SEC/NAT/274, Vol.I. Cf., Lord Harlech "The British Protectorates in South Africa", African Studies, Vol. 4, No. 1, 1945, pp. 128-129; M.G. Billing, "Tribal Rule and Modern Politics in Northern Rhodesia", African Affairs, Vol.58, No. 31, 1959 pp. 135-40, particularly at p. 139. For a specific instance of Indirect Rule, see E.W.Smith, "Addendum to the Ila-speaking Peoples of Northern Rhodesia", African Studies, Vol.8, No. 1, March 1949, pp. 1-9, particularly pp. 7-9.

for them.[1] The demand for labour supply, as has been indicated, was of course the most natural qualification to the reserve scheme. Although it was initially believed that places of employment outside reserves were merely temporary,[2] this attitude was soon to be reversed by the practical demand for labour stabilization, so that industries, particularly the mines could be efficiently manned.[3]

Thus, what in its inception could have been more inclined to some kind of apartheid, had in practice to be adapted to the demanding industrial conditions of the territory. But even where reserves appeared to be serving the purpose for which they were created, it was discovered sooner than expected that a good number of them could no longer contain the population.[4] Overstocking and overpopulation severely eroded reserves, and it was realised as early as 1929 that no amount of agricultural

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[1] For the means of keeping unemployed Africans from towns, see "Urban Problems in East and Central Africa", Report of a Conference held at Ndola, Northern Rhodesia, Feb. 1958 in J.A.A. Vol. X, No. 4, Oct. 1958 pp. 223-224 & p. 226.

[2] For a reflection of this attitude in the composition of urban local courts, see C.M.N. White, "The Changing Scope of Urban Native Courts in Northern Rhodesia", J.A.L., Vol. 8, No. 1, 1964 p. 30.

[3] See H. Heisler, "The Creation of a Stabilised Urban Society: A Turning Point in the Development of Northern Rhodesia/Zambia", African Affairs, Vol. 70, No. 279, April 1971, pp. 144-145. Cf., House of Commons Debates, 11/2/1941, Vol. 377, cols. 1521 & 1523.

improvement alone could remedy the situation.[1] The answer lay in provision of more land. It was as a result of this cummulative shortage of land over the years that the Trust land policy was to evolve.

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[1] See G. Kay, "Resettlement and Land Use Planning in Zambia: The Chipangali Scheme", Scot. Geo. Mag. Vol. 81, p. 166. Cf., R.H. Fraser, "Land Settlement in the Eastern Province of Northern Rhodesia", Rhodes Livingstone Journal, Vol. III, June 1945 pp. 47-49.

CHAPTER 4

'NATIVE TRUST LAND': Governor Young's Scheme

1935 - 1947

The Zambia Trust Land Orders, 1947-1964,[1] the legal formulae for effecting trust land policy, in their principal features do not reveal any remarkable distinction between trust land, and its counterpart,reserves. Trust land, like reserves, was vested in the Secretary of State, with this difference, "for the use or common benefit, direct or indirect,of natives".[2] Reserves, it may be recalled, were "for the sole and exclusive use and occupation of natives". A consequence arising from this difference in phraseology is that while in reserves an alienable interest to a "non-native" was restricted to 5 years only, so long as it was in the interests of the "natives", an alienable interest in trust land could be for as long a period as 99 years, so long as such alienation was in the general interests of the community as a whole.[3]

This subtle qualification, and the nature of the land interest can only be understood against the background of European settler antagonism to the policy and the official conception of how trust land was to be distinguished from reserves.

Just as Stanley relied on his Southern experience in creating reserves,[4] so did Governor Young want to introduce

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1 Appendix 4, Revised Laws.

2 Ibid., s.4.

3 Ibid., s.5(1)

4 See pp 202 et. seq., supra.

a policy with which he was most familiar during his years of administration as governor of neighbouring Nyasaland. The Nyasaland scheme as contained in the Protectorate's Native Trust Land Order-in-Council[1] was just the reverse of its Northern Rhodesia counterpart. In Northern Rhodesia, as has been seen, the effect of the 1928 Order was essentially to convert all land to Crown land unless reserved. In Nyasaland, on the other hand, all land was trust land unless reserved for different purposes. Thus s.4 of the Nyasaland Order provided:

> The whole of the lands of the Protectorate except Crown lands and reserved lands, are hereby declared to be native trust land.

Crown lands were defined as "all lands and interests in land acquired or occupied by or on behalf of His Majesty".[2] Hence there had to be a specific act of acquisition or occupation. Thus the Crown could not by virtue only of its status regard any land as its own. Reserved lands included lands in townships, all previous dispositions by which private interests in land were acquired before the commencement of the Order or indeed any parcels of land specifically reserved as set out in the schedule to the Order.[3]

The effect of this Order was to declare the greater part of the Protectorate as trust land. The rationale for this, as has been observed, is that Nyasaland with its predominant

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[1] See the Nyasaland Protectorate (Native Trust Land) Order in Council (consolidated) 1936.

[2] Ibid., s. 2.

[3] Ibid., s. 2(a)-(f).

indigenous population was essentially an African territory with European occupancy being merely regarded as an exception.[1] To realise this the land so declared as trust land was vested in the Secretary of State to be administered and controlled by the Governor, under the supervision of the former, "for the use or common benefit, direct or indirect, of the natives of the Protectorate".[2] In this use, however, disposition to "non-natives" by grant of rights of occupancy was allowed, the criterion still being "common benefit direct or indirect, of the natives".[3] The interest envisaged in the rights of occupancy could be for any term not exceeding 99 years, subject to the proviso that the Governor "shall not . . . grant rights . . . free of rent or upon any condition which may preclude him from revising the rent at intervals of not more than thirty-three years".[4] This it may be noted is the exact language of the Tanganyika Land Ordinance.

The only distinction between the Northern Rhodesia trust land and Nyasaland model is in the criterion for disposition to non-natives - "in the general interests of the community as a whole." This is to be revealed in the compromise arising from settler antagonism.

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1 See C.K. Meek, Land Law and Custom in the Colonies, 2nd ed., London, 1968, p. 116.

2 See s. 5(1) Native Trust Land Order in Council, 1936.

3 Ibid., s. 6(1)(a).

4 Ibid., s. 6(4).

At the time the trust land policy was being conceived in Northern Rhodesia -- 1935 -- all the land there was was unalienated Crown land. The Northern Rhodesia Government found itself in the embarrassing predicament of having people in reserves without sufficient land while there was superfluous land elsewhere. The opportunity to consider African needs also invited a reassessment in land policy. It was this occasion that Young seized to implant in the territory the Nyasaland model. He was, however, to develop the justification for doing this in quite unrelated conditions.

Mindful of the need to justify his scheme, he wished first to gauge the Colonial Office feelings by a draft despatch.[1] Acknowledging the differences between the two countries, Young noted that (a) Northern Rhodesia was less densely populated with the population spread over more than seven times as extensive an area. With well advanced ecological and geological surveys, he concluded that the possibility of further alienations of land in areas suitable for permanent non-native development could not be over-ruled. But the fact that Northern Rhodesia was less densely populated is not a reason consistent with the premise on which the Nyasaland scheme evolved. The trust land policy in Nyasaland was developed to safeguard African interests because the African population was larger over a smaller area than Northern Rhodesia. In Northern Rhodesia therefore the density of African population over such an extensive area could not have justified creating trust lands on the principle of protecting African interests.

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[1] See Young to Sir J. Maffey (Pers. & Conf.) draft Despatch of 20/9/1935. CO 795/45120/35/1.

He then acknowledged (b) that Northern Rhodesia was better provided "with mineral deposits of the greatest imperial importance". On this basis he proposed that mineralised areas be excepted from trust land. This factor could be accepted as justifying the adoption of the Nyasaland model, for similar reasons that necessitated reserving certain areas from trust land in Nyasaland. Then (c) Young conceded that the system of reserves had already been adopted in Northern Rhodesia. But he did not see this as being objectionable since the solution lay in converting reserves into trust land with an expansion in the size of the former. Accepting trust land as the policy, this would have been the natural consequence. The question which at this time, however, Young had not addressed himself to was in what manner had reserves failed.

Summarising the import of his proposals, Young concluded: ". . . so far as the land policy is concerned, instead of the whole of the unalienated land in the territory being declared native trust land, only such areas of unalienated land as are shown by ecological survey to be unsuited for non-native settlement and by a geological survey not to contain workable mineral deposits should be declared . . . native trust land". Although he qualified himself as to this that he never meant that only poorer agricultural soils should be reserved for Africans, the inconsistency was very apparent and hard to defend. Certainly poorer agricultural soils could not be suitable for settlers, a criterion which according to the proposal would except such land from European settlement.

The Colonial Office replied to Young's proposals with misgivings. Bottomley, an officer in the Colonial Office, expressed its feelings.[1] In converting reserves to trust land, he saw a threat to the security of tenure of Africans by divesting the Secretary of State of the trustee title. This of course could hardly have been the objection because, as it turned out, trust land could equally be vested in the Secretary of State under the Nyasaland Order. The more fundamental objections raised were however: (a) failure of Young's proposal in demonstrating any inadequacy in the reserves provisions, and (b) the basis of determining what should and should not be trust land. As to (a) Bottomley pointed to s.6(3) of the 1928 Order which provided for alteration of boundaries of reserves where need arises. As to (b), he observed, "I am not clear how we could justify a division of the area, under which the Native Trust Land would consist only of those districts which are unsuitable for settlement . . ." On this the Colonial Office's uneasiness as to the discriminatory implication was subsequently even more amply expressed. In this regard Smith[2] minuted:

> . . . the natives may gladly have what the white settlers do not want . . . But I fail to see how any increase in the area of land held in trust for the natives (provided it is useless for any other purpose) can justify the withdrawal of the right of first consideration from the natives, and this is what the Secretary of State would have to justify.[3]

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1 See Bottomley to Sir H. Young (semi-official) Despatch of 24/12/1935. CO 795/45120/35/4.

2 Smith was one of the officers in the Colonial Office dealing with African affairs.

3 See Minutes of Smith of 11/6/1936. CO 795/45120.

This was the Colonial Office reaction which Sir H. Young had to accept. Unfortunately he never seemed to have addressed himself to the objections raised by Bottomley which were valid arguements against the proposals. He now shifted his line of emphasis attacking the rigidity of native reserves. He thus wrote:

> My objection is that the system of Native Reserves as at present constituted is not sufficiently elastic. It is an acceptance in advance of what may turn out to be the wrong principle, namely segregation. It definitely rules out the possibility of European help in developing the land for the good of the natives, since no one in his good senses would put any capital into land held on a tenure not exceeding five years.[1]

In considering the involvement of European capital he was now expressly evoking the Select Committee's pronouncement on the 'Native and European' complementary interests. Amplifying this principle, he went on to argue ". . . The so called alien or immigrant community is the one that brings in capital and develops the country in a way that the natives could never be expected to do. To my mind there is no more reason why the interests of the natives should be regarded as paramount in such places . . ." Acknowledging the paramountcy of "native" interests, Sir H. Young argued that this should be confined to those tracts of land "in which Europeans will never be able to settle down and form a permanent community". Referring to Nyasaland as a unique territory falling within the latter definition, he

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[1] See Sir H. Young to Sir J. Maffey of 7/1/1936. CO 795/45120/36/1.

indicated that it was in this context that he recommended unalienated land in the territory to be declared trust land, where "native" interests would be paramount.[1]

In so far as Sir H. Young was attacking the rigidity of the reserves, he was certainly now being more consistent with his Nyasaland model which was more permissive. In segregating reserves for the mere sake of it, he certainly would have had an ally in Stanley who equally was resentful of segregation. It might be thought, however, that extension of the period of leasehold in reserves would have been a better solution than a complete departure from the scheme of reserves. This solution, however, was contrary to the basis upon which reserves were constituted, permanent settlement of the Africans with as little interference as practically possible. In this regard to have to view reserves, as Sir H. Young did, that the scheme was entrenching the paramountcy of "native" interests is hardly tenable. The paramountcy of "native" interests had not yet been enunciated at the time of creating reserves. Reserves were a conception of the 1920's while the paramountcy of "native" interests was developed subsequently in the very early 1930's.[2]

The principle of complementary interests at this time should certainly have been a very forceful argument so long as the characteristic that trust land be inferior was abandoned. At this stage it was in this direction that Sir H. Young seemed

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1 See Sir H. Young to Sir J. Maffey (pers) of 29/4/1936. CO 795/45120/36/5.

2 For a discussion of the paramountcy of "native" interests doctrine, see pp. 285-286 infra.

to be leaning. Reframing his proposal he wrote: ". . . what I am now proposing to do is reserve for the natives all the land that can prudently be so reserved, keeping the rest open, as it is now, for such disposal as may subsequently turn out to be desirable".[1] This appears a retreat from having only as trust land that which is unsuitable. "The rest" which is kept open is not necessarily intended to deprive Africans but to provide for any future needs. At this point in time it was indeed well to make provision for the future.

In a more implicit admission that he did not envisage trust land as inferior, with the Nyasaland analogy at the back of his mind, Sir H. Young wrote: "The status of the native trust land . . . would be the same as has been approved in Nyasaland, namely land which can be disposed of in the native interest but from which European co-operation and capital are not excluded in the way that they are excluded in native reserves".[2] For the utility of such land to be attractive to European co-operation and capital, it would have to be suitable for settlement in the first place. The objection to the basis of determination would then fall away. The uncertainty in Sir H. Young's views as indicated, only go to reflect the difficulties of this policy in its formative stage.

This enunciation of Sir H. Young's latest views did not, however,

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1 See Sir H. Young to Sir J. Maffey (pers.) of 29/4/1936. CO 795/45120/36/5.

2 Ibid.

allay the Colonial Office fears. The Colonial Office saw in these views a proposition of the paramountcy of European interests derogating from the task and role of trusteeship in the Imperial Government. In this regard Smith minuted:[1]

> . . . The basis of the differences of opinion is the fact that Sir H. Young still refuses to accept the principle of trusteeship, of the paramountcy of native interests. His view, stated a little naively . . . is that since it is the alien white community that brings in capital and performs the work of development, the interest of this community should prevail in all areas in which such development is possible.

With this fear prevailing in the Colonial Office, the Governor was instructed to withhold any action on the proposals pending a personal discussion of his views with the Colonial Office.[2] It transpired at the meeting[3] with the Colonial Office officials that Sir H. Young seems to have abandoned his earlier fear of paramountcy of "native interests" and concentrated on the inflexibility of the reserves scheme. His vision of trust land was as a centre of intense economic activity without any hinderance and that this would be to the advantage of the African.[4] In this Sir H. Young found an ally in Gore-Browne, the unofficial member of the Legislative Council representing African interests. At home he certainly had, inter alia, the support of Provincial Commissioners.[5]

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[1] See Minutes of Smith of 11/6/1936. CO 795/45120/36.

[2] See Colonial Office letter to Sir H. Young of 5/8/1936. CO 795/45120/36/6.

[3] See Note of Discussion on Land Policy -- a meeting of Secretary of State, Sir H. Young, Sir W. Bottomley, Calder & Gore-Browne of 3/5/1937. CO 795/45120/37/34.

[4] See Note on proposed visit to Colonial Office NAZ/SEC/SL/ 111 Vol. 1 p. 6.

[5] For approval of the Young scheme by Provincial Commissioners, see Provincial Commissioners' Conference 16/3 - 21/3 1936. NAZ/NAT/A/2/6.

At this meeting, having seen Sir H. Young's imaginative thinking, the Colonial Office did not react adversely to the idea of greater European participation, beyond indicating that any such arrangement would have to include provision that such participation is not to the prejudice of African interests. It was however also indicated that there was at the moment no expressed commitment to this scheme by the Colonial Office, the question of policy being subject to further consideration.

But even with this qualification, Sir H. Young seems to have taken it that he had scored a tacit victory for his proposals. In no time he submitted his proposals officially with minor modifications.[1] The Colonial Office reply to these official proposals was now one of deferrment. It was decided that the proposals should await the Pim Commission on the financial situation of the territory and the Royal Commission on closer relations between the Rhodesiasand Nyasaland.[2] The Pim Commission was appointed by the Secretary of State for the Colonies at the request of the Northern Rhodesia Government at a time when the latter was urgently concerned with the economy of the country. This Commission was expected to enquire and report on the practicability of reducing the cost of administration, and developing and supplementing the existing sources of Government revenue. In this assignment the Commission was "to make recommendations generally."[3] A.W. Pim was appointed chairman

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1 See Sir H. Young to Ormsby Gore, Conf. of 4/9/1937. CO 795/45120/37/6.

2 See Ormsby Gore to Sir H. Young (secret & pers.) of 19/10/1937. CO 795/45120/37/9.

3 See Report of the Commission Appointed to Enquire into the Financial and Economic Position of Northern Rhodesia, Colonial No. 145.

of the Commission. S. Milligan was the second member of the Commission. A.B. Cohen, of the Colonial Office, acted as secretary to the Commission. The Rhodesia and Nyasaland Commission was similarly appointed by the Secretary of State for the colonies. This Commission was to advise the British Government on "what form of closer co-operation or association between Southern Rhodesia, Northern Rhodesia and Nyasaland is desirable and feasible". Any such recommended union was to have due regard of the interests "of all the inhabitants" and the special responsibility of the British Government over the interests "of the Native inhabitants".[1] The chairman of the Commission was Viscount C. Bledisloe. The other members were P.A. Cooper, E. Evans, T. Fitzgerald, W.H. Mainwaring and I.L. Orr-Ewing.

It appears the Colonial Office felt that the Commissions might throw some light on the broad issue of land policy. For its part the Colonial Office was still uncertain as to what policy to pursue. There was on the one hand the desire that uniformity in land policies should as practicably as possible be maintained between the Rhodesias. On the other hand, however, it was felt that an assimilation of such policies must for the moment be avoided in the three territories. In this latter respect Ormsby Gore, an officer in the Colonial Office, pointed

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[1] See Rhodesia and Nyasaland Royal Commission, Cmd 5949, 1939.

out[1] to Sir H. Young that if the effect in adopting the trust land proposals was to suggest to Southern Rhodesia that its reserves policy be assimilated to its northern neighbours, a serious controversy would arise.[2] At the same time Calder[3] was more hesitant that a reserves policy in Northern Rhodesia, where the regulations relied heavily on those of Southern Rhodesia, should detract from that of the latter. He found this unjustified at a time when the reserves scheme in Southern Rhodesia was working successfully with regard to grants of five year leases.[4] With these doubts the "wait and see" traditional attitude of the Colonial Office was the only way out of possible difficulties.

In 1938, the Pim Report was out and with regard to the trust land proposals commended: ". . . If carried out in the spirit in which they are put forward, the proposals would provide a means of dealing with a number of the anomalies . . . especially that of the great undeveloped areas without inhabitants". Commenting on flexibility, the Report continued: "There is much greater flexibility in the proposed system than is compatible with the system of reserves and congested areas could be relieved".[5]

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1 See Ormsby Gore to Sir H. Young (secret & pers.) of 19/10/1937. CO 795/45120/37/9.

2 For the rejection of the trust land policy in Southern Rhodesia as applied to Nyasaland, see Discussion on Points Arising from the Salisbury Conference held on 9/7/1935. NAZ/Msc./8/4/3 at 58/3.

3 Calder was one of the Colonial Office officials responsible for the administration of African affairs.

4 See Calder, Colonial Office note on Land Policy in Northern Rhodesia CO 795/45120/37/3.

5 See The Pim Report op. cit., par. 165 at p.75.

The Royal Commission in its report the next year shared similar feelings as to the suitability of the proposed policy.[1] Lord Hailey, writing in 1938 in his African Survey had also something on this which did not escape the attention of the Colonial Office. He observed: "In the circumstances of Northern Rhodesia much should be gained by the adoption of the more elastic system now under consideration, which should permit, as in Nyasaland, of a redistribution of areas, subject, however, to the guarantees given to the tribes when the reserves were first constituted, that they would not be moved without their own consent".[2]

These views supported Sir H. Young's proposals advanced almost five years earlier, and the Colonial Office was now sufficiently moved to accept them. The outbreak of the Second World War, however,resulted in the delay in acceptance till 1941.

A. The Colonial Office acceptance of Sir H. Young's proposals.

In all of what had been expressed by what might be called independent observers it is to be noted that there was nothing new added to Sir H. Young's proposals. Hence it cannot be said

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1 See The Bledisloe Report, op.t. cit., par. 386.Cf., par. 402.

2 See Lord Hailey, An African Survey (1938) op. cit., chapter XII, p. 810.

that the Colonial Office acceptance was based on any added grounds of merit. In an authoritative pronouncement,[1] Lord Moyne, the Secretary of State for the Colonies, paying tribute to Sir H. Young as commended by the Financial Commission and Lord Hailey's African Survey, declared: ". . . it is essential in the interests of all sections of the population that there should be a permanent settlement of land policy in Northern Rhodesia". Outlining the guiding principle upon which the new scheme was to be put into effect, Lord Moyne continued:

> . . . His Majesty's Government, while not wishing to place obstacles in the way of European settlement upon an economic basis, must necessarily ensure that full provision is made for the security of the natives in the land already in native occupation, and for the availability of land, upon terms of equal security, for future native needs .

In this proposition it is clear that "land already in native occupation", a reference to reserves, would not be interfered with, and the future proposal must provide equal security. With this principle in mind, the Moyne despatch accepted Sir H. Young's proposals with caveats, naturally flowing from the acceptance of the principle. Qualifying Sir H. Young's concept of flexibility Lord Moyne said: ". . . It is of absolute importance that such elasticity or flexibility should not be capable of interpretation as affording any possibility that the security and adequacy of native lands should be in any way diminished in the future." To entrench "native" title along the Nyasaland model, he suggested:

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[1] See Lord Moyne to O.A.G. of Northern Rhodesia, Conf. (2) of 18/4/1941. NAZ/SEC/SL/111 Vol. II.

> . . . provision should be made for the land to be not only vested in the Secretary of State but also set apart in perpetuity for the sole and exclusive use and occupation of the natives, subject to provision for alienation for specified periods to individual natives, or to non-natives in special cases, where such alienation can be shown to be for the benefit of the natives and the land is not required for direct occupation by natives . . .

Thus the idea of converting reserves into trust land was expressly rejected. The Colonial Office wished the two schemes to exist side by side and to be merged only in light of experience. In this conclusion Lord Moyne concurred with the Pim Report.[1]

In deciding on this it is pretty obvious, as indeed already observed by Lord Hailey,[2] that a merger of the two in so far as it would have involved movements of settled population was not compatible with assurances at the time of constituting reserves that once settled, they (Africans) would not be moved again. The Colonial Office could not have been unmindful of that unanimity expressed by Africans during the 1926 Commission as to their resentment of indefinite movements from one area to another.[3]

Mindful too, that the indigenous population should not get the worst of the land, a fear that had earlier been entertained in the Colonial Office, Lord Moyne insisted that in determining

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[1] See The Pim Report, op. cit., par. 166.

[2] See note 2 at p. 265, supra.

[3] See Native Reserves Commission Report, Vol. 11, op. cit., particularly pp. 437-439.

which areas were to be assigned to Crown land and Trust land, respectively, "the selection of the areas of land actually and potentially available for European settlement should be so arranged as to ensure that adequate good agricultural land should be set aside as Native Trust Land for the use of natives . . ." However, the clarity of this instruction was somewhat obscured by the paragraphs which followed. Addressing himself to the duration of leases to Europeans, Lord Moyne went on: "Native Trust land will, ex hypothesi, not include land which is potentially suitable for European agricultural settlement, and for such purposes as trading plots etc., a maximum of 33 years might in general be regarded as sufficient". He did concede, however, that agricultural leases to Europeans were possible. He said: "White the Native Trust Land will not normally include land which is potentially suitable for European agricultural settlement, I consider that there would be no objection to the grant of agricultural holdings. . .to Europeans, but . . . it would be advisable to limit the extent of such holdings."

The obscurity arises from the uncertainty as to whether priority in agricultural land, is to be given to European or African agriculture. Lord Moyne's propositions quoted raise the dilemma of what land is to be set aside for "natives". Good agricultural land is determinable on objective criterion, ascertaining when this land is not needed for Europeans is much more vague.

Another matter upon which importance was attached in European participation in trust land was the addition of a proviso that in the grant of leases "Native Authorities" situated within the area of proposed grant be consulted and their consent obtained. The Northern Rhodesia Government never appears to have been concerned with the lack of clarity in the instructions in that regard. General agreement was expressed to the Moyne despatch except in respect of the power of consent by a 'native authority'.[1] It was argued that the Governor should have overriding powers over "an unenlightened or obstructive local Native Authority" which might block approved lines of development. The Colonial Office was happy to note general agreement and did not insist on the need for such consent, accepting that the Governor should have such qualifying powers as suggested.[2]

This compromise is effectively reflected in the final Trust Land Order which merely required that a native authority "shall be consulted".[3] The Nyasaland provision is similarly drafted[4] but it is not clear whether its original inclusion was prompted by similar motives as in Northern Rhodesia.

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1 See Logan, A/Governor to Lord Moyne, Conf. of 15/10/1941 NAZ/SEC/SL/111 Vol. II. For the Executive Council Discussion of Logan's despatch as the official reaction, see Ibid., Native Trust Land Despatch, Executive Council of 30/9/1941.

2 See Secretary of State to Governor, Teleg. of 16/12/1941. NAZ/SEC/SL/111 Vol. II.

3 See s.5(2) Zambia (Trust Land) Orders, 1947 to 1964 (1964 ed.)

4 See proviso to s.6, Native Trust Land Order in Council, 1936.

At the official level, consensus had finally been achieved and a policy formulated.

B. The Land Commission Report and European settlers' antagonism

The Northern Rhodesia Government, in formulating the new policy, announced the Government's long awaited decision.[1] Land not yet alienated or set apart for reserves was to be divided into (1) Crown Land and (2) 'Native' Trust Land. The essential features of these two classes were to be:

(1) Crown Land consisting of:

(a) land potentially and actually available for non native settlement,

(b) land for mining development, and

(c) land the allocation of which could not at the time be determined; and

(2) 'Native' Trust Land consisting of the remainder to be vested in the Secretary of State and set apart in perpetuity for the sole and exclusive use of the natives subject to provision for alienation for specific periods to:

(a) individual natives, and

(b) to non-natives in special cases in respect of limited areas where such alienation could be shown to be for the benefit of the natives; and

(c) for the purpose of establishing townships.

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[1] See General Notice No. 416 of 1942 in Govt. Gazette No. 1107 of 31-2-1942.

This was a basis for the terms of reference of the 1942-1943 Land Commission,[1] appointed to determine and recommend how this land policy was to be implemented. The composition of the Commission and the time involved to carry out its work posed some difficulties for the Government. The Government had originally intended to appoint three permanent members including a representative from the European farming community of the territory. A permanent member from European farmers was not, however,available for the length of time required covering a vast area of the territory. Savory, a farmer from the agricultural area of the Southern Province, who had been approached for the job turned down the offer on account of being unable to be away from his farming occupation for any considerable length of time.

Two permanent members were,however, easily secured.[2] L.W.G. Eccles, Commissioner for Mines, Lands and Surveys, was appointed chairman. Gore-Browne, representative of Africans in the Legislative Council was appointed another permanent member. Eccles, being inter-alia, a Commissioner for Mines was an obvious member as the Commission's assignment involved the exclusion of areas with mineral deposits from Trust land. Thus it was necessary to secure the services of a man knowledgeable in the mineral resources of the country. As African interests were also in issue, it was felt Gore-Browne was well suited as a member on such a Commission. In accepting the appointment, Eccles,however,seized the occasion to disapprove the Government's intended policy of

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1 For terms of reference for the Eastern Province, see Govt. Notice No. 196 of 1942 in supplement to Northern Rhodesia Govt. gazette of 31/7/1942; for the Southern Province, Mwinilunga (N.W. Province), Chingola, Kitwe, Mufulira, Luanshya (Copperbelt), Broken Hill (now Kabwe) and Lusaka (Central Province), see Govt. Notice No. 258 of 1942; and for Abercorn (now Mbala) and Isoka (N. Province), see Govt. Notice No. 206 of 1943.

2 See Acting Chief Secretary to Eccles of 21/3/1942.NAZ/ZP/3/1/2.

restricting in acreage European involvement in Trust land.[1] He suggested that the 6000 acres limitation per province be completely deleted as there might be instances when Europeans might need more than this acreage. The Chief Secretary's Office, however, reminded him that the matter had thoroughly been discussed before recommendations were made to the Colonial Office and as such nothing further could be done now.[2]

To get round the difficulty of securing a permanent representative of European farmers, it was decided to limit the areas of enquiry to two urgent areas and thereby obtain services of two European representatives for a shorter period. The two areas considered as posing urgent problems to be resolved were the Ndola and Mkushi Districts and the North Charterland concession in the East Luangwa District. To tackle these areas, the Commission was split into two.[3] Gore-Browne and Eccles, as the chairman of both, were retained as permanent members. Two other members were appointed each to sit on one of the Commissions. C. Gordon James, a well known European Lusaka Farmer, was appointed on the first Commission to deal with problems of Mkushi and Ndola Districts. E. Taylor, arbitrator in the North Charterland Arbitration Award at the time the Crown purchased the concession area from the North Charterland Company, was appointed a third member on the second Commission dealing with the same area.

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1 See L.W. Eccles to Chief Secretary of 27/3/1942. NAZ/ZP/3/1/2.

2 See Sandford to Eccles of 14/4/1942. NAZ/ZP/3/1/2.

3 See E.J. Waddington to Secretary of State, Conf. of 22/8/1942. NAZ/ZP/3/1/2.

Governor E.J. Waddington explained this arrangement to the Colonial Office.[1] Both areas of inquiry had a special European presence which would be affected seriously and hence had to be taken into account before declaring trust land. The rest of the Eastern Province, except for the purchased concession area, was,however,to be declared trust land without further inquiry. The Commissions in their turn proceeded to the areas and received evidence from both Europeans and Africans.

In all the areas of inquiry evidence primarily centred on what land both Africans and Europeans wished to retain for their needs. In the Ndola and Mkushi Districts African Chiefs complained particularly about the inadequacy of land in the reserves.[2] In the Ndola District, Chief Mushiri complained that he had a very small area and indicated the areas of land he preferred for his people. Similarly Chief Chiwala asked for more land, handing in a statement of his requirements. In the Mkushi District the gravity of the situation in reserves expressed by all chiefs was corroborated by both the District Commissioner, D.B. Hall, and the missionary, Rev. J. Munday.[3]

In the North Charterland Concession, it was European farmers who expressed concern at the proposed acreage which was to be reserved for the tobacco farming industry.[4] The Farmers' Association, representated by J.W. Clintock, and Captain F.B. Robertson, presented the case for European farmers in the area. They insisted on 100,000 acres for tobacco farming, warning that the effect of

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1 See E.J. Waddington to Secretary of State, Conf. of 22/8/1942 NAZ/ZP/3/1/2.

2 See NAZ/ZP/3/2/8 pp. 2-3 and NAZ/ZP/3/2/5 at p.7.

3 See NAZ/ZP/3/2/5 pp. 2 et seq.

4 See NAZ/ZP/3/2/9 pp. 14-19.

converting all land into trust land would be ignoring future European needs. They also criticised the criterion of basing allocation of land on African cultivation methods. This they pleaded would leave very little for the European farming industry.

African chiefs, on the other hand, appeared content with proposals for more land reservation for their needs.[1] The only common ground between the two races was that land reserved for their needs should be close to each other for easy supply of labour.

Although it had been thought that the Commission for other areas could only be appointed after the Second World War, the acceptance of C. Gordon James to render further service facilitated early government action. Thus Eccles, as chairman, Gore-Browne and James were appointed on a further but same Commission to inquire into the rest of the areas. At this stage the appointment of James invited the resentment of C.J. Lewin, the Director of Agriculture and member of the Legislative Council. Lewin disapproved the appointment of James, the Lusaka farmer, because of James' public utterances against the Crown and himself (Lewin). Lewin subsequently made it known that he would not, except under compulsion, give evidence before such a man, and even then he would only do so under protest at the

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[1] See NAZ/ZP/3/2/9, pp. 21-22.

insult.[1] Notwithstanding this disapproval James continued as a member of the Commission.

The areas of inquiry of the Commission were specified as Southern Province; Mwinilunga (in North Western Province); Chingola, Kitwe, Mufulira, Luanshya (on the Copperbelt); Broken Hill and Lusaka (in the Central Province) .Northern Province, Serenje District in the Central Province, Kasempa and Balovale Districts in North Western Province were specifically excluded from inquiry and were to be declared trust land forthwith.[2] This provoked reaction from members of the Commission who felt such an exclusion of Europeans unjustified in respect of the Northern Province and Kasempa District.[3] The Commission's inquiry was subsequently extended to merely two Districts - Abercorn (now Mbala) and Isoka in the Northern Province.[4] The justification for exclusion of certain areas was the absence of European settlement and mineral deposits to warrant consideration of reserving certain land as Crown land.

With these preliminary issues disposed of the Commission started its work. On the Copperbelt the primary considerations were industrial development and preservation of important forest

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1 See C.J. Lewin to W.G. Eccles of 17/5/1943. NAZ/ZP/3/1/1.

2 See E.J. Waddington to Secretary of State, Conf. of 22/8/1942. NAZ/ZP/3/1/2. Cf., General Notice No. 416 of 1942.

3 See Eccles to Chief Secretary of 13/4/1943. NAZ/ZP/3/1/1.

4 See Govt. notice No. 206 of 1943.

reserves. European settlement from the view point of agriculture was not relevant, except for Ndola, because Europeans were a settled urban community working in mines.

The evidence, which was primarily from District and Provincial government administrators, reveals this understanding. The Provincial Commissioner suggested to the Commission that enough land be preserved for future industrial expansion.[1] He added further that the reserved trust land should be away from industrial centres due to the effects of absentism by the African labour force frequently visiting nearby villages. On forest reserves, the Director of Agriculture, C.J. Lewin suggested[2] that most of the Copperbelt should be retained as Crown land due to important and valuable forests. The Forest Officer, C.E. Duff went further, after being invited by the Commission, to indicate which areas were required for forestry purposes.[3] African opinion so far as can be ascertained was only confined to an expression of the desire to have provision for individual tenure near urban centres. C. Robinson,[4] in the Ndola District Administration, favoured such provision of individual farms on Crown land to avoid the creation of trust lands which would have the nature of being irreversible even when industrial needs demanded reversal.

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1 See Provincial Commissioner to Chairman of Commission dated 21/8/1942. NAZ/ZP/3/2/8.

2 See NAZ/ZP/3/2/8 at p.23.

3 See NAZ/ZP/3/2/8 pp. 9-13.

4 Ibid., at p.20.

The Southern Province, and the other two Districts (Lusaka and Broken Hill) along the line of rail posed an entirely different situation. European agriculture here was well advanced - hence the need to make adequate agricultural provision. The assignment was, however, made more difficult because of deteriorating conditions in reserves requiring urgent attention. African chiefs used the occasion to express their grievances over the inadequacy of land for grazing, cultivation and water supply.[1] They saw in the trust land scheme a rare occasion to redress the evil effects of the already established reserves scheme. The District Commissioner for Livingstone joined his local chiefs in this appeal.[2] The urban African, on the other hand, was more concerned with the provision for individual tenure in trust land,[3] a proposal which the Provincial Commissioner, B. Wickens, opposed as being premature.

European opinion on the other hand was full of fear that Africans might be given more land than European farmers needed along the line of rail. E.D. Kirkby, one of the representatives of the Farmers Association, did in this regard ask the Commission whether this was the case. Eccles, chairman of the Commission, assured him that this was not likely but only probable in respect of areas further north of Lusaka and Broken Hill where there was very little European settlement.[4]

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1 See for example evidence of chiefs in Livingstone, attached to District Commissioner's memo dated 20/4/1943 at p.2. NAZ/ZP/3/2/3.

2 Ibid., pp 1-4. Cf., evidence in Broken Hill at p.2.

3 See for example statement of the African Civil Servants Association in District Commissioner to Chairman of Commission dated 26/5/1943. Boma messengers, representatives of the Urban Advisory Council, African Welfare Association and African small-holders expressed similar views. See pp.9 et seq.

4 See NAZ/ZP3/2/4. pp. 2-3.

Besides this expressed apprehension, European evidence concentrated on indicating which areas were regarded suitable for European agriculture. But the European wish emerged as to the location of African land. It was expressed that there should be a buffer zone separating European owned farms from African land. Previous experiences from the proximity of some of the reserves to European farms sparked off the resentment of such an arrangement. Reasons advanced for the buffer zone proposal were mainly two, namely that (1) proximity to villages in reserves encourages labour absenteeism and (2) native cattle strayed on European farms and intermingled with European herds.[1] Lusaka District Commissioner, J. Gaunt, took even a more extreme view of having the Luangwa valley reserved for trust land so as to have the Africans removed far away because ". . . The natives were extremely backward and difficult to administer." He, however, favoured individual tenure for Africans who wanted it.

From the government administrators there was a further expression of the need to control forest reserves and protected areas in trust land. R. Miller, the Assistant Conservator of Forests, advanced this view before the Commission.[2]

Another related area to the line of rail which attracted attention was Mumbwa. One of the problems like in other areas was provision for more land in some of the very exhaustedreserves. In addition to this, and more importantly, was the need for a definite

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[1] See NAZ/ZP/3/2/4 at p.1 Cf., evidence in Broken Hill at p.11.

[2] See evidence in Broken Hill at p.4.

apportionment of the Kafue flats, vital to the European ranching industry. Evidence was received from African chiefs and one of them who was more affected by the shortage of land expressed the wish for more land and water resources.[1] On the issue of the grazing area, L.F. Leversedge, District Commissioner for Mazabuka, and J. McArthur, Lusaka District Vetinary Officer, prepared a report with recommendations.[2] The recommendations involved an excision of 26 sq. miles from the Kafue flats for European cattle ranching. The report and this recommendation was supported by the Provincial Commissioner.[3]

When the Commission subsequently relied on this recommendation, C.G. Trapnell, the government ecologist, criticised the recommendation. Trapnell felt that the acreage involved was unjustified when one of the neighbouring reserves needed more land from the already restricted flats.[4] Trapnell went further to indicate that in respect of another area a decision had been made when the land and population situation had not been satisfactorily worked out. C.J. Lewin, the Director of Agriculture, agreed with the criticism in respect of the grazing area.[5] However, he objected to the inclusion of a larger area into the exhausted reserve. He felt this would be beyond native needs and would exclude the

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1 See evidence of Chief Kampengele, NAZ/ZP/3/2/6 at p.2.

2 Ibid., pp.8 et seq.

3 See Provincial Commissioner to Chairman of the Commission dated 10/11/1943. NAZ/ZP/3/2/6.

4 See C.G. Trapnell to Director of Agriculture dated 13/3/1944 NAZ/ZP/3/2/6.

5 See C.J. Lewin to Chief Secretary of 15/3/1944. NAZ/ZP/3/2/6.

land from any other future needs that might arise.

The remaining areas for further consideration were the Northern and North Western Provinces. Investigations were confined to Districts where there were scattered and small European settlements. In the Northern Province, Abercorn (Mbala) and Isoka were the Districts of Inquiry. Evidence from settlers was practically negligible. Orne-Gliemann, a local settler, merely indicated which areas he regarded suitable for European settlement and expressed the view that Africans had enough land except that they were wasteful.[1]

Most of the evidence came from government administrators, who were divided in opinion as to whether there was or was not need for a policy of land reservation. U.L. Moffat, a District Commissioner, saw no prospects of European settlement on an economic basis but still favoured some reservation of Crown land in case of such settlement.[2] G. Clay, a District Commissioner in Isoka, favoured the creation of trust land but warned against the dangers of African resentment if ever the scheme involved movement of populations. Although opposed to moving populations, he favoured stringent measures of control in trust land for the protection of the watershed and forests.[3] G. Stokes, a District Commissioner in Abercorn, was, on the other hand, entirely opposed to the idea of reserving land as Crown land. He gave his reason as being that after such reservation, the land still continues to be unoccupied. He favoured a scheme of moving Africans only if there was need and even then it would have to be on payment of compensation, having explained fully to the Africans what this meant.[4]

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[1] See NAZ/ZP/3/2/1 at p.17

[2] Ibid., at p.3.

[3] Ibid., at p.28.

[4] Ibid., at p.30.

The Provincial Commissioner, G. Howe, took a flexible view. He stated that he was not opposed to giving Africans more land as native trust land so long as this land was subject to control. The Government, he insisted, would need to have power to impose agricultural measures and to declare forest reserves.[1]

African opinion was sharply divided. African chiefs expressed satisfaction at the provision of more land although they were unhappy with the effect of the proposed control measures on their cultivation methods. Representatives of the Abercorn African Welfare Association, on the other hand, expressed absolute ignorance of what the Commission had wanted to hear from them. On the specific question of trust land they expressed no comment as they did not know what it was about.[2] African staff on the Shiwa Ng'andu estate were, however, opposed to any scheme which involved the division of land.[3] They gave mainly two reasons for this attitude, namely that (1) Europeans take most of the good land leaving Africans landless as in the Union of South Africa and Southern Rhodesia and (2) the scheme did not have the consent of the chiefs as it had not been explained fully.

In the Mwinilunga District, the evidence which the Commission heard appears to have been very limited. Of the three settlers in the District none appeared before the Commission. The African chiefs who appeared before the Commission had very little to say. After the chairman to the Commission explained the Government policy and stated that there would be stringent measures of control

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1 See NAZ/ZP/3/2/1 at p.23.

2 Ibid., at p.29.

3 Ibid., at p. 32.

in trust land, the chiefs merely expressed appreciation for government's action.[1] Asked whether they would like to see any European settlement, they answered that they would like to see the Europeans before expressing any opinion.

The rest of the evidence came from government administrators in the District. K.S. Kinros, a District Commissioner, provided the data of the District including European owned freehold farms which were either unoccupied or undeveloped. He then proceeded to indicate how the land was to be divided, emphasizing that the African problem in the District was not one of shortage of land.[2] H.B. Waugh, another District Officer, indicated which areas were suited for European settlement, south of which was infested by tse-tse-fly. The tse-tse fly free area being the only available land for Europeans, he suggested that the rest be declared trust land.[3]

On this data, gathered over two years, together with the geological surveys in possession of the Commissioner of Mines, Lands and Surveys, the Commission compiled its recommendations in a consolidated form, except for the North Charterland Concession. The latter came out in a separate report at the time the Commission completed its findings in 1942. Four areas suitable for the European tobacco industry were at the conclusion of that Commission reserved as Crown land and as such excluded from trust land.[4]

In respect of all other areas, the Commission reported its consolidated findings in 1946.

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[1] See NAZ/ZP/3/2/7 at p. 9.

[2] Ibid., pp. 1-7.

[3] Ibid., at p. 7.

[4] See NAZ/ZP/3/1/1.

With regard to Crown land, in obedience to the instructions intended to implement the 1942 Government policy, the Commission, inter alia, reserved all known mineralised lands, together with probable areas of future development, along the lines of the South Rhodesian "unassigned areas", to the Crown.[1] The position of the latter could be reviewed after a period of time. With regard to 'Native' trust land, the Commission reported that full provision for agricultural requirements was given as well as access to 'railways and main arteries of communication',[2] having proceeded, as its 1926 predecessor, on the principle of homogenoeity of large land blocks.[3] And like its 1927 predecessor it repeated the recommendation of allowing Africans occupy such Crown land as was not immediately in need without having to move them into the reserved trust land.[4]

Just before the publication of the Report, when the matter was to be debated in the Legislative Council, criticism had mounted within the group of unofficial members of the Council at the extent of the area converted from Crown land to trust land. It was feared that such reservation would only result in locking up this land in perpetuity. To avert this unofficial disapproval Governor Waddington who was in office from 1942-1947 was persuaded by Gore-Browne's suggestion, which was acceptable to the critics. Gore-

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[1] See Land Commission Report, Govt. Printer, Lusaka, 1946 par. 1.

[2] Ibid.,pars. 4-5.

[3] Ibid., par. 3.

[4] Ibid., par. 6.

Browne as a representative of Africans in the Legislative Council had considerable influence on both the Government and European settlers on matters that affected African interests. Gore-Browne suggested that land in excess of 6000 acres per province would be made available for non native occupancy so long as the necessary approval was obtained and such alienation 'was in the general interests of the community as a whole'.[1] This was the beginning of the departure from the phraseology 'for the benefit of the natives'. The Colonial Office did not appreciate the European sentiment and flatly rejected Gore-Browne's proposals.[2]

The Colonial Office refusal was confined to the matter of principle and it ignored the proposal to extend the acreage. It was felt that the "common benefit direct or indirect of the natives" was a fundamental condition of the whole policy and this was to be so even if it was not in the general interests of the community as a whole. It was admitted that often there would be a coincidence of interest between the "natives" and the general community, but the original provision was intended to cater for the rare situation where "native" interests were not necessarily the interests of the general community. Emphasizing this the Colonial Office note ended, ". . . it is . . . just such cases,

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[1] See Sir E. Waddington to Secretary of State, Conf. teleg. No. 661 of 14/12/1945. CO 795/45120/45/7.

[2] See Secretary of State to Sir E. Waddington, Conf. teleg. No. 615 of 20/12/1945. CO 795/45120/45/14.

rare though they might be that the Order-in-Council is intended to cover".

Rejecting the proposed amendment, (which also meant that the 6,000 acres limitation still stood), the Colonial Office approved the Report as conforming to the 1941 Moyne despatch and expressed the wish that as the detailed application of a policy had been worked out, "it should be brought into force as soon as possible".[1] However, this wish was not fulfilled.

Quite apart from the unofficial members of the Legislative Council, who no doubt represented European interests, the farmers, most affected by the new land policy, emerged as the most vocal single group. In this new policy they saw a culmination of the 1930 HMG doctrine of the "paramountcy of native interests" which proclaimed that "if and when, those interests and the interests of the immigrant races should conflict, the former should prevail".[2] A memo of the Midland Farmers' Association warned of the disastrous effect the land policy, if carried out, would have on "(a) the present

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[1] See Hall to Governor, Conf. No. 163 of 27/12/1945. CO 795/45120/45/15.

[2] See Memorandum on Native Policy in East Africa, Cmd. 3573, June 1930. For a detailed discussion of the paramountcy doctrine, see Report of the Commission on Closer Union of the Dependencies in East and Central Africa, Cmd. 3234, 1929. The paramountcy doctrine from its very inception in 1930 was very vehemently criticised by the European settlers in its adoption to Northern Rhodesia. See Correspondence with regard to Native Policy in Northern Rhodesia, Cmd. 3731, Dec. 1930. Cf., Rhodesia and Nyasaland Royal Commission Report, Cmd. 5949, March 1939. Two years hence the Colonial Office discarded the policy in respect of the territory. Subsequently the official policy emerged to be a recognition that European and African interests should be complementary. For a brief account of this shift in policy, see H. Heisler, "The Creation of a Stabilized Urban Society: A Turning Point in the Development of Northern Rhodesia/Zambia", op. cit., p. 128. Cf., Leg. Co. Debates, 23rd March 1948, session 6th March-24th March 1948, pp.417-419; and House of Commons Debates, 22nd Sept. 1948, Vol. 456, cols. 868-869.

European farming community and (b) future European settlement". The memo stated "It has been said that it would amount to nothing less than the culmination and fulfilment of the policy laid down in the White Paper of 1930 . . .".[1] This was put even more strongly by the Farming Development Committee to the Chief Secretary: "The final and irrevocable limitation of European settlement to so small a proportion of the country will obviously designate Northern Rhodesia as a "Black Man's Country", in which the European will hold so restricted a place that the policy of Complementary Development which Government has so lately professed . . . will be definitely abandoned".[2]

The farmers' opposition was not an isolated incident because Provincial Commissioners were also opposed as early as 1941 to one aspect of the restrictive nature of trust land, namely the 6,000 acres per province rule.[3] Presumably this was a different class of provincial administrators from those who almost five years earlier backed the Young proposals apparently without any reservations. Of course at that earlier time the policy had not been amply formulated in its practical aspects.

At the time of debate in the Legislative Council, on a motion to adopt the Report, the conciliatory mood of the Council revealed that all the criticism of the settlers had been taken into account and a formula of accommodation provided. Wanting to be certain that this was so, Page, a local farmer and member of the

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1 See Memo from Committee of Midland Farmers' Association, Enclosure 1 in Sir E. Waddington to Sir G. Gater of 11/3/1946. CO 795/45120/46/14.

2 See Enclosure 2 in Sir E. Waddington to Sir G. Gater of 11/3/1946. CO 795/45120/46/14.

3 See Minutes of Provincial Commissioners' Conference, Oct. 1941. NAZ/SEC/SL/111 Vol. II.

Legislative Council, retorted as to the 6000 acre limitation: ". . . I hope that this question of . . . restriction . . . has been removed once and for all, and that the amount to be set aside for European settlement will be entirely at the discretion of the Governor."[1] Gore-Browne, a member of the Land Commission representing African interests, gave the final position -- "I can tell Members that the 6,000 acre limit is definitely done away with, and a formula has been substituted which I may say, without divulging any secret, was first suggested at a friendly, private meeting . . . which was attended by various other Official and Unofficial Members of Council. The formula is that when alienation is proved to the satisfaction of the Governor and the Secretary of State, after consultations with Native Authorities concerned, to be in the interests of both races, it should be allowed". Emphasizing the nature of the qualification for such alienation, which had hitherto emphasized as the interests of the local African population, Gore-Browne asserted:

> No actual limit is laid down, but the essential qualification is that it should be in the interests of both races that the land in question should be alienated.[2]

Thus the general interests of the community as a whole prevailed over the Colonial Office's latest insistence upon the recognition of the principle of "the common benefit direct or indirect of the natives" in 1945. This provision, having found its way into the 1947 Order, Secretary of State Lennox Boyd had the occasion six years later to give an unusual executive interpretation of the provision. Asked in the House of Commons

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[1] See Leg. Co. Debates, 11th Feb. 1947, session 30th Nov. 1946-12th Feb. 1947, Col. 827.

[2] See Leg. Co. Debates, 11th Feb. 1947, session 30th 1946-12th Feb. 1947, Col. 830. Cf., assurances of the Secretary for Native Affairs, cols. 831-832.

whether the utilisation of trust land for the construction of the Kariba hydro-electric scheme involving removal of Africans from their land was not a violation of the very basis of that scheme, he replied: ". . . while protecting African interests to the full we are sure that there is real value to the Africans in power developments of this kind."[1]

Ten years from the start of discussion, the legal instrument giving effect to the consensus was essentially a drafting exercise of the Northern Rhodesia Government in which heavy reliance was placed on the Nyasaland model.[2] On receipt of the draft Order, the Colonial Office consulted the British South Africa Company[3] which had no comments to offer. Clauses 6(1) and (2) allowed mineral exploitation mutatis mutandis as did clause 8 of the 1928 Order.[4] In this the Northern Rhodesia clause differed from its Nyasaland counterpart due to different arrangements[5] with the British South Africa Company. In Nyasaland the property in all minerals in trust land was vested in the Secretary of State to be administered and controlled, like land, by the Governor "for the use or common benefit, direct or indirect of the natives" of the Protectorate. The Order became the Native Trust Land Order in Council on 14th October, 1947.

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1 House of Commons Debates, 9th March 1955, Vol. 538, Col.441.

2 For a discussion pertaining to the draft Order-in-Council, and Note for Executive Council, NAZ/SEC/SL/111 Vol. III.

3 See Cohen to Secretary, BSA Co. of 11/2/1946. CO 795/45120/46.

4 See Secretary, BSA. Co. to Under Secretary of State of 18/2/1946. CO 795/45120/46/3.

5 See H.M. Williams, Mining Law of Northern Rhodesia, op. cit., pp. 59-60.

Although like reserves, trust land continued to be a feature in the land categories of the territory, successive years saw hardened African opinion attack the policy particularly during currency of the Federation of Rhodesia and Nyasaland

C. Trust land, the Federal status of the Territory and African opinion

The status of various African lands in the three territories during the Federation of Rhodesia and Nyasaland remained unaffected by the Union. They remained, as before, the subject of their respective territorial laws.[1] The Federal Government could however utilise African lands, in the same way as territorial governments, for public purposes only. In this regard it was as materially relevant provided in s. 33(1):[2]

> Notwithstanding anything in this Constitution, the Federal Legislature shall not have power to make provision for the acquisition, whether compulsorily or by agreement, of any African land . . . otherwise than in accordance with the provisions of any of the African land laws applicable to the land in question; and any power for the compulsory acquisition of land conferred by a law of the Federal Legislature shall, notwithstanding anything in that law, not be exercisable in relation to African land for the purpose of settling immigrants thereon.

Public purpose in the territorial land laws was extended to include the Federal Government's public purpose in the words:

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[1] Cf., Lord Hailey, An African Survey, op. cit., chapter XI p. 708.

[2] Federation of Rhodesia and Nyasaland (Constitution) Order-in-Council no. 1199 of 1953.

> For the purposes of the African land laws, except as may be expressly provided thereinafter the coming into force of this Constitution . . . any reference therein (however expressed) to public purposes shall be construed as including a reference to Federal public purposes.[1]

African land meant any of the designated areas essentially reserved for Africans in the three territories, i.e. trust land, reserves, etc.[2]

It must be noted that land acquired for a public purpose by the Federal Government from African lands could not be used to settle immigrants. This prohibition in the Federal Constitution appears to have been included to assure the interests of Africans who were very suspicious of the effects of the creation of the Federation.

One of the known instances when this power was used was in the construction of the Kariba Hydro-Electric Dam which was to supply power to the territories of the Federation. The lands affected by this project included both trust land and reserves in the Southern Province of Northern Rhodesia. To effect this project the Zambia (Gwembe) District Order[3] was effectively passed on 27th February, 1959 empowering the Central African Power Corporation to "inundate any of the lands to which this Order applies by the construction of a dam at the Kariba Gorge for the purposes of the generation of hydro-electric power . . .". This Order

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1 See s. 33(3), Federation of Rhodesia and Nyasaland (Constitution) Order-in-Council no. 1199 of 1953.

2 Ibid., s. 33(4)(a).

3 See the Zambia (Gwembe District) Orders 1959 and 1964 Appendix 4. Revised Laws.

prevailed over any previous Trust Land and Reserves Orders to the extent of any inconsistency.

The actual acquisition was effected by the Northern Rhodesia (Native Trust Land) Amendment No. 2 Order in Council 1954. In respect of reserves, it was not clear whether the Federal government's power of acquisition extended to a corporation controlled by it. This doubt was cleared by expressly providing that the power of acquisition extended to such a corporation.[1]

African opinion seems to have been that the trust land scheme was more vulnerable to interference than its counterpart due to its flexibility. The African move was to exert pressure for a merger of trust land into reserves. The battle for merger raged throughout most of the 1950's. The African Representative Council[2] now provided the forum for African opinion which generally at this time was bitterly critical of the general land policy. Kakumbi, a member of the African Representative Council, revealing the African sentiment as early as 1951 over the land question asserted: ". . . recently the leader of the European Elected Members claimed for self government . . . We are afraid that if we

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[1] See Northern Rhodesia (Native Reserves) (Amendment) Order in Council 1955.

[2] For the beginnings and creation of this Council, see D.O. Aihe The Constitution of Zambia: An historical and Comparative Study, Ph.D. Thesis, University of London, 1968, pp. 54-60.

cannot add this Native Trust Land to our own Native Reserves, to make it as one land, under the Native Reserve Land, the Trust Land will soon be occupied by the European settlers".[1] A motion to this effect proposing a merger of trust land into reserves, was passed by the African Representative Council. In the following year a similar motion was again passed which brought this government reply: "Government does not hold the opinion expressed in the . . . motion . . . The Government sees no sufficient reason to advise Her Majesty the Queen to amend the Native Trust Land Order in Council in the manner suggested".[2] No amount of assurances allayed African fears. Three years hence the motion was revived as a reminder to the Government that African feelings were growing stronger on the matter.[3] Stubbs, Secretary for Native Affairs, repeated the assurance that "the land is vested in the Secretary of State and protected by Orders in Council" which was an adequate safeguard against settlers taking over native lands.[4]

Neither the Colonial Office nor the territory's administration saw in these African demands circumstances warranting the merger of the two lands. Their attitude was that experience alone would

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[1] See A.R.C. Debates, 24th July 1951, session 23rd-26th July, 1951, col. 106. For the whole debate, see cols. 105-116.

[2] See A.R.C. Debates, session 18th-20th December 1952, col. 192.

[3] See A.R.C. Debates, 12th Oct. 1954, session 12th-14th Oct. 1954, cols. 19-20.

[4] Ibid., col. 33. For the whole debate, see cols. 19-41.

show whether such a merger was necessary. Thus by 1955, the Colonial Office's official stand was rejection of conversion of trust land into reserves.[1]

The African line of attack now changed to a request to amend those aspects of trust land which made it vulnerable to settler intrusion. In first three years of the Federation, the power of the Federal Government over immigration was seen as a severe threat to African lands. Taking the opportunity of the presence of the Secretary of State at a meeting of the African Representative Council, Yamba, a Council member proposed several amendments to the Order-in-Council. These were namely:[2] - that (a) "consultation" with a Native Authority prior to alienation should be substituted by "consent" of that Authority as the Governor was sufficiently powerful to overrule the Authority; and (b) the 99-year lease period was too long an interest to be granted to Europeans and a period of five years should be substituted as this was long enough for European participation.

Secretary of State Lennox Boyd seized the opportunity to assure the African critics that an Order in Council was above local pressure.[3] The lands were vested in him and he was answerable to the British Parliament, in as much as the Governor was answerable to him and subject to his direction. Legal assurances there were, but the credibility gap between the two

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[1] See Reply of Secretary of State to the Commons, House of Commons Debates, 9th March 1955, Vol. 538, Cols. 440-441.

[2] See A.R.C. Debates, special session with Secretary of State of 21st Jan. 1957, cols. 5-8 and col. 49.

[3] Ibid., col. 30.

sides must have widened as this was a prelude to organised nationalism. The merger between the two has never taken place to date.

Before we can look at the post-independence era and the impact it has had on land policies it will be well to dispose of the remaining aspect of the colonial policies. This relates to alienation of land outside reserved areas to settlers and those Africans regarded as sufficiently detribalised to have shown signs of wanting tenure to land along European lines.

CHAPTER 5

LAND POLICY RELATING TO EUROPEANS AND DETRIBALIZED AFRICANS

A. Land alienation to European settlers

The Administration's primary concern was to encourage and entice European settlement by grant of land on conditions and tenure consistent with the objectives of development. To achieve this it was necessary to have machinery for land administration, and of much importance to us here, a determination of the nature of the land interest alienable for specific purposes of development.

Previously under the British South Africa Company administration, land allotment was haphazard with individual settlers touring districts to pick on a parcel of land which suited them. Following this sightseeing an individual settler would then submit an application in respect of such parcel which was invariably granted.[1] The effect of this was dotted and unsystematic European settlement without any effective supervision of land use. In 1928, Governor Maxwell in liaison with the Legislative Council Select Committee came out with the suggestion of creating an Advisory Land Settlement Board[2] which was constituted in the following year.[3] The Board proved a useful

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[1] See Memo on European settlement by Acting Secretary of Agriculture, Enclosure in Maxwell to Amery, Conf. of 8/4/1929. CO 795/35305/29 at pp. 8-9. Cf., M.A. Jaspan, The Ila-Tonga Peoples of North Western Rhodesia, Ethnographic Survey of Africa, London, 1953 at p. 55.

[2] See Maxwell to Amery, Despatch No. 546 of 8/12/1928. CO 795/3522/28/1.

[3] See Maxwell to Amery, Conf. of 8/4/1929, note 1 supra.

machine in implementing government land policies. This became more evident in the 1940s and 1950s when much of these policies were settled and European settlement had reached a stage of stability. In 1946, a year after a Select Committee on land settlement was appointed to determine the scope and conditions of land grants to intending settlers, the Board had its functions more adequately defined and expanded.[1]

Thus at long last the management and alienation of Crown land, supervision of good husbandry, general review of alienation, and the grant of loan facilities were all the concern of the Board.[2] As to the more fundamental issue of the nature of the alienable interest, this to a great extent was influenced by the personal inclinations of individual governors. The tug of war as to the preference of one interest over the other has always been between freehold and leasehold.

(i) Freehold vs. Leasehold

Prior to direct British rule, the British South Africa Company favoured granting freehold estates in fee simple with the imposition of a development clause prior to the grant of final title. Stanley, the first Governor of the territory, being more

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[1] See Leg. Co. Debates, 28th June 1945, session 19th June-4th July 1945, cols. 200-204. Cf., cols. 213-235.

[2] For the Board's functions, see Northern Rhodesia Land Board Annual Reports, 1948-1952, Govt. Printer, Lusaka. Cf., Land Board Information for intending settlers, 1949-1950, Govt. Printer, Lusaka.

accustomed to the South African freehold tenure was inclined to continue with this system of alienation. The only amendment Stanley offered was an insertion in the granting conveyance of a clause requiring permission from the Crown for laying out of any land or part thereof as a building estate.[1] This was quite understandable at a time when there was no Town and Country Planning legislation for the territory. Thus Stanley was avowedly a freehold exponent; and subsequently showed his bias when he put forward his preference at the expense of the Colonial Office desire for a leasehold policy.

Stanley's preference for freehold tenure was put to the test by the Colonial Office on the recommendation of the East African Royal Commission[2] that consideration should be given by the Crown in respect of Northern Rhodesia, to substituting the British South Africa Company's freehold grants by leasehold, revisable at stated intervals along the lines of the Tanganyika Ordinance.[3] In so suggesting the Colonial Office must have been mistaken in believing that European tenure of land in Northern Rhodesia could be based on the Tanganyika system. Europeans in Northern Rhodesia were more inclined to the South African than East African experience.

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1 See Stanley to Amery, Despatch No. 153 of 6/4/1925. CO 795/2/25. par. 11.

2 This Commission was appointed by the Secretary of State for the Colonies in July 1924 to visit British East Africa Dependencies (including Northern Rhodesia) "with a view to obtaining. . . information. . . on all subjects covered by the terms of reference to the East Africa Committee". The terms of reference of the East Africa Committee on which the present Commission was to obtain further information, included consideration of co-ordinating policy between these Dependencies to generate economic development.

The Commission's personnel were W. Ormsby-Gore, M.P.(Conservative); A.G. Church, M.P. (Labour); and F.C. Linfield, M.P. (Liberal); J.A. Calder, from the Colonial Office, acted as Secretary. On the tenure of land in Northern Rhodesia, the Commission recommended the adoption of the Tanganyika leasehold system. See Report of the East Africa Commission, Cmd. 2387 at p. 101.

3 See Amery to Stanley, [illegible]

The Tanganyika system of tenure, like its Nyasaland offshoot, proceeded on the premise that the territory was essentially a 'native' area and all land dispositions, particularly to 'non-natives' were subject to 'native'interests. In other words no disposition was to take place if inconsistent with 'native' interests as determined by the governor.[1] In achieving this objective it was apparently not found desirable that land be specifically reserved for Africans like in Northern Rhodesia. The formula adopted was to declare all ungranted land as 'public lands' with the consequence that all such land was at the disposal of the governor for the benefit of the Africans.

Thus the Land Ordinance provided, excepting for previous private acquisitions:[2]

> The whole of the lands of the Territory, whether occupied or unoccupied, on the date of the commencement of this Ordinance are hereby declared to be public lands.

Evidencing the intent s. 3 declared:

> . . . all public lands and all rights over the same are hereby declared to be under the control and subject to the disposition of the Governor and shall be held and administered for the use and common benefit, direct or indirect, of the natives of the Territory, and no title to the occupation and use of any such lands shall be valid without the consent of the Governor.

Disposition of a land interest termed 'rights of occupancy'[3] was allowed to both 'natives and . . . non-natives'[4] for a definite term not exceeding ninety-nine years.[5]

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[1] Cf., R.W. James, Land Tenure and Policy in Tanzania, East African Literature Bureau, 1971, pp. 96 et seq.

[2] See s. 2, Land Ordinance No. 3 of 1923 as amended by Land Ordinance No. 5 of 1924.

[3] Ibid., s.5.

[4] Ibid., s.6(a)

[5] Ibid., s.7.

In regard to a 'non-native' there were further restrictions imposed -- namely: (a) that the Governor could not make such a grant "free of rent or upon any conditions which may preclude . . . revising the rent at intervals of not more than thirty-three years;[1] and (b) that "Except with the approval of the Secretary of State, no single right of occupancy shall be granted . . . in respect of . . . land exceeding 5,000 acres".[2]

Such was the Tanganyika tenure, identical to that effected in Uganda outside Buganda by 1922.[3] Disposition of grants in Northern Rhodesia to European settlers could not have taken into account African interests. The essence of a policy of land reservation was to exclude the relevance of African interests in land dispositions outside reserves. In those areas only European interests were primarily relevant. It was to the European that you had to look for a determination of what alienable interest was preferable.

Stanley's reaction to the Colonial Office's intimation of a leasehold policy was absolute rejection stating that it was suitable only to a European who was a temporary inhabitant uninterested in permanent settlement.[4] Warning against European reaction to the Tanganyika system, Stanley concluded: "The enact-

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[1] See s.7, Land Ordinance No. 3 of 1923 as amended by Land Ordinance No. 5 of 1924.

[2] Ibid., s.16.

[3] See H.F. Morris & J.S. Read, Uganda: the development of its laws and constitution, London, 1966 at p. 45.

[4] See Stanley to Amery, Despatch No. 25 of 12/1/1926. CO 795/X1423/26.

ment of a law embodying the principles of the Tanganyika Ordinance . . . would, I fear, be strongly resisted and bitterly resented by the white inhabitants of the Territory". The Colonial Office seeing the different local conditions, decided not to insist on the Tanganyika model leaving the territory to develop its own policy. Downie, an officer in the Colonial Office who advocated partitioning the territory, minuted: "In any case the question can hardly be pursued until the future of the country can be more clearly envisaged. (There is the possibility of partition)".[1] Ormsby-Gore, Parliamentary Under Secretary of State for the Colonies, although suspecting that Stanley might not have understood the Tanganyika law, summed up the Colonial Office consensus on the peculiar local conditions when he minuted: "I have discussed with . . . Strachey who agrees with me that the circumstances in N. Rhodesia as described in . . . Stanley's despatch do not warrant our pressing the idea of a Tanganyika Ordinance in the Protectorate".[2]

Thus freehold still retained a foothold in the tenure of land in the territory but not for long before it was questioned and revised by Stanley's successor, Governor Maxwell. Maxwell was much less favourably disposed towards freehold on the ground that such tenure was vulnerable to speculation. Three years after Stanley's freehold overtures, Maxwell entered a caveat[3]

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[1] See Minutes of Downie of 26/2/1926. CO 795/X1423/26.

[2] Ibid., Minutes of Ormsby-Gore of 21/1/1927.

[3] See Maxwell to Amery, Conf. of 18/4/1929. CO 795/35347/29. For the whole of Maxwell's scheme, see particularly pars. 5-7 and 9-11.

against freehold when he wrote: "However strong the feeling may be in South Africa and Southern Rhodesia in favour of freehold as opposed to leasehold tenure, there is the undeniable fact that by the grant of freehold, especially where large areas are alienated, all control over the land is lost, an undesirable thing in a country in which European settlement is still in its infancy . . . it is the interests of future settlers as opposed to speculation in land, that alienation . . . in the form of freehold should be restricted". Giving his other reason for this proposed restriction, Maxwell feared that holdings in fee simple could be leased to Africans without any difficulty thereby defeating the Government's policy of reserves.

However, at this time, there was no evidence of this practice to substantiate the fear. But even assuming that such a situation could potentially arise, Maxwell would have done well to address himself first to a provision in the Order-in-Council, which granted Africans the right to acquire land on the same terms and conditions as Europeans anywhere in the territory.[1] A leasehold policy based on this premise was untenable because restrictive covenants prohibiting transfers to Africans were inconsistent with this provision of the Order-in-Council.

Maxwell's real problem was to reverse a policy which hitherto had been well entrenched. Acknowledging that European

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[1] See art. 42, Northern Rhodesia Order in Council, 1924.

reaction would be insurmountable, Maxwell searched for a compromise and came up with a more accommodating formula. In this he drew a distinction between areas already settled and new areas for settlement. In the case of the former he conceded to the status quo because a reversal could not be achieved without bitter resistence. As for the latter he advocated an absolute abandonment of the freehold policy and immediate grant of leasehold tenures.

Put into practice, his policy meant that agricultural land in the vicinity of more settled areas along the railway line would be by freehold grant. From this category he excepted ranching land for which he proposed a leasehold grant for thirty three years only. If this land continued to be suitable for ranching the tenant could have his lease renewed on the same terms. In this he saw the speculator being effectively precluded from acquiring ranching land. In the same settled areas he conceded to continue freehold grants for residential and business premises because of the prevailing freehold tenure. Final grant of title would however be withheld till erection of buildings of a specified value. This again would have the effect of checking on land speculators. But it does seem that if this was considered an adequate check it must surely have contradicted the arguement that freehold is not capable of being controlled.

As for the latter areas -- new settlements -- he proposed the grant of 999 year leases for agricultural land with revisable rental every thirty three years. On this he relied on the Kenyan

practice[1] which offered the longest life of a lease as a substitute for freehold. And for mining purposes and new townships in the North Western part of the territory he proposed the grant of leases from 30 to 99 years.

After Stanley's commitment to freehold tenure there could have been no more ideal occasion than this for the Colonial Office to withdraw its approval of that policy. In giving its general approval to the proposals, the Colonial Office insisted that even in settled areas means must be found to overcome the difficulty of conveying leasehold for residential and business premises.[2] This was never implemented. The Colonial Office also took the occasion of expanding on Maxwell's proposals to re-think its policy over the North Eastern part of the territory adjoining Tanganyika and Nyasaland, which in the past it had been thought should be assimilated to the Tanganyika tenure. In this regard Lord Passfield, the Secretary of State for the Colonies stated: "The policy thus laid down applies primarily to North Western Rhodesia. I consider that in North Eastern Rhodesia the Tanganyika system of leaseholds for periods not exceeding ninety nine years, should be adopted. The Tanganyika system is eminently adapted for a tropical area with a comparatively large native population and a few European settlers, and it is my object to secure as much

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[1] For this Kenyan 999 years lease, see C.K. Meek, Land Law and Custom in the Colonies, op. cit., p. 79.

[2] See Lord Passfield to Maxwell, Conf. of 13/7/1929. CO 795/35347/29/2.

uniformity as is feasible in the land systems of neighbouring Territories with similar conditions". This area, although not expressly touched by Maxwell, did of course fall outside the more settled areas over which freehold tenure was proposed to continue. The only issue was the period of tenure within the domain of leasehold.

A clearer view of Colonial Office opinion, endorsing the Maxwell proposals, may be obtained from its internal minutes. In approving the retention of the status quo along the line of rail, it was felt that this part of the territory should be correspondingly uniform to Southern Rhodesia to which at some future date it might belong. Thus, Green, an official in the Colonial Office, minuted:[1]

> . . . the high-lying "railway strip" which, while only about one-fifth of the total area, comprises the railway, mines and nearly all the white population, and marches for about 400 miles with Southern Rhodesia, must come increasingly under South African influence and must before long gravitate to Southern Rhodesian control.

As to the insistence of finding means to overcome the difficulty of conveying a leasehold interest, it is evident that the Colonial Office was more concerned with the growth of towns with the consequent rapid increase of site value and accordingly what land should be retained for the government in the future.[2]

As for the policy in North Eastern Rhodesia, this was in part influenced by the Hilton Young Commission[3] which advocated

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[1] See Minutes of Green of 27/6/1929. CO 795/35347.

[2] Ibid.

[3] This was a Royal Commission appointed by the Secretary of State for the Colonies in November 1927. The Commission was, inter alia, charged: "To make recommendations as to whether, either by Federation or some other form of closer union, more effective co-operation between the different Governments in Central and Eastern Africa may be secured..." The Commission was under the chairmanship of Sir E.H. Young, M.P. Other members of the Commission were Sir R. Mant, Sir G. Schuster and J.H. Oldham. Cmd. 3234.

that the larger part of this area be administered as parts of the neighbouring territories. Green shows this quite clearly when he wrote:[1]

> But in North Eastern Rhodesia the Tanganyika system of leaseholds . . . should be adopted. It has been contemplated for years, and the Hilton Young Commission has unanimously supported, that at least the larger part of North Eastern Rhodesia should before long be administered as parts of Tanganyika and Nyasaland.

A land policy had been formulated and accepted with this thinking but Stanley's warning of bitter settlers' resentment was to prove well founded. In 1930, a year after the Imperial Government's commitment to this policy, a heated and controversial debate raged in the Legislative Council. In a test of opinion Harris, an unofficial member of the Legislative Council, moved: "That in deference to the wishes of the people and in the interests of the country, it would be advisable that the Government sell in future all land under freehold title and not leasehold".[2] Brown, another unofficial member of the Legislative Council, however, took the occasion to amend the motion calling on the government to appoint a Commission to seek public opinion on the policy of land alienation.[3]
Government, however, through its official members of the Council resisted the motion and refused to distract from a policy they regarded well thought out. The amended motion met with a resounding defeat upon which the original motion was withdrawn.[4]

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[1] See Minutes of Green of 27/6/1929. CO 795/35347.

[2] See Leg. Co. Debates, 25th Nov. 1930, p. 99. Enclosure in Maxwell to Sir P. Cunliffe-Lister of 27/6/1932. CO 795/36421/32.

[3] Ibid., Leg. Co. Debates, 4th Dec. 1930, p. 192.

[4] Ibid., pp. 215-216.

Summarising the feelings of European settlers, Harris in the course of debate, defended freehold tenure: "'Freehold' is the progressive land policy throughout the civilised world, and even in the more settled portions of Southern Africa . . . from Cape Town to the Zambezi -- nine tenths of the land sold is under freehold title".[1] At this point the Harris motion provoked the Chief Secretary to the Government, to the astonishment of the unofficial members, to declare the Maxwell proposals, as endorsed by Lord Passfield's despatch, as official land policy of the territory. Giving as justification for the policy the anti-speculator check, he stated: ". . . the grant of freehold, especially where large areas are alienated, has the effect of a complete loss of control, and this in the Government's view is most undesirable in a country in which European settlement is still in its infancy. It is the interests of future settlers, as opposed to speculators in land, that alienation of land in fee simple should be restricted, so far as Government can restrict it at this late date".[2]

Reacting to this policy pronouncement, associating it with the "paramountcy of native interests",[3] Norris, an unofficial member of the Legislative Council, charged: "The inevitable reaction throughout the country will be to associate these new departures in land policy with the memorandum on native policy and in view of the smouldering distrust in this connection, it is most unfortunate that Government should launch such a revolutionary

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[1] See Leg. Co. Debates, 25th Nov. 1930, p. 100.

[2] Ibid., pp. 104-105. Cf., p. 106.

[3] For the "paramountcy of native interests" doctrine, Cf., p. 285, supra.

land policy at the present juncture . . ."[1] The Chief Secretary denied that this memorandum had anything to do with a land policy which had been in the pipe-line long before it.[2] It might be pointed out here, as earlier indicated, that paramountcy of African interests never was a dominant consideration in policy formulations, particularly when these policies were locally initiated and hence less subject to Colonial Office influence.

It is, however, evident that European settlers had a natural inclination to the South and anything done inconsistent with the Southern policies was apt to arouse suspicion as derogating from European interests in favour of African interests. Thus Norris made this desired affiliation and suspicion in the minds of European settlers clear when he said, "No such policy as that now indicated exists in Southern Rhodesia, or further South. This is yet another of the occasions on which we find that our problems are being considered and our policies framed from an East and West African viewpoint. We must again emphasize that our relationship is with the Southern group of Colonies and that precedents established in the older members of this Group cannot be ignored here".[3]

Whatever their sentiments were at the time, the settlers were ineffectual as a pressure group for it is clear that the Imperial Government was the sole determining factor in the formulation of

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[1] See Leg. Co. Debates, 4th Dec. 1930, p. 189.

[2] Ibid., p. 209.

[3] Ibid., p. 189,

this leasehold policy. Hence leasehold and freehold were to exist side by side with emphasis on the former wherever possible. In this the Colonial Office was not willing readily to abandon the policy. Thus even when approached by the British South Africa Company, which was concerned with the dimunition of the divisible revenue from land sales under clause 3(c) of the 1923 Agreement, the Colonial Office refused to succumb to any suggestion of revision of policy based on a profit motive. Reacting to the Maxwell proposals, the Company submitted: ". . . that its own practice, while it was administering the territory, having been to sell land in freehold it was reasonably entitled, when the 1923 Agreement was made, to assess the value of the 40 year interest upon the assumption that that practice was to be continued and to feel aggrieved if as a result of a radical change of practice the value of that interest is materially diminished".[1] Reminding the Company of an earlier Colonial Office policy pronouncement in this regard, the reply read: "The policy will, of course, be decided by general considerations and not influenced by any desire to increase the share of the government or reduce that of the Company".[2]

Earlier on, in a matter involving a conveyance of a parcel of land to Bwana Mkubwa Copper Mine in which the British South Africa Company had made initial arrangements before the transfer of the

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[1] See Assistant Secretary, BSA. Co. to Under Secretary of State of 9/11/1928. CO 795/35204/28/1.

[2] Colonial Office to Secretary, BSA. Co. of 11/12/1928. CO 795/X35204/28/2.

administration to the Crown, the Colonial Office had occasion to state its policy in light of the 1923 Agreement. At the suggestion of freehold being preferred, Amery, then Secretary of State for the Colonies declared: "On the general question of freeholds v. leases, I do not suppose that you would go as far as to suggest that freehold should be invariably granted. The Agreement with the BSA. Co. with regard to the division of the land proceeds in North-Western Rhodesia expressly refers to leases as well as to sales. . . and the only assurance I can give is that if any such decision is taken it will be taken not with the object of diminishing the sums payable to BSA. Co. under the sharing arrangement but solely on broad grounds of public policy".[1] Application of this principle during the Maxwell proposals was merely a matter of consistency which the Company had already known. Thus in this the Company, as an interest group, was also ignored.

In 1932, in the extension of the leasehold policy to the new capital site, Cunliffe-Lister, then Secretary of State for the Colonies, endorsed the Maxwell policy.[2] In 1936, however, Governor Young proposed a revision of this policy as extended to this area, arguing that the application of leasehold endangered the development of the capital site as all developers were attracted to the surrounding freehold area.[3] Persuasive though the arguement was,

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[1] See Amery to Malcolm of 25/2/1925. CO 795/30410/25.

[2] See Cunliffe-Lister to O.A.G., Conf. of 25/11/1932. CO 795/36421/32/3.

[3] See Young to Secretary of State, Conf. of 31/5/1936. CO 795/451012/7/36/2.

the Colonial Office expressed its disapproval particularly when the leasehold policy had successfully been prosecuted by the two preceding governors.[1]

The Maxwell policy henceforth stood the test of time. The Pim Report in 1938, reviewing inter alia the land tenure of the territory, fully acknowledged the implementation of the Maxwell policy.[2] Although the leasehold policy successfully ran through the 1940s and 1950s, 1956 witnessed a change in attitude arising from constant pressures. This marked a prelude to the reversal in policy.

(ii) Leasehold tenure reversed

Of the successive Committees appointed prior to 1956 to review land tenure outside reserved lands those which reported in favour of leasehold tenure did so invariably for similar reasons as those advanced by Maxwell. In 1943, after the 1938 Pim Report, a Land Tenure Committee was appointed with, inter alia, these terms of reference: "to examine the conditions under which Crown Land is at present alienated and to advise whether, and if so, in what respect, they should be altered. . ."[3]

At the time of appointing this Committee the Northern Rhodesia Government was still concerned in attracting European settlers into the territory. This is evident in the extension of the Committee's

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[1] See Colonial Office to Governor, Teleg. No. 98, Conf. of 3/7/1936. CO 795/45012/7/36/3.

[2] See The Pim Report, op. cit., par. 37 at p. 16. For statistics of alienated land by 1936, see par. 58 at p.23. Cf., pp.262-263 supra.

[3] See Report of the Land Tenure Committee, Govt. Printer, Lusaka, 1943.

terms of reference to include "the question of the grant by Government of financial assistance to enable intending settlers to purchase farms". Representing the Government on this Committee were C.J. Lewin, the Director of Agriculture, and E.I.G. Unsworth, Crown Counsel. Small-holders were represented by M.S. Visagie, a member of the Legislative Council. Farmers in the Fort Jameson District of the EasternProvince were represented by Capt. F.B. Robertson. R.U. White, the sixth member of the Committee, represented North Western farmers.

The Committee met three times in Lusaka without taking evidence from any witness. The Committee then proceeded to report its recommendations without any indication as to what opposing arguments might have emerged in its deliberations. Echoing previous arguments in favour of leasehold, the Committee resolved that freehold tenure was prone to abuses due to the lack of control. Specifying in what respects control was lacking, the Committee argued: "There is no control over subdivision or transfer and, though a certain amount of development is necessary to qualify for the issue of freehold title, once this has been obtained there is no further control over the continued use of land".[1] With this in mind the Committee recommended: ". . . that Government should place itself in a position to enforce the maintenance of improvements and the proper use of land by the

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[1] See Report of the Land Tenure Committee, 1943, op. cit., par. 14.

adoption of a leasehold system, where-under the Government would be able to terminate occupancy for failure to comply with the conditions of the lease".[1]

It need hardly be said here that if control were the objection this could equally be achieved by control legislation. In the utilisation of land, development as an objective can equally be achieved by such legislation as regulates town and country planning. Restriction on transfer and subdivision could probably be regarded as more persuasive arguments as freedom of alienation is the very root of freehold tenure.[2] Such restrictions however could only be objected to in so far as they impeded land development. But as just indicated this objection can be taken care of by legislation. There is no doubt that town and country planning regulations in the very early stages of the country's development would have been attended by administrative difficulties. In this regard, a leasehold policy as a substitute could only be provisionally justified.

In endorsing the Committee's recommendation of retaining leasehold, the Colonial Office seized the opportunity to propose the reduction of 999 years leases with regard to agricultural

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[1] See Report of the Land Tenure Committee, 1943, par. 15. For a summary of recommendations, see pars. 1-7, pp. 7-8.

[2] See E.H. Burn, Cheshire's Modern Law of Real Property, eleventh ed., London, 1972, pp. 319-320.

holdings to a shorter term.[1] The Committee, however, insisted that the term of 999 years should continue as most land in this category had already been alienated in freehold and should the duration of the lease be shortened this would unduly push up the price of land already alienated.[2] To this the Colonial Office agreed.[3]

In 1946 a Committee appointed to look into the development of the European farming industry never concerned itself with land tenure but with the facilities to encourage farming.[4] This was a tacit reflection of feeling that there was no need to review or change the policy. This Committee was appointed by the Government in response to Post-War planning measures which in the field of European agriculture aimed at encouraging "a reduction of one-crop farming and a gradual development of mixed farming . . ." In this regard the Committee was charged "To make general recommendations on all aspects concerned with the development of the European farming industry". The Committee had representatives from both Government and the farming industry. E.T. Fern, the Director of Agriculture, and C.J. Lewin, now the Director of Veterinary Services, were the Government representatives. G.S. Joseph was appointed chairman of the Committee. Representatives of European farmers were G.B. Beckett, a member of the Legislative Council, H.B. Bennett, G.P. Burdett, R.W. Dean, and H. Ross.

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[1] See Colonial Office meeting with Governor Waddington of 14/4/1944. CO 795/45372/44/4.

[2] See Waddington to Secretary of State, teleg. No. 618 of 30/11/1944. CO 795/45372/44/16.

[3] See Secretary of State to Governor, teleg. No. 569 of 22/12/1944. CO 795/45372/44.

[4] See Northern Rhodesia Committee Appointed to Enquire into the Development of the European Farming Industry Report, Govt. Printer, Lusaka, 1946.

The Committee did not consider it necessary to travel and take evidence from the various farming areas in the country. It was felt that the Committee's personnel was widely representative of the various sections of the farming industry. Memoranda were, however, received from the North-Eastern Agricultural and Commercial Association and other interested bodies and individuals. The Committee recommended three ways of improving European agriculture.[1] But despite the wide terms of reference, there was nothing said on the existing land tenure.

In 1950 a Select Committee restated the existing policy with recommendations for uniformity in tenure and conditions of all agricultural leases throughout the territory, which recommendations the Northern Rhodesia Government accepted.[2] This Committee, although precluded by its terms of reference from reviewing existing policy on tenure of land, revealed growing demands by European settlers for freehold tenure. The Select Committee was appointed on a motion by the Acting Financial Secretary. The Secretary felt that since the establishment of the Land Board in 1946, its functions and problems had increased without a corresponding revision in the Board's terms of reference. Pursuant to this motion, the Select Committee on the Land Board was appointed with these terms of reference: "to review the constitution and terms of reference of the Land Board with particular reference to a revision of development clauses in leases and of loan facilities generally and to make recommendations". G.B. Beckett, Member for Agriculture and Natural Resources was appointed

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[1] For a summary of the Report, see pp. 33-34.

[2] See Report of Select Committee on the Constitution and Terms of Reference of the Land Board, Govt. Printer, Lusaka, 1950, pars. 47 and 49.

chairman. Beckett's present position in the Northern Rhodesia Government is significant to note. It will be recalled that in 1946, when he was appointed a member on the Committee enquiring into the development of the European farming industry, he was merely an unofficial member of the Legislative Council.[1] His rise by now to being in charge of Agriculture and Natural Resources in the Northern Rhodesia Government should serve to indicate that European settlers were gaining ground in the machinery of government, and hence having access to influence policies directly. The Acting Financial Secretary, J.O. Talbot, was also a member of this Committee. The remaining members of the Committee were unofficial members of the Legislative Council. These were J.F. Morris and A.A. Davies, representing the Copperbelt Electoral Area; H.J. Millar, representing Livingstone in the Southern Province; and G.F.M. van Eeden representing the Midlands in the Central Province.

The Committee heard evidence from seventy-three witnesses. These included members and executive staff of the Land Board, representatives from farmers' organizations and a number of government officers.[2] Conceding that although strictly it was not within the

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[1] See p 313, supra.

[2] For the list of witnesses, see Appendix II to the Committee's Report. Evidence from the respective witnesses is, however, not reproduced.

Committee's terms of reference, the Committee disclosed that it had received overwhelming evidence in favour of freehold tenure. Impressed with this evidence, the Committee expressed the opinion that "there is justification for early and careful consideration by Government of the possibility of allowing the conversion of leasehold to freehold tenure under certain conditions". The Acting Financial Secretary concerned, however, that this involved "a fundamental alteration to the existing land policy of Government"dis-associated himself from the expressed opinion.

Pursuing the sentiments of European settlers expressed before this Select Committee, another Select Committee was appointed by motion of the Legislative Council in the same year. The terms of reference were a mere restatement of the opinion expressed by the previous Committee. This subsequent Select Committee was instructed: "to enquire into the advisability of changing the present system of leasehold tenure to a system under which freehold grants of Crown land might be made and, if considered advisable, to make recommendations with particular reference to the terms and conditions of such freehold grant".[1]

Significantly, this Select Committee retained the membership of the previous Committee except for three new persons. G.B. Beckett was appointed again chairman of this Committee. A.A. Davies, H.J. Millar and G.F.M. van Eeden were the other unofficial members of the Council retained from the previous Committee. F.B. Robertson, an unofficial member of the Council representing the North Eastern

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[1] See Motion of the Leg. Co. on 21st June, 1950.

Electoral Area, was the new person added to the Committee. The official members of the Council representing the Government were the Attorney General and the Economic Secretary.

The Committee proceeded to hear evidence from individual settlers, farmers' associations, banks and other money lending institutions and government officials.[1] The dividing line of rivalry emerging from the evidence centred on the insecurity of tenure of leasehold, on one hand, and the difficulty of imposing any control on freehold, on the other. The latter was in fact a re-statement of the 1943 Land Tenure Committee. Those who favoured freehold argued that the traditional desire of an occupant and a farmer in particular was to own freehold. This desire was not only based on the wish for security of tenure against risks of forfeiture but the wish to own land for oneself and descendants. Those in favour of leasehold on the other hand argued that land was limited, hence the need for control in its use. This control was better suited through a leasehold system.

The only common ground between the two views was on the need for control of land use in the event of freehold prevailing over leasehold. It was generally agreed that such control, which should not affect the title, was necessary to avoid land being idle. But exponents of the freehold tenure did not obtain the support of the money lending institutions in their allegation that loans

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[1] For the list of witnesses, see Appendix II of the Report.

were hard to get on the security of leasehold property. On the contrary, banks and other money lending institutions refuted this and said short term loans were easily granted. And in cases of longer leases, such as the 999 years leases, these were just as good security as freehold. There was not a single instance presented to the Committee where a loan had been refused on the security of leasehold property.

Convinced, however, that the overwhelming desire by European settlers was for freehold, the Committee recommended a reversal in policy from leasehold to freehold.[1] The Committee came out with its interim, but only report, in 1951, a year after its appointment. The Attorney-General and the Economic Secretary dissented from the recommendation of this Committee and instead wrote a minority report. They argued against a reversal in policy because conditions in the territory, in their view, had not changed since the adoption of the leasehold policy. On insecurity of tenure, they expressed the view that the English Conveyancing Acts, 1881-1882 provided adequate security to a tenant.[2] These Acts required the landlord to furnish notice on the lessee before forfeiture to remedy the breach of conditions which are capable of being remedied or pay compensation in lieu thereof.

In this apparent deadlock of opinion, the Government refrained

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[1] For the Report, see Appendix B, Leg.Co. Debates, session 10th Nov-21st Dec., 1951, cols. 1022-1054.

[2] For the Minority Report, see Ibid., cols. 1052-1055.

from taking any action. Two years having elapsed without any Government comment prompted a motion in the Legislative Council that the report be adopted as the land policy of the territory.[1] The move was blocked by an amendment at the instance of the Economic Secretary, who subscribed to the minority opinion of the report. The issue was to be referred to an impartial expert because the opposing sides were too involved in the matter. If this meant anything it was an indication of the mounting European desire for freehold tenure.

In 1954, Commissioner L.G. Troup, an expert on agriculture, was invited from England by the territory's Government to inquire into the future of the European farming industry. It will have been gathered that the diversification of the European farming industry had become a major Government concern since 1946 as a post war measure for economic recovery.[2] At the time the Government deferred the parliamentary motion on the adoption of a freehold land policy, it had already been known that Commissioner Troup would be visiting the territory at the Government's invitation. His main assignment as the terms of reference reveal was "To inquire into the present position of the European farming industry in Northern Rhodesia and to make recommendations for its future development with particular reference to the need for increased food production and for the development of balanced farming".[3] However, following debate on land tenure in the Legislative Council on the 10th December 1953, he was asked to report separately on the

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[1] See Leg. Co. Debates, 10th Dec. 1953, session 7th Nov.-17th Dec. 1953, col. 637. For the whole debate, see cols. 637-655.

[2] Cf., p. 313, supra.

[3] See Report of the Commission of Inquiry into the Future of the European Farming Industry in Northern Rhodesia on the issue of the Tenure of Agricultural Land, Govt. Printer, Lusaka, 1954.

First Interim Report of the 1951 Select Committee. His terms of reference were expanded to permit an inquiry on freehold tenure and the whole question of the tenure of agricultural land in the Territory.

In his assignment Commissioner Troup was assisted by H.B. Bennett, R.W. Dean and H.C. Deacon who agreed to be advisers to the Commission. Bennett and Dean[1] served as members on the 1946 Committee which was first appointed to review the development of the European farming industry. In tackling the issue on the tenure of land, Commissioner Troup met three European organisations and travelled to Salisbury (Southern Rhodesia) to confer with the relevant government officials there. Within Northern Rhodesia he held meetings with the North-Eastern Rhodesia Agricultural Association at Fort Jameson, and the Northern Rhodesia Farmer's Union and the Land and Property Owners' Association at Lusaka.

On the tenure of agricultural land, Commissioner Troup recommended "that the system of 999 years leasehold be continued" subject to modifications. The recommended modifications related inter alia to (i) grounds for termination of leases by the Crown, (ii) provision for compensation of improvements on land and (iii) provision for arbitration in the event of dispute. As to arguements for and against leasehold, the Commissioner merely reviewed previous inquiries. These, as we have seen, are the 1943 Land Tenure Committee, which engineered leasehold tenure for purposes of control of land use, and the 1951 Select Committee

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[1] See p. 313, supra.

on Freehold Land Tenure which opposed leasehold for insecurity of tenure. Commissioner Troup ruled in favour of leasehold, satisfied that the allegation of insecurity of tenure was well catered for by the provisions of the English Agricultural Holdings Act 1908 and the Conveyancing Acts 1881-1882 both applicable to the territory.[1] Provisions of the 1908 English Act relating to agricultural holdings entitle a tenant "at the determination of the lease" or "on quitting his holding to obtain from the landlord as compensation . . . for the improvement such sum as fairly represents the value of the improvement to an incoming tenant".[2] Provisions of the 1881-1882 Conveyancing Acts, on the other hand, relate to non-compliance with covenants. In the event of a tenant failing to comply with covenants of a lease, the landlord was obliged to give notice to the tenant to comply with the covenants or pay compensation

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[1] See Report of the Commission of Inquiry into the Future of the European Farming Industry in Northern Rhodesia, op. cit., pars. 88-97.

[2] See in particular s1, 8 Edw. 7, ch. 28.

in lieu of forfeiture.[1] Thus leasehold tenure which included agricultural holdings of 999 years was retained. On the basis of these legislative provisions the Commissioner's ruling could not be challenged.

Although the issue of freehold tenure remained in abeyance till 1956 when the Agricultural Lands Bill[2] was introduced, it is evident from the passage of this Ordinance that Government had not completely ignored the popular European demand for freehold. Government, still concerned with the European farming industry, had been giving particular attention to agriculture and wished to devise a formula of tenure which would take into account differing views registered over the years.[3] With the enactment of this Ordinance it was sought to create initially a leasehold tenure which, on satisfying development clauses, would gradually be converted to freehold by providing an option for the lessee to purchase the land.[4] The Government had come to accept the argument that control over the use of land could better be effected through legislation than the imposition of development clauses. This was especially so in cases of long leases such as agricultural holdings since such clauses once inserted, could not be easily revised even when conditions requiring new regulations emerged.

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[1] See s.14(1), 44 & 45 Vict. ch. 41.

[2] See Leg. Co. Debates, 2nd Oct. 1956, session 2nd Oct. - 4th Oct. 1956, cols. 11-70.

[3] See Leg. Co. Debates, 23rd March, 1956, session 6th March-23rd March 1956, cols. 727-755, particularly col. 739.

[4] See Part III Agricultural Lands Ordinance No. 57 of 1960 (1962 ed.)

This shift in government attitude could not have escaped the attention of the critics of a leasehold policy. The subsequent year, 1957, was to witness an outright demand for a return to a freehold tenure in all the lands that mattered to Europeans. European feelings which had apparently been effectively suppressed in 1953 were now revived. Pursuant to a motion of the Legislative Council, initiated by Gaunt,[1] member for the Midlands, a Committee on the tenure of urban land was set up. Gaunt reminded the Council that "sentiments have since changed as witnessed by the passage of the Agricultural Lands Ordinance". But he went further than agricultural lands by indicting the present Government policy for being unattractive to settlers who wished permanent settlement in the country. The Committee was given the mandate: "To examine the present policy and system of land tenure in urban and peri-urban areas and, having particular regard to the need for encouraging capital investment and other development, to make recommendations on the necessity for, or desirability of, effecting revisions or changes".[2]

The Committee consisted of H.M. Williams, as chairman, L.M. McBean and R.H.C. Boys. Public hearings were held in Livingstone, Lusaka, Broken Hill, Ndola and Kitwe. All these are towns along the line of rail. Witnesses who gave evidence before the Committee included B.A. Doyle, the Attorney General; Col. E.T.E. Martin, representing the Law Society of Northern Rhodesia;

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[1] See Leg. Co. Debates, 20th March 1957, session 12th March - 3rd April 1957, cols. 298-373.

[2] See General Notice No. 1161 of 1957 in Govt. Gazette of 5/7/1957.

F. Lund, Honorary Secretary of the Royal Institution of Chartered Surveyors; and the Commissioner of Lands. The First Permanent Building Society, trade unions and the copper mining companies were also represented. With the overwhelming demand for freehold tenure, the Committee recommended that freehold tenure should be adopted in urban areas except African townships and African housing areas in European municipalities and townships.[1] Supporting this recommendation, the Committee observed that freehold policy was backed by all European urban Associations and institutions and "permanent Government officials concerned with the day to day administration of land affairs". The Committee also noted that these Government officials gave evidence which was" at variance with the present Government policy, appreciating what was needed for /the/ development of the country".[2]

Evidence from European settlers was a restatement of previous arguments - the desire for a tenure compatible with permanent settlement in the country. Investment and Finance companies, on the other hand, appear to have retracted from the evidence given before the 1951 Select Committee refuting allegations that they were reluctant to give loans on security of leasehold property. These money lending houses now expressed reluctance to invest money

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[1] See Committee Report on the Tenure of Urban Land in Northern Rhodesia, Govt. Printer, Lusaka, 1957, par. 106 at p.9.

[2] For a summary of the evidence, see Ibid., pars. 85 et seq.

in leasehold property. Reasons given were "(a) conditional negotiability of leasehold land" and "(b) steadily diminishing value of investment as the lease runs out". It was explained on "conditional negotiability", that the primary consideration for investment in urban land was that it is freely negotiable and only freehold could provide this. Accepting this recorded evidence of the Committee as to the reaction of money lending institutions, we can only conclude that these institutions must have changed their attitudes within six years of the 1951 Select Committee. The Committee also recorded the general dissatisfaction expressed in that the country was at a disadvantage to Southern Rhodesia which attracted all the investment due to its freehold tenure.

With apparently no evidence before the Committee supporting leasehold tenure, the Committee proceeded to discard the tenet that leasehold provided better control over freehold. In this regard, the Committee observed that control was a matter of regulatory legislation and this was now facilitated by the emergence of local authorities with powers to regulate development.[1] If control were the sole basis of its consideration, then the Committee's recommendation would not have been thoroughly convincing. The leasehold policy in its control aspects through covenants was equally

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[1] See Committee Report on the Tenure of Urban Land in Northern Rhodesia, op. cit., pars. 23-26 and par. 64 at p. 3 and p.6 respectively.

adequate except to the extent that it could be shown that there were superseding circumstances. The Committee's rationalisation was in great part reminiscent of the Stanley style of thought and the 1926 Commission's justification of excluding Africans from the European developed line of rail area.

Referring to European initiative as the prime factor in urban development thereby necessitating compliance with the European desire for freehold, the Committee concluded:

> Northern Rhodesian towns are exclusively the creation of the non-African element in the population, and particularly of the European section backed by overseas investors, and . . . it is to that section that the Government must look for any major development of these areas in the foreseeable future. When such feelings . . . exist among the very people to whom the Government must chiefly look for the encouragement of capital investment . . . everything that can reasonably be done to meet the requirements of such people should be done.[1]

The message was precise and its accuracy could not be denied. It would be an exaggeration to indict the Committee of race prejudice, because on this the Committee endorsed that freehold be available to the Africans alike, so long as the structures on land conformed to the European standard.[2]

The Northern Rhodesia Government was obliged to concede to the European demand which as Carlisle, Minister of Land and Natural Resources, in proposing a government motion to be

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[1] See Northern Rhodesia Committee Report on the Tenure of Urban land, op. cit., pars. 94-95, p.8.

[2] Ibid., par. 157.

endorsed by the Legislative Council admitted that the Council was being asked to place its hall-mark on this public request.[1] As for the Colonial Office, in the present circumstances, it was in keeping with tradition to assent wherever the local opinion was irretrievably unanimous on a matter of policy.[2] The conversion process culminated in the passage of the Crown Grant Ordinance in 1960[3] to facilitate implementation of a reversal in policy.

This Ordinance gave a conveyance of conversion the effect of determining a lease from the Crown or a sublease from a local authority with all encumberances, such as mortgages, subsisting under the previous tenure being attached with the same force to the converted interest in fee simple.[4] The Ordinance was of course only of relevance to interests in land already alienated. As for future alienations pursuant to this policy, the Northern Rhodesia Government decided to grant freehold directly or through local authorities.

Thus the freehold v. leasehold contest was at least in the European context finally resolved after nearly thirty years of a leasehold policy. With the emergence of an African government of independent Zambia in 1964, the freehold policy was however shortlived. This reversal in policy can be deferred for discussion under the post independence period. We may now proceed to the policy of land alienation to detribalized Africans.

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[1] See Leg. Co. Debates, 14th April 1959, session 7th April April-14th April 1959, col. 269.

[2] See Leg. Co. Debates, 2nd July 1959, session 23rd June-7th August 1959, col. 165.

[3] No. 13 of 1960. Since repealed by Act. No. 20 of 1975.

[4] See s.4 of Ordinance No. 13 of 1960.

B. Land alienation to detribalized Africans: definition of African and intended interest

The need to provide a land interest akin to that of Europeans to a detribalized African had been recognised as early as 1926 by the Native Reserves Commission reporting in that year. The Commission defined the term "detribalized native" as meaning "the native who has worked for Europeans, has got into their ways and now, in working for himself, wishes to follow those ways as far as he can. He is not prepared to go back to his village and tribal garden from which he would have to move every few years as it moved; he is by now accustomed to a more permanent manner of living . . .".[1]

Recommending the type of land interest to be granted to such Africans, the Commission said, "We recommend that the land granted to approved applicants should be for short leases for those asking specially for the same but that save in such cases it should be for a conditional life estate, . . . an estate of freehold capable of being enlarged into an estate of inheritance; the incidents now attendant on a European's application for land might well be followed mutatis mutandis".[2]

In the Commission's view the most suitable places for such grants were on the edges of reserves so as to form a buffer zone between European settlements and the reserves.[3] Although there

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[1] See Northern Rhodesia Native Reserves Commission, Vol. I, op. cit., par. 62, p. 56.

[2] Ibid., par. 296, p. 289.

[3] Ibid., par. 294, p. 286.

appears to be no express indication as to this recommendation in drafting the 1928 Order, the provision that only allowed a maximum of five years for a lease to a 'non-native' was so drafted as to allow individual grants to Africans. Thus s. 6(1) provided: "No portion of any Native Reserve shall be granted to any person other than a native save upon lease for a period not exceeding 5 years . . .".

This provision, it will be observed, never expressly provides for such leases to Africans but at the same time does not prohibit individual grants contemplated by the Commission. As it turned out, however, leasing of land to individual Africans was not confined to areas on the edges of reserves only. Had the Commission's recommendation been consistently followed, it would have approximated Northern Rhodesia's position to that in Southern Rhodesia where Native Purchase Areas . . subsequently emerged.[1] Native Purchase Areas were specifically designated for the purchase of land by Africans only, and no sale transaction was available to an African elsewhere.

At this point in time, however, the matter never seems to have been so pressing as to warrant any definite government commitment to the programme. It may well be indicated that strictly such a scheme was unnecessary since under the territory's constitution, as earlier mentioned, article 42 granted the African equal rights to acquire land on the same terms and conditions as the European.

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[1] For the South Rhodesian Native Purchase Areas, see M. Yudelman, Africans on the Land, Cambridge, Mass. 1964, pp. 74-75. For successes and failures in this scheme, see A. Hunt, Native Purchase Farms, An Economic Appraisal, April 1960, pp. 8 et seq. For the South African model of Native Purchase Areas, see E.B. Jones, "South African Native Land Policy", Bantu Studies, Vol. XV 1940-41, pp. 191-193.

In practice, however, there were limitations to such acquisitions such as the capital requirement to obtain a Crown lease. Quite apart from this transfers and alienations by a European tenant to, inter-alia, an African were prohibited by a covenant in the Crown grant. Thus under the conveyancing practice obtaining in the country clause 3 of the Permit of Occupation provided: "The Tenant shall actually and continuously occupy the said land during the said period either personally or by a European substitute to be approved by the Crown in writing. . .". Similar restrictions did in fact exist in Kenya too.[1]

In the absence of a well defined policy, land continued to be leased to individual Africans at random.[2] By 1937, while the trust land policy was still in the making, Provincial Commissioners disapproved this haphazard manner of lease grants and advised a suspension of further grants pending land policy pronouncements.[3] The Governor had become equally concerned that the tenure of land to these individual Africans should be more elaborately spelt out. This concern prompted the appointment of a Native Land Tenure Sub-Committee in 1942 to consider conditions under which Africans might hold land individually.

The Sub-Committee's terms of reference confined its assignment to urban areas and farms near the railway where it was felt that there was more need for individual holdings than in remote rural

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[1] See C.K. Meek, Land Law and Custom in the Colonies, op. cit., p. 78.

[2] See Correspondence of review from Provincial Commissioners to Chief Secretary of 12/8/1933. NAZ/SEC/NAT/202.

[3] See Minutes of Provincial Commissioners' Conference, 1937. Enclosure in Acting Chief Secretary to Under Secretary of State of 11/5/1938. CO 795/45096/38/1.

areas. Without specifying who was to be chairman, T.F. Sandford, S. Gore-Browne, C.J. Lewin and L.W.G. Eccles were appointed members. Familiar names amongst these were Gore-Browne, a member of the Legislative Council nominated to represent native interests; Lewin, the Director of Agriculture; and Eccles, Commissioner for Mines, Lands and Surveys.

Apart from acknowledging a suggestion that had been brought to the attention of the Committee, there is no indication that the Sub-Committee ever heard evidence from interested parties. A suggestion was put to the Sub-Committee that Africans who expressed a wish for individual tenure were in fact doing so to escape from the control and authority of traditional chiefs. This being the motive for individual holdings, such Africans are bound to turn out poor tenants. The Sub-Committee dismissed this allegation convinced "that there are many Africans who genuinely desire to become farmers or market gardeners and who, with adequate guidance, would be capable of achieving success".[1]

This Sub-Committee in its deliberations resolved" . . . that it is essential to lay down and enforce definite conditions of tenure to ensure that land alienated to Africans will be utilised to the best advantage and, particularly, to guard against its misuse. Such conditions could best be enforced under a form of leasehold tenancy in which the right is reserved to the Crown

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[1] See Report of the Native Land Tenure Committee, Govt. Printer, Lusaka, 1945, Appendix 4, par. 3.

to terminate occupancy in the event of non-compliance with the covenants".[1] Pursuing this proposition the Sub-Committee recommended an experimental 30 years leasehold tenure with the right in the tenant to bequeath the leasehold interest but such tenancy to be restricted to approved Africans with adequate means to carry out the minimum development covenants.

This recommendation was effected but the stringency of the conditions deterred many from obtaining leases. Three years hence the government felt that the conditions ought to be relaxed.[2] But even with all this, the topic was never satisfactorily settled till the end of the Second World War when the prospects of returning ex Askaris (African soldiers) prompted (as in many other African territories), a more detailed concern for individual holdings. In 1945, another Committee primarily concerned with returning soldiers also included in its consideration "advanced Africans". Government felt that returning soldiers may wish individual holdings in reserves and trust land. Since the previous 1942 Sub-Committee concerned itself with urban areas, Government was anxious to devise equally a scheme of individual holdings in rural areas. This Committee's terms of reference also included an investigation into the customary tenure of land.[3] This inclusion was a response to Gore-Browne's appeal at the conclusion of the 1942 Sub-Committee. Although Gore-Browne subscribed to that Sub-Committee's report, he

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[1] Report of the Native Land Tenure Committee, Govt. Printer, Lusaka, 1945, Appendix 4, par. 5. Cf., pars. 6, 8 and 9.

[2] See Minutes of meeting of Executive Council held on the 18th, 19th & 20th Oct. 1945. NAZ/SEC/NAT/205. folio (19)

[3] Cf., pp. 99-100, supra.

expressed the disappointment "that the terms of reference. . . did not make it possible to investigate the whole question of land tenure for Natives. . .". Concerned with the effect customary tenure had on land development, Gore-Browne urged that attention should be given to the topic "at the earliest possible moment".[1]

This being the moment Gore-Browne was appointed chairman of the Committee. L.W.G. Eccles, a member of the 1942 Sub-Committee, was also retained on this Committee. The third member was J.S. Moffat, who was also secretary to the Committee. The Committee visited most Bomas in the country except for Barotseland. It interviewed government officials, missionaries, Europeans, superior Native Authorities, African Associations and individual Africans.[2] In all, it was reported that one thousand five hundred and fifty two Africans attended the Committee's meetings. Of these two hundred and forty two gave evidence which was recorded. A very few "askaris" were, however, interviewed.

The Committee examined the individual tenure within the context of village settlements in reserves. On this the Committee advised the abolition of instructions which required people to live

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[1] See Report of the Native Land Tenure Committee, 1945, Appendix 4, op. cit., at p.5.

[2] For the list of witnesses, see Appendix 2 of the Report.

within a registered village unit of ten tax payers. Instead a parish system was advocated which would substitute areas for villages.[1] The essence of the proposed parish system was that an individual could be registered in an area instead of a village thereby being enabled to build and cultivate wherever he wished.[2] This it was argued was conducive to development on a permanent basis on the part of an advanced African who, desirous of utilising and investing in the land, would not be impeded and discouraged by the impermanent nature of villages based on shifting cultivation.[3] It appears that all the evidence on individual tenure centred on the parish system, a proposal initiated by the Committee itself. Reporting on how enthusiastically this proposal was received, the Committee said: "The parish system was regarded by practically all our witnesses as a desirable ideal at which to aim."[4] Africans in particular are reported to have been very happy with the proposed scheme. Some European witnesses were, however, very sceptical about the whole scheme which they felt could not succeed "until such time as a complete survey of all native areas had been undertaken". The Committee's response to this was that it was not a serious objection, satisfied that Native Authorities were capable of determining boundaries with accuracy.

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[1] See Report of the Native Land Tenure Committee, 1945, op. cit., par. 3, at p. 3.

[2] Ibid., Appendix 3.

[3] Leg. Co. Debates, session 24th Nov. to 20th Dec. 1945, cols. 354-382 particularly cols. 357-358.

[4] See Report of the Native Land Tenure Committee, 1945, op. cit., at p. 3.

The Committee, however, added that a school of African surveyors should also be established. The Government accepted the Committee's report and recommendations.[1]

This Committee however proceeded on the false premise that all Advanced Africans would wish to retreat to the rural area (reserves) after a working life with European contact. This was equally the belief of the government which had felt that the progressive African should be situated close to his tribal area so that his skills and experience could be imparted to his kin.[2] By the time of the 1946 Land Commission, this proved a myth for although the desire to have individual holdings was more pronounced among Africans,[3] the development of the mining industry on the copperbelt resulted in a stabilised urban African labour force. This in turn resulted in the creation of two distinct classes -- namely the urban African and the rural African. Most Africans in the former category wished to live in the urban area even on retirement. But as may be recalled this area was mainly along the line of rail which in all Land Commissions had been designated as primarily for European involvement.

A policy of granting Crown leases elsewhere could not have been extended to this area without any apprehension of race conflict in land rights. It had seriously been thought for a while that the Southern Rhodesian Native Purchase Areas might serve as a model if no other alternative were available to resolve the difficulty.[4]

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1 See Leg. Co. Debates, session 24th Nov. to 20th Dec. 1945, cols. 361-364 & col. 382. For intended government implementation, cf., NAZ/SEC/NAT/205 folio 22. For a review of the parish system, see G. Kay, Social Aspects of Village Regrouping in Zambia, University of Hull, 1967, pp. 15-17.

2 See Note for the Executive Council. NAZ/ZP/3/1/2.

3 See Report of the Land Commission, 1946, op. cit., par. 9.

4 See note 1 at p. 329, supra.

The most immediate alternative it was believed, was to constitute individual African holdings in trust land on the Copperbelt/as trust land/was still in formulation. This suggestion was however resisted by both the Provincial Commissioner and District Commissioners fearing that the effect this would have was to lock up the land in so potential an area as the Copperbelt for any other future needs for which this land might turn out to be suitable.[1] Their insistence was on security of tenure for such Africans whatever type of land might be in question.

The effect this opposition had was to render even the Rhodesian model unworkable since trust land would have achieved what Native Purchase Areas were intended to serve in Rhodesia. Under whatever name the land was classified, it would have entailed specific demarcation and thus meeting the same objection of locking up. To meet the growing African demand on the other hand, which if ignored would lead, in part, to disturbances,[2] the solution lay in the grant of leases from Crown land. For the rural attached African no difficulties lay to the grant of individual holdings within the reserved areas. In this regard, at the time of copying the Nyasaland model of trust land, provision for leases to Africans within trust land was most suitable.

Thus the Rhodesian model of segregation was avoided while both classes of the advanced African were taken care of. The feared European hostility on alienation of Crown leases never really emerged. This, it may be suggested, ought to have been due to the

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[1] See Report of the Land Commission, 1946, op. cit., par. 9. Cf., p. 276, supra.

[2] The lack of provision of land in part accounted for industrial disturbances. See Report of the Commission Appointed to Inquire into the Disturbances in the Copperbelt, Northern Rhodesia, Govt. Printer, Lusaka, July 1940, pp. 32-33.

lack of advanced African agriculture posing the threat of competition to the European sector. It has been observed[1] in the Rhodesian context at least, that it was this threat of advanced African agriculture rivalling its European counterpart that primarily precipitated race prejudice in Rhodesia culminating in a land policy of segregation thereby confining the area of activity of African agriculture.

European reaction though negligible, was confined to an expression of anxiety at the African having the best of both worlds. This was revealed in the Gaunt[2] motion of 1954, which proposed that no grants be made to Africans of Crown land except on exchange of trust land on a quid pro quo basis.[3] The motion, seconded just for purposes of allowing debate, suffered a resounding defeat with just the mover voting for it.

Thus with the acknowledgement of both classes of Africans, leases were grantable in both reserved areas[4] and Crown land. By 1955 there were 112 leases granted to Africans on the copperbelt Crown land.[5]

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1 See R.H. Palmer, The Making and Implementation of Land Policy in Rhodesia, 1890-1936, Ph.D.Thesis, University of London, 1968, pp. 259-261 and pp. 273-274.

2 Gaunt was, as we have seen, a member of the Legislative Council and a District Commissioner in Lusaka during the 1942-43 Land Commission. See pp. 33 and 278, supra.

3 See Leg. Co. Debates, 28th July 1954, session 26th June-29th July 1954, cols. 566-686.

4 For an instance of approval of grant in trust land in Southern Province, see R.S. Hudson to Provincial Commissioner of 28/12/1946. NAZ/NAT/205. Cf., minutes of meeting held on 20/12/1946. For the Northern Province, see NAZ/SEC/NAT/207 particularly folio 62/1.

5 See Leg. Co. Debates, 23rd March 1955, session 8th March-25th March 1955, col. 390. For agricultural and residential holdings granted to individual Africans from Crown land by 1959, see First Report on a Regional Survey of the Copperbelt, Govt.Printer, Lusaka, 1960, pp. 71-76.

The foregoing land policies were the legacy of the colonial heritage at the birth of an independent Republic of Zambia on October 24, 1964. It is to the post independence period that we can now address ourselves.

CHAPTER 6

THE POST INDEPENDENCE ERA AND THE EXISTING CATEGORIES OF INTERESTS IN LAND: 1964-1975

This period can be examined and discussed in two stages, namely: The first decade of the colonial heritage and The 1975 Land Reforms. The first decade after Independence saw very little systematic decision on land policy. Most of what emerged during this period were random developments primarily motivated by political sentiments. In 1975, however, there were major land reforms remoulding the tenure system of the country. All freehold estates were converted into leasehold with all the land vested in the President. The State assumed ownership of land in the belief that there would be more effective control in dealings and the use of land. Government resolved to control the price for sales of land and compel development of idle and vacant tracts.

It is proposed in this Chapter to discuss first current categories of interests in land as a background and in an effort to indicate how unsystematically post independence land policies had been pursued. Previous Chapters have shown that land was classified in various ways: (i) Reserves and Trust land; (ii) State land (previously Crown land) and (iii) private estates of land held by individuals. As from July 1975, however, the last category has been incorporated into State land.[1] One of the distinguishing features between the two classes of land is that land in category (i) is primarily held under customary law (subject

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[1] For a detailed discussion on the conversion of interests to State land, see pp. 390 et seq., infra.

to certain statutory provisions) while that in category (ii) is held entirely under the general law. It is necessary first to examine the nature of land interests in these categories.

In this examination the legal characteristics or incidents of Reserves and Trust land will be explored in their present state. We shall conclude this discussion by showing the similarity in the practice of State grants in both Reserves and Trust land. The contrast between Reserves and Trust land, on one hand, and State land, on the other, will be drawn by depicting what practical advantages are available to a landholder in either category of interests.

Apart from merely indicating the statutory nature of a leasehold interest in State land, discussion will focus on the hybrid lease which has evolved in response to the pressing problem of urban settlements.

A. The nature of existing interests

(i) Reserves and Trust land:

There can be little doubt that interests in these lands are those held under customary law. The relevant instruments of creation, however, make no specific mention of customary law. S.7 of the Zambia (State Lands and Reserves) Order has merely this message on the intended interest: "The President shall within each Reserve assign lands to natives, whether as tribes or

portions of tribes . . .". The Trust Land Orders are virtually silent in this regard. The provisions of the Kenya Order in Council are a remarkable contrast. With regard to the reserved lands it was provided: "the Native Lands shall be subject at all times to all such rights in respect of land as are or may be enjoyed by native tribes, groups, families or individuals by virtue of existing native law or custom, or any subsequent modification thereof, in so far as such rights are not repugnant to any law from time to time in force in the Colony".[1]

The vagueness withwhich customary interests in reserved lands have been granted has quite appropriately invited adverse comments from White[2] who doubts whether there is any legal basis for rights under customary law. In this regard he observes: "There is no provision for land to be assigned to individual Africans, although in fact Africans hold land as individuals and not as groups". White is here criticising the phraseology "whether as tribes or portions of tribes" because it disregards the fact that Africans hold land individually under customary law. In this regard he concludes: "The rights which individual Africans exercise and enjoy in both reserves and trust lands can therefore only be described as customary . . . Nevertheless, the rights enjoyed by individual Africans are perfectly well defined and must be regarded as a system of land tenure". He,

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[1] See the Kenya (Native Areas) Order in Council, 1939 quoted in C.K. Meek, Land Law and Custom in the Colonies, op. cit., p. 86.

[2] See C.M.N. White, "A Survey of African Land Tenure in Northern Rhodesia", J.A.A. Vol. 11, No. 4, pp. 170-172.

however,sees in the absence of a conveyance from the President (previously Secretary of State) to an individual a negation of legal title to these customary rights. In this respect he observes: ". . . Under these circumstances it may be well to abandon any attempt to explain the legal basis of existing individual African land rights, and more satisfactory simply to refer to them as de facto land rights exercised today by individual Africans". The cure for the anomaly, he insists, is in amending the Orders to provide individual title.

White's reaction however appears too legalistic although no doubt forceful. The import of the whole reserves scheme, as embodied in the Orders, must suggest that customary tenure is by implication recognised and conferred with legal title, a title which pertains to whatever rights in land exist under customary law. A more vulnerable area of attack is the vesting of land in the President for the sole use of the indigenous population. In the absence of a specific conveyance to an individual, such rights must appear tenuous in that their enjoyment is at the discretion of the President who might merely tolerate their continuance. To an individual African landholder, however, what matters more than legal title is to be able to use the land.

The effect of vesting reserves in the Crown for the use of "natives" was the subject of interpretation in the Kenyan case of Gathomo and another v. Indangara and another.[1] It was there

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[1] 9 E.A.L.R. 102.

held, that such vesting had the effect of extinguishing "all native rights in such reserved land", rendering those Africans in occupation thereof tenants at will of the Crown. Lord Hailey's rebuke [1] of the impropriety of importing English concepts to an entirely different situation is a more fitting criticism of this ruling. The mitigation for the absurdity in this interpretation must, however, equally be acknowledged. The vesting Order itself is imprecise in its intended legal effect. Kabato v. Nagi[2] another Kenyan case, appears a more welcome ruling. In a suit by plaintiffs against the defendant sub chief for encroaching on their tract of land, Maxwell, J., although finding the claim was not proved, recognised that a member of the Kikuyu tribe could acquire and obtain the right to occupy and cultivate ascertained tracts of land within a reserve and such rights were enforceable by suit for trespass and/or for an injunction.

On this basis it can be said that notwithstanding the apparent effect of a vesting Order as creating and vesting a statutory interest in the President, it is important not to lose sight of the intended objective -- the provision and recognition of land rights under customary law. In interpreting the Orders, regard must be had to this objective. In determining ultimately the nature and content of such land rights, only customary law is relevant. In this task English analogies are misleading. This is not to say, however, that English concepts are in all instances inappropriate and inapplicable. English concepts are relevant

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[1] See Lord Hailey, An African Survey (1956 Revised) op. cit., p. 717.

[2] 8.E.A.L.R. 129.

in that category of land to which English law applies.

Thus in the Zambian High Court case of Akowa v. Mukwati,[1] a tenancy at the will of the State was quite correctly identified and its consequences applied. In this case the plaintiff was initially a tenant of the Crown on Crown land, paying rent on a monthly basis. At the expiration of this arrangement, a formal lease was offered which he did not take up. Subsequent to non-acceptance, the Crown withdrew the offer and the Court found a tenancy at the will of the Crown between the time of the offer and withdrawal of the same. The Court also found the withdrawal quite consistent with the tenancy at will.

Thus it can be said that in Reserves and Trust land the nature of land interests is primarily governed by customary law. From this arises the conclusion that an African holding land under customary law enjoys similar customary interests irrespective of whether it is in Reserves or Trust land.[2] The only basic difference between Reserves and Trust land emerges from provision in the respective Orders for individual grants to non-Zambians. Leases and Rights of Occupancy, initially intended for non Africans, can still be granted.[3] The former pertain to Reserves and the latter to Trust land. Rights of occupancy to non-Zambians can be for as long as 99 years;[4] whereas ordinary leases in Reserves are merely for 5 years except where a tenant is a missionary or charitable organisation for which there is provision for a grant of a 33 years lease.[5]

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[1] 1972/HP/530 (unreported).

[2] For a detailed discussion on interests in land under Customary law, see chapter 2, pp. 114 et. seq., supra.

[3] Between 1967 and 1970, there were about 30 leases granted in Reserves and 28 rights of occupancy granted in Trust land, see Annual Reports of the Lands Department, 1967-1970, Govt. Printer, Lusaka.

[4] See s.5(6), Zambia (Trust Land)Orders, 1947-1964, App.14 Revised Laws.

[5] See s.6A(1)(a) -(d), Zambia (State Lands and Reserves)Orders, 1928-1964, Revised Laws.

Strictly, this is the law even at the present time although as subsequently discussed the practice of grants ignores the law. In the case of a Zambian African, an individual grant can be made in either Reserves or Trust land[1] limited only in duration by the consideration that no interest can now be conveyed exceeding a 100 years. Thus from the viewpoint of the African landholder of a statutory grant no difference exists whether the grant is in Reserves or Trust land. Irrespective of the tenant no dealings in land comprised in a Reserve or Trust land grant (including alienation) can take effect without the consent of the President.[2]

In respect of African tenants there is the further restriction on disposition by will. Both Reserves and Trust land Grants Regulations provide that "any disposition by will of the land comprising the grant or any part thereof or interest therein" can only be done "as may be provided by a law enacted by the Parliament of Zambia".[3] It is further provided that transmission of such land on the death of the holder of the grant "shall be as determined by a law enacted by the Parliament of Zambia".[4] The Parliament of Zambia, however, has never enacted any law in this regard. In these circumstances, the applicable law, it is submitted, is that subsisting at the moment: namely Customary law, the 1837 English Wills Act or the common law of England in force prior to the terminal date.[5]

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[1] See reg. 2 of the Reserves Grants Regulations, and reg. 3 of the Trust Land Grants Regulations.

[2] See reg. 10 of Reserves Regulations, reg. 4 of the Reserve Grants Regulations; and reg. 4 of the Trust Land Grants Regulations (applicable to African tenants); clause 2(3) of Reserve lease and clause 2(3) of Rights of Occupancy (both applicable to all tenants irrespective of race).

[3] See reg.4(3) of Reserve Grants Regulations and reg.4(3) of Trust Land Grants Regulations.

[4] See reg.6 of Reserve Grants Regulations and reg.6 of Trust Land Grants Regulations.

[5] For the reception of English law, see pp. 405 et. seq., infra.

Current practice in the administration of statutory interests in both Reserves and Trust land now clearly suggests that no differences are recognised in practice between the two types of land. Subject to satisfying survey requirements under the Land Survey Act,[1] the State grants either a lease or right of occupancy for a term of years not exceeding one hundred years. And so the statutory distinction relating to the duration of the interest is ignored. The two previous Land Commissioners have confirmed that in practice no difference exists between Reserves and Trust land.[2]

But although the State can, in principle, grant an interest in either land for a period of a hundred years, the restricting factor has been the unavailability of surveying facilities.[3] In these circumstances the State merely grants an interest of 14 years in either type of land until a survey in relation to a parcel of land, the subject of grant, has been carried out. This is so because under the present law which requires preparation of a diagram describing and giving detailed particulars of the parcel of land in question, no interest in land exceeding 14 years can be granted without a diagram. Where the State grants an interest for 14 years (or less) the parcel of land in question need only be accompanied by a "sketch plan" which merely describes and locates it in relation to the surrounding physical features.[4] The preparation of a"sketch plan" does not need surveying the parcel of land to be granted.

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[1] See ss. 31-33. Land Survey Act, cap. 293, Revised Laws.

[2] Interviews with Mr. C. Kawamba, Commissioner of Lands 1974-1977, on 12/4/1977, and Mr B.R. Sharma, Commissioner of Lands 1970-1974, on 26/4/1977 at Lusaka.

[3] For surveying difficulties, see chapter 9, pp. 581 et seq., infra.

[4] See s.12(1)(b), Lands and Deeds Registry Act. For a further discussion see pp. 583 et seq., infra.

Normally a grant is made for 14 years; after the parcel of land has been surveyed and a diagram prepared, then the State may extend the duration of the lease, with effect from the date of the original grant, for a term exceeding 14 years. The State reserves the right to extend the term by a covenant inserted in the lease "that the covenants conditions and other stipulations . . . are performed observed and complied /sic/ by the Lessee to the satisfaction of the Lessor . . .". In this way the State continues to exercise control in the development of the land.

Although the distinction relating to the duration of the interest currently appears to be ignored in practice, the Zambia (State Lands and Reserves) Orders, 1928-1964 and the Zambia (Trust Land) Orders, 1947-1964 have not been amended to authorise this.[1] This is so even when the grant is made expressly subject to these Orders.[2] There has been no declared Government policy on the matter. It is understood that administrative instructions have been issued allowing the practice.[3]

Since Independence in 1964, the move has been to grant leases (in Reserves) and rights of occupancy (in Trust land) for a term of 99 years. These have been granted to Zambians and non-Zambians alike.[4]

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[1] See s.6A, Zambia (State Lands and Reserves) Orders, and s.5(6), Zambia (Trust Land) Orders. Therefore, strictly, in Reserves a grant of an interest to a non-indigenous tenant exceeding 5 years(and in the case of a missionary or charitable organisation exceeding 33 years) cannot confer good title.

[2] See clause 3 (3) of a Reserve lease and clause 4(4) of a Trust land Right of Occupancy.

[3] Interview with Mr Chirwa, Principal Lands Officer, on 26/8/1977 at Lusaka. The author was not given access to the written administrative instructions.

[4] Ibid.

To Zambians such grants have been made in respect of commercial, agricultural and residential leases. This was intended to encourage development by enabling Zambians to obtain loans on the security of a lease. In the case of non-Zambians grants of land in Reserves and Trust land have been made for types of business enterprise that Zambians are not presently engaged in. Government has, however, insisted as a condition for such grants that there should be participation by Zambians. Thus if it is a company which requires the land for a commercial enterprise the requirement is commonly made that there should be at least one Zambian on the Board of Directors of the company. Mission stations, on the other hand, are now being granted the full term of 99 years upon satisfying survey requirements, as opposed to the shorter terms previously granted them (normally 33 years in Reserves and up to 99 years in Trust land).

A search in the Lands and Deeds Registry confirms this practice in both Reserves and Trust land. Kapita Ngulube, a prominent Lusaka businessman and owner of ZanimuoneHotel obtained from the State in 1968 a 14 years lease in the Lenje Reserve. On having the parcel of land, on which he has built the hotel, surveyed seven years later, he was granted a 99 year lease.[1] Similarly Musyanyi Sikasula, another Zambian, was initially granted in 1974 a 14 years right of occupancy by the State in Trust land.[2] A year later after having the parcel of land surveyed his term of interest was extended to 99 years. In both cases, the extension of the term from 14 years to 99 years, with a certificate of title issued , enabled the lessees to obtain loans from banks on the security of the land granted by the State.

The Tobacco Board of Zambia (previously an expatriate enterprise) has been cited as one of the major commercial concerns that has made extensive use of State grants in both Reserves and Trust land. With considerable Zambian participation in the Board now, the Board was in 1968 granted one of the rights of occupancy in Trust land for an initial period of 14 years. In 1970 the term was extended to 99 years with effect from the date of the original grant after having the land surveyed.[3]

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[1] See Lot No. 995/M. Lands and Deeds Registry at Lusaka. Cf., Lot No. 1445/m and Lot No. 1489/m.

[2] See Lot No. 1531/n. Lands and Deeds Registry at Lusaka. Cf., Lot No. 1347/m.

[3] See Farm No. 3576. Lands and Deeds Registry at Lusaka.

In cases where a commercial enterprise does not involve Zambian participation, shorter terms of leases have been granted. Thus the State granted a lease in a reserve to Burton Whyle Ltd for a term of five years commencing on 1st April 1966.[1] Similarly Burton Construction Ltd was granted a five years lease in the Tonga (Choma) Reserve No. xx1 on 1st October 1966.[2]

The grant of a lease by the State in a reserve to the Mission of the Scandinavian Independent Baptist Union, on the other hand, illustrates the extension of the current practice of State grants to mission stations as well. This Mission was granted a 14 years lease in 1973 which in the subsequent year was extended for a term of 99 years after fulfilling the survey requirements.[3]

In all these grants in Reserves and Trust land the procedure has been to obtain the consent of the chief and the rural council[4] in the area within which the land is situated. Application for this consent is processed through the District Secretary who then forwards the consent to the Commissioner of Lands. No grant is made by the State within a reserve or trust land where consent has been withheld.[5]

From what has been discussed so far the existence of a number of disadvantages can be deduced in the law and practice in Reserves and Trust land when compared to that applying to State land elsewhere

[1] See Lot No. 1022/m. Lands and Deeds Registry at Lusaka.

[2] See Lot No. 1029/m. Lands and Deeds Registry at Lusaka.

[3] See Lot No. 1454/m. Lands and Deeds Registry at Lusaka.

[4] A rural council is a local authority in rural areas responsible for local administration in the same way as a municipal council in urban areas.

[5] Interviews with Mr C. Kawamba on 12/4/1977, and Mr B.R. Sharma on 26/4/1977 at Lusaka. See note 2 on p. 346, supra.

in the country. Land in Reserves and Trust land is in an unsurveyed state whereas State land is invariably surveyed in advance before it is offered for allocation by the State. Thus a land developer who wants immediate title to land for purposes of securing a loan would rather obtain State land. Before obtaining title to land in Reserves and Trust land conditions precedent have to be fulfilled, which conditions are not similarly attached to State land. The requirement of Zambian participation for a non-Zambian land developer may be discouraging when land in State land can easily be acquired without a similar condition. The obtaining of consent from the chief and the rural council can equally be discouraging for Zambians and non Zambians alike when a land developer has no ethnic ties with the area in question. This requirement is more favourable to persons born within the jurisdiction of the local chief and rural council. In these circumstances State land is more attractive to a land developer apprehensive of local prejudice in Reserves and Trust land.

All these disadvantages in Reserves and Trust land were succinctly reflected in an interview with Mr W. Cobbett-Tribe: he concludes that rural land is virtually unmarketable. Mr Cobbett-Tribe has been a real estate agent for well over thirty years in the country. In his experience it is practically not feasible to find purchasers for rural land mainly because the land in question is either unsurveyed or there are just no title documents which can pass from the vendor to the purchaser.[1] In these circumstances he recalls that although he got inquiries about rural land, there was hardly any intending purchaser with money keen to obtain land in Reserves and Trust land.

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[1] Interview with Mr W. Cobbett-Tribe, now a Lusaka Auctioneer, on 6/2/1977 at Lusaka.

(ii) State Land

Since freehold tenure has now been abolished by the process of conversion into leasehold title with all land vested in the President, all such land can be regarded as State Land. Now the important feature of this land is that it is leasehold. It is a special kind of leasehold because the relationship of landlord and tenant between the State and landholder is specifically regulated by statute -- the Land (Conversion of Titles) Act, 1975. It is this statute, as will be discussed,[1] which determines the nature of the interest any lessee might be holding from the State. The terms and conditions of this statutory lease can be fairly clearly deduced from the Act itself.

A difficult interest to define, however, is that arising from the hybrid lease put into use in site and services schemes. Through the head-lease system the State has granted leases to local authorities which in turn have sublet lesser interests to individuals in these site and service schemes. The interest so assigned in such schemes has never been clearly defined.

In probing into this interest, it may be advisable to reflect on the background to the site and service scheme arrangement. This has to do with the legal consequences of the main classes of land in Zambia. Customary tenure is only possible in Reserves and Trust land which are outside urban areas. In the non-customary sector -- essentially State land (within which category urban areas fall), there is no provision for customary tenure. Thus a landholder cannot acquire a customary land interest in this land by virtue alone of conforming with customary practice. The acquisition of

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[1] See pp. 390 et. seq., infra.

any such interest would need a grant of tenancy. Any purported acquisition of a land interest other than by grant of tenancy confers on such landholder no recognisable land interest.

Thus in Humane v. Chinkuli[1] where the plaintiff was seeking possession of land, allegedly allocated to him by a local UNIP chairman, from the defendant, who in turn alleged that he had bought it from another person, the court had no difficulty in ruling that as between the parties none had a better title. In this regard Scott, J., ruled: "The whole matter is extremely unsatisfactory in that both plaintiff and defendant are squatters and the defendant has no more rights to be on that land than the plaintiff claims he had". Finding that the plaintiff had failed to show title to the land, his lordship dismissed the action for possession. On this authority it can safely be said that any occupant of land without any specific grant outside reserved areas is a squatter and has no enforceable rights at law.

The contrast with Tanzania, as revealed in the Court of Appeal decision in Abdalla v. Mohamedi & Others,[2] is remarkable. Law, J.A., rejecting the High Court's verdict that disputing parties on government land were trespassers held:

> The litigation does not concern the ownership of the land, which it is common ground belongs to the Government, but the right to occupy the land by members of a tribal unit which has been in occupation thereof for two generations or more. I have no doubt that customary law does apply to disputes amongst such members relating to such occupation. I . . . find myself unable to agree with the learned judge . . . that the parties to this suit . . . are, and always were trespassers. Their presence on the land for fifty years or more cannot have gone unnoticed by the Government, and they must in my opinion be considered as occupying, and having occupied, the land with an implied licence from the Government to do so until such time as it pleases the Government to terminate such licence.

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[1] 1971/HP/407 (unreported)

[2] [1969] E.A. 444 at p. 446.

The Court does not of course indicate when the licence commences. Notwithstanding this a customary interest of first occupation as between the parties and termed a licence vis-a-vis the Government is accepted.[1] Had there been a corresponding ruling in Zambia, the legal status of an occupant in similar circumstances would not have been so tenuous. Licences have, however, been created by the Housing (Statutory and Improvement) Areas Act.[2] These licences provide the legal basis on which a person occupies the land in circumstances which would otherwise have rendered him a squatter.

With the effect of the occupant being a squatter, the influx of human population into urban areas has created a severe problem of human settlements.[3] This problem has in part been contained by provision of site and service schemes.[4] As has been stated, by grant of a head-lease from the State to a local

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[1] James regards this decision per incuriam the statute regulating such government reserved areas to which customary law is applicable. See R.W. James, Land Tenure and Policy in Tanzania, op. cit., p. 112. Cf., R.W. James & G.M. Fimbo, Customary Land Law of Tanzania, East African Literature Bureau, 1973, pp. 42 et.seq.

[2] For further discussion, see pp. 358 et seq infra.

[3] For the year 1969, the total population of urban areas was 1, 192, 116 or 29.4 per cent of the total population. The corresponding figure for 1963/1961 was 715,256 or 20.5 per cent of the total population. Thus by 1969 the urban population had risen by 8.9 per cent. See Census of Population 1969 Report, Central Statistical Office, op. cit., p. 1.

The National Housing Authority puts for example the present population of unauthorised areas for Lusaka, the capital, at 26,300 households. See Lusaka Sites and Services Project Vol. 1, prepared by the National Housing Authority, July 1973, p. 2.89. Cf., pp. 2-46-2.56. For a summary of the squatter population of Lusaka between 1954 and 1973 see T. Seymour "Squatter Settlement and Class Relations in Zambia", Review of African Political Economy, no. 3, May-October 1975, p. 71.

For an earlier account of origins of unauthorised settlements either on Crown Land or privately owned estates, see NAZ/SEC/NAT/209. Cf., Report of a Soil and Land Use Survey, Copperbelt, Northern Rhodesia, Govt. Printer, Lusaka, 1956, pp. 128-129.

[4] For the Lusaka model of these schemes, see Lusaka Sites and Services Project, Vols. 1-5 prepared by the National Housing Authority, July 1973. The housing aspect of government policy is not pursued because it would be beyond the scope of this thesis.

authority, the latter has in turn sublet a lesser interest to an occupant by a system that has been known as the "Land Record". The Land Record stipulates that it is a memorandum of an oral agreement between a local authority and the occupant. The relationship between the two is of a dual character. In addition to that of landlord tenant there is also a creditor debtor relationship in that the local authority provides a loan to the tenant to erect a permanent fixture (building) of a specified standard on the land. In as far as the landlord tenant relation is concerned, which is the only one relevant to us, the Land Record Card stipulates, inter alia, the following as the conditions:

> 1. The owner paying the rent and observing the covenants hereinafter contained shall be entitled to occupy the within holding for a minimum period of TEN YEARS commencing . . . as a monthly tenant pursuant to the said oral agreement.
>
> 2. The rent shall be the sum of . . . payable monthly in advance on the first day of every month and may be revised from time to time by the local authority upon giving notice to the owner.

This agreement was the subject of interpretation as to the nature of the interest in Municipal Council of Luanshya v. Daka.[1] In this case the defendant was to pay a monthly rental of K3.70 payable in advance, and under the service scheme was to build a house on the plot, the subject of the agreement. The lower court found in this arrangement a lease for a minimum period of ten years. On appeal Gardner, J., in a brief judgement reversing the lower court's ruling held: "I find this to be a monthly tenancy". Although no reasons were given by the learned judge, it is fair to assume that he arrived at this conclusion by making reference to the duration for which rent is payable -- in this case a month, hence the

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[1] 1970/HN No. CA/3 (unreported).

monthly tenancy. This of course is a proper test to apply in all cases where the duration of the tenancy, in the absence of any express agreement or indication, is in issue.[1] It must however, with due respect, be pointed out that although where there is nothing more than the reservation of a monthly rent, the inference may be drawn that there is a monthly tenancy, such inference is not available where the reservation of a monthly rent is followed by provision inconsistent with a monthly tenancy. In the instant case, the condition relating to a minimum period of ten years, it is submitted, is such a provision inconsistent with a monthly tenancy.

In Adams v. Cairns[2] a written agreement was entered into between the plaintiff and the defendant's tenant for the apparent duration of the latter's tenancy. The agreement was couched in the words:

> I shall be pleased to accept you as tenant for the barber's shop at the rental of seven shillings per week, the rent not to be raised during my present tenancy.

This tenant, however, surrendered his tenancy to the defendant, the owner of the premises, long before the due date of expiration. Thereupon the defendant sought to take possession of the premises due notice, on the footing of a weekly tenancy, having been given.

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[1] See R.E. Megarry & H.W.R. Wade, The Law of Real Property, (3rd ed.), London, 1966, p. 643. Cf., W.J. Williams, Hill and Redman's Law of Landlord and Tenant, Fourteenth ed., London, 1964, p. 40.

[2] (1901), 85 L.T. 10, C.A.

The plaintiff had expended some money on the premises on taking the tenancy.

Addressing himself to the issue of duration, Smith, M.R., resolved -- "If there was only a tenancy from week to week, what would be the use of the last clause? It would be useless, and yet it is expressly stipulated that the rent is not to be raised until expiration of . . . then tenancy . . . I think looking at the expenditure which the plaintiff made, the parties did not intend that there should be a mere tenancy from week to week".[1] Specifically dwelling on the implication that the non increment in rent suggests that the tenancy could not be determined during the tenancy duration, William, L.J., boldly asserted:

> I would draw the inference from this agreement that it was intended that the term of the tenancy should be until the 24th June 1901 (the intended date of expiration of defendant's tenant lease). . . The reason why I am disposed to take that view is that the stipulation that the rent is not to be raised must necessarily mean in law that the lessor will not determine the present tenancy and create a new one, and therefore necessarily implies a promise not to determine the tenancy.[2]

The Land Record condition I can be put on a similar footing as the issue in this case. That condition promises a tenant that on rent being paid and all other covenants being observed, the tenant shall be in occupation of any given parcel of land for a period of ten years. If this promise means anything, it is that, in the absence of any default on the tenant's part, the tenancy cannot

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[1] at p. 11

[2] Ibid.

be determined within a period of ten years from commencement. This conclusion is supported by the fact that the tenant is expected to incur expenditure in erecting a house on the premises. Surely this could not be expected of a monthly tenant.

With the passage of the Housing (Statutory and Improvement) Areas Act,[1] it would have been expected that a definition of the intended interest in the site and service schemes would have been put beyond doubt. Regrettably this does not appear to be the case. The Act creates Statutory Housing and Improvement areas with registrable interests to assure security of tenure. Site and service schemes together with what have hitherto been known as "Shanty compounds" fall within the latter category. By virtue of s. 37(1) the responsible Minister is empowered to declare an area within the jurisdiction of a council to be an improvement area. To facilitate registration of assignable interests in these areas at the instance of the council, the interest designated "licence" is created. The definition of this interest is, however, unsatisfactory. S. 39 attempts to define it.

Forbidding the occupation of any land without such licence, s. 39(1) as materially relevant declares:

> No person shall without a licence issued under this section and except in accordance with the conditions thereof, build, use . . . any piece or parcel of land.

Providing for the maximum duration of the occupancy licence, subsection (3) says:

> Subject to the provisions of this Act every occupancy licence shall be valid for a period of not more than thirty years.

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[1] No. 30 of 1974. Came into force on 1st June 1975. See S.I. No. 88 of 1975.

As to the nature of the interest in this licence, subsection (4) provides in broad terms:

> The holder of an occupancy licence shall have such rights and obligations in respect of the piece or parcel of land to which the licence relates and in respect of any dwelling or other building erected thereon as may be prescribed.

From the look of these general provisions there is nothing expressed to indicate whether it is a licence or leasehold type of interest which is contemplated. In other words, the provisions are such that either a lease or licence can be granted. If security of tenure is the theme of the exercise, surely prospective occupiers are entitled to know, or at least provision must be made forthose who care to know, what it is that they are actually obtaining.

By contrast the interest intended to be conveyed in statutory housing areas is a lease. These areas once declared under the Act are what have been municipal council housing estates. In these areas a municipal council may "let to any person any piece or parcel of land for such term and on such conditions as may be approved by the Minister".[1] The duration of such an interest is not specified but it is quite evident that a lease is contemplated. Reference to the duration of the interest is contained in the prohibition of councils from selling or conveying any freehold estates.[2] If it is freehold that is prohibited, then it is a leasehold estate that is intended.

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[1] See s. 5(1) (c) of Act No. 30 of 1974.

[2] Ibid., proviso (i) to s. 5(1).

The use of the term "occupancy licence" in relation to the interest in improvement areas is equally unfortunate and it may well be a misnomer. In strict legal parlance "licence" imports the absence of any estate or legal interest in the property to which it relates.[1] A licence merely "confers a right making that lawful which without it would be unlawful.[2] In this a licence is distinguishable from a lease or tenancy in that the latter creates a legal estate in the land the essence of which is that the tenant is given the right to exclusive possession.[3] These common law implications cannot lightly be ignored so long as the common law continues to be a cardinal source of the Zambian law.[4] With the status of a licence under common law, it is submitted that the occupancy licence is revocable at the will of the State and that its only protection is against a trespasser. To the extent, therefore, that Zambian legislative enactments remain silent or vague and the common law remains a residuary system, common law principles may be used to interpret them. Since improvement areas (site and service schemes) are outside Reserves and Trust land, the general law (a term which also includes common law) rather than customary law is intended to apply to them.

With the lack of clarity in the definition of this occupancy licence only practice in the grant of such rights can determine the nature of the interest desired to be conveyed.

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[1] See W.J. Williams, Hill and Redman's Law of Landlord and Tenant, op. cit., p. 16.

[2] Ibid.

[3] Ibid., p. 12. Cf., R.E. Megarry and H.W.R. Wade, The Law of Real Property,op. cit., p. 624.

[4] See English Law (Extent of Application) Act, cap. 4, Revised Laws.

If the prescribed form of conveyance contemplated by s. 39(4) is anything like the Land Record, it is well to emphasize here the obscurity of the intended interest under that system notwithstanding the High Court decision in Daka's case. It only remains to suggest that the entrusted authority when granting the occupancy licence take note of the potential uncertainty in the law and redraft the Land Record card (if this is the intended prescribed form) to correspond to the desired interest in the licence. It is further suggested, as the occupancy licence purports prima facie to be a licence, to note that the essence of a licence is to grant a mere right to occupy premises while the grantor remains in general control of the property.[1] It may well be that a licence is deliberately desired as a temporary solution in granting the occupier protection against a trespasser, e.g. another squatter. This arrangement would also have the advantage of flexibility in that if and when the scheme needs modification, existing rights would easily be extinguished. But if the inference can be drawn that the theme of the site and service scheme is to provide security of tenure, then it must be doubted that this could be the desired end if the house owner is denied that much desired exclusive possession inherent in home ownership.

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[1] See R.E. Megarry and H.W.R. Wade, The Law of Real Property, op. cit., p. 624. For an elaborate distinction between a lease and a licence, see W.J. Williams, Hill and Redman's Law of Landlord and Tenant, op. cit., p. 12. Cf., Chilufya v. City Council of Kitwe, S.J.Z. No. 8 of 1967, 66 at pp. 70-71 (H.C.).

B. The first decade of the colonial heritage: 1964-1974

With the intention of retaining the status quo the Zambia (State Lands and Reserves) Order 1964, coming into force immediately before the 24th October 1964, vested both what was previously called Crown land and native reserves in the President recognising at the same time that all estates, rights and interests created and disposed pursuant to the 1928 Order in Council "shall continue to have the same validity as they had before . . ."[1] The Zambia (Trust Land) Order 1964, on the other hand, vested the former native trust land in the President, acknowledging in the same language the validity of all estates, rights and interests created and disposed of pursuant to the Native Trust Land Order in Council 1947.[2]

The previous Reserves and Trust Land Orders in Council were not revoked and their continued operation received the sanction of the Zambia Independence Order, 1964, the instrument providing for the establishment of the new Republic, when it declared:

> . . . the existing laws shall, notwithstanding the revocation of the existing Orders or the establishment of a Republic in Zambia, continue in force after the commencement of this Order as if they had been made in pursuance of this Order.[3]

The Zambia Independence Act equally provided for the continued operation of existing law notwithstanding the change

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[1] See ss. 3-5, State Lands, Reserves and Trust Land Orders, Appendix 5, (1965 ed.)

[2] Ibid., ss. 3 and 4.

[3] See s. 4(1).

in the constitutional status.[1] The Act provided in s.9:

> Her Majesty may by Order in Council make such adaptations in any Act of Parliament passed before this Act, or in any instrument made or having effect under any such Act, as appear to Her necessary or expedient in consequence of the change in the status of Northern Rhodesia taking effect on the appointed day.

Pursuant to this authority, nomenclature modification to the Reserves and Trust Land Orders have been effected in accord with the agreement reached at the Independence Conference that such lands should vest in the President who stepped into the shoes of the Secretary of State.[2]

Thus the categories of land and the interests therein were the same as before Independence. The acquisition of political sovereignty by indigenous people, however, brought with it new aspirations demanding a new modus operandi for the distribution and enjoyment of the country's resources; because land was regarded as the most important of those resources there was need to focus attention on the system of land tenure. People's expectations, however, were naturally ahead of the means to tackle the new assignment. Assuming a policy had already been in the making, a bewildered Mr Chilimboyi, a member of the Opposition in the National Assembly, pressed for an elaboration ofthis policy when he queried, "At the moment I would like to know what the condition of land is up to date".[3] The Minister responsible for Land and Natural Resources politely conceded that no change had taken place since independence, the only change being in nomenclature.[4] This reply provoked another member of the

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[1] See s. 2(1).

[2] See Report of the Northern Rhodesia Independence Conference, 1964, Cmnd. 2365. Annex C.

[3] See N.A. Debates, 5th August 1965, session 13th July-22nd September 1965, Cols. 549-550.

[4] Ibid., col. 774.

Opposition, Mr Walubita, to charge that the retention of colonial land policies was not consistent with the aspirations of an independent Republic. Elaborating on what he had in mind he proceeded to suggest, "The change should come so that the people will have their land as they used to".[1]

What appears to have been suggested was free acquisition of land without a cash consideration. It was of course not in the hands of the Opposition to decide on policy. Resentment, however, for treating land as a saleable commodity seems to have also affected government thinking and was reflected in subsequent utterances by the Minister of State for Land Settlement. Reacting against views being expressed relating to sales of land, he remarked: "But I object to the views . . . to turn our land into a market which, in fact, the land as we know it, land /sic/ is the national asset and must be respected and be protected properly . . . Government should take every precaution to see the land of the people protected".[2]

It was not clear until then whether Government thinking was primarily concerned with the restriction of land alienation. The land question was too cumbersome to be disposed of by abrupt utterances, and the President cast some light on the land issue in an earlier address to the National Assembly when he revealed that a

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[1] See N.A. Debates, 11th August 1965, session 13th July-22 September 1965, cols. 799-800.

[2] See N.A. Debates, 9th Aug. 1966, session 20th July-23rd Sept. 1966, cols. 521-522.

Commission had been set up to examine all aspects of land law, and that government intended "to introduce in the near future measures necessary to bring land policy into line with the needs of our country."[1] The vagueness of this announcement, however, invited criticism from Mr Burnside, a member of the Opposition, when he observed: ". . . it does not explain what the policy is. The needs of our country are something which we here argue day after day in this House. Honourable members seem to have conflicting views as to what the needs of our country are".[2]

This observation underscored the lack of policy but it was unrealistic to criticize lack of elaboration of detail as the policy formulation vis-a-vis the needs of the country could not precede an enquiry upon which the policy was purportedly to be based. The Land Commission, appointed in 1965 to advise the Cabinet Land Policy Committee, was ready by mid August 1967. Despite government reliance placed on this Report for its policy, there has to date never been any express indication whether the Report was accepted or not. Hence the Report has never even been published.

The Commission's membership consisted of A.A. Johnson (as chairman), W.T. McClain (a University law lecturer), and J.L. Kazoka (then Commissioner of Lands). The Commission was charged to review all matters pertaining to land policy and administration.

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[1] See President's address in N.A. Debates, 8th March 1966, session 8th March-6th April 1966, col. 33.

[2] Ibid., 23rd March, 1966, col. 615.

This assignment involved both rural and urban land. In its task the Commission was assisted by provincial working committees, established to gather local views. The respective committees (except for Western province where none was constituted) consisted of a local chief conversant with customary land law and practice; a representative from the rural council; a town clerk or secretary of a town council representing urban interests; and a resident minister responsible for the province. The Commission made its various recommendations which all centred on one central authority in land administration.[1] In this the Commission was substantially supported by all provincial committees except for the Luapula province committee.[2] The Luapula province committee felt that nothing should be done which should endanger rights of people under customary law. With this qualification this committee joined all other provincial committees in supporting the view that land under customary law should be made more available for development.

On the question of law reform the committees left this to the Commission. The Commission appended to its Report a draft bill on Property and Conveyancing which James has called "a renumbered version of the 1925 English Law of Property Act, with its emphasis on protecting plenary powers of the fee simple owner".[3] This might

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[1] See chapter 7, Report of the Land Commission, Aug. 1967, Lusaka.

[2] Ibid.,, chapter 4.

[3] See R.W. James, "Mulungushi Land Reform Proposals - Zambia", E.A.L.R., Vol. 4, No. 2, 1971 at p. 127.

well be the reason why Government received the Commission's Report with mixed feelings. James has explained the Commission's reliance on the English law of real property as being due to the fact that the members "were all trained in Anglo American law, with little or no knowledge of developments on this Continent".[1] On this basis, he indicts the Commission's Report as being a document lacking imagination. McClain, one of the members of the Commission, concedes to the criticism on lack of imagination. Accepting that the Commission extensively relied on English land law, he denies, nevertheless, that this is due to the legal education of the members "or their devotion to English law". He attributes the Commission's handicap to "the uncertainty about fundamental policies which the new Zambia government intended to follow".[2]

On receipt of the Commission's recommendations, all subsequent questions concerning land raised in the National Assembly were deferred by government on the premise that the Report was under review.[3] Surprisingly though, despite government's silence on the Report, three years later the government's decision to assimilate lands in the former Barotseland to the status of reserves is consistent with the Land Commission's recommendations.[4] This being a remarkable political move within this period of policy review, we need to look at it in more detail.

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[1] See R.W. James, "Mulungushi Land Reform Proposals - Zambia", E.A.L.R. op. cit., at p. 127.

[2] See W.T. McClain, Legal Aspects of Housing and Planning in Lusaka (unpublished paper-typescript 40pp.) at p.4.

[3] See N.A. Debates, 6th March 1968, session 23rd January-4th April 1968, col. 720 and 1646-1647.

[4] See Report of the Land Commission, op. cit., p. 161.

(i) Status of land in Western Province as Reserves

As will have been gathered from chapter 1, Barotseland, as it then was, had a special status within the British Protectorate of Northern Rhodesia. In matters affecting land it was not affected by the Reserves and Trust Land Orders in Council. All the lands comprised in Barotseland were reserved for the Litunga (the Lozi king) and the Lozi people. In practice in the exercise and enjoyment of land rights, the Lozi do not seem to have been any different from the rest of the territory as they were equally subject to their customary laws. The only distinction, however, was that neither the Northern Rhodesia Government nor the Colonial Office could legislate or get involved in matters pertaining to Lozi land. Overall power over Lozi land lay in the Litunga.

Shortly before Independence as the instruments of power were being transferred, it was felt that provision should be made to retain the status quo in regard to the land issue in Western Province within the unitary form of government of independent Zambia. This was achieved by the Barotse Agreement of 1964[1] negotiated and entered into by the succeeding Zambian government, of one part, and the Litunga of the other.

In regard to land, clause 5(1) of the Agreement refers to arrangements contained in the annex thereto, the import of which clause 5(2) stated: "In particular, the Litunga of Barotseland and his Council shall continue to have powers hitherto enjoyed by them in respect of land matters under customary law". The arrangements referred to in clause 5(1) which were to have effect are spelt out in clause 4(b) of the annex. Clause 4(b) provided: "The Litunga and National Council of Barotseland will be charged with the responsibility for administering Barotse customary land law within Barotseland". The nature of this responsibility is more elaborately

[1] Cmd. 2366.

expounded in clause 4(3) which entrusted the Litunga in consultation with his Council to make laws for Barotseland in relation, inter alia, to the following matters:

(g) land;

(h) forests;

(j) fishing;

(k) control of hunting;

(l) game preservation;

(m) control of bush fires; and

(q) reservation of trees for canoes.

To the extent that the Zambian government was obliged to honour this Agreement two peculiar and apparently conflicting clauses were provided. Clause B, mandatory in its import, stated:

> The Government of the Republic of Zambia shall take such steps as may be necessary to ensure that the laws for the time being in force in the Republic are not inconsistent with the provisions of this Agreement.

Clause 3 in the annex of the arrangements to take effect, on the other hand, did not impose any such mandatory obligations on the Zambian government. As materially relevant the clause states, very liberally:

> . . . So far as land is concerned, apart from confirmation of wide powers to the Litunga over customary matters, the position is as follows. (1) The . . . Government does not wish to derogate from any of the powers exercised by the Litunga and Council in respect of land matters under customary law and practice.

As will be observed, this is a mere declaration of intent on the part of the government not to derogate from what it has accepted. Under this clause it seems fair to suggest that the government

could derogate from its acceptance if it so wished. But while under clause 8 the government undertook to ensure that existing laws were not inconsistent with the Agreement, it is suggested that to give sense to the contractual document, the government could not at the same time in consistency with that undertaking legislate to the contrary. However, another flaw in the Agreement which appears difficult to cure is the absence of any enforcement provision. Clause 9, the only relevant provision in this regard, merely permits either party to the Agreement to refer any matter of interpretation to the High Court, which would only render an advisory opinion and no more.

The Zambian government in an attempt to achieve uniformity in the treatment of land in all parts of the Republic, has by the Western Province (Land and Miscellaneous Provisions) Act,[1] vested all the land and interests therein in Western Province in the President as reserve land under the Zambia (State Lands & Reserves) Orders. Thus land in the Western Province is now on par with any other reserve in the country.

In looking at this Act two important points emerge: (a) the question of the validity of the Act; and (b) the effect thereof. As to (a), in view of clause 8 of the Agreement and our submission that clause 3 cannot derogate therefrom we may proceed on the premise that the Act is a unilateral abrogation of the Agreement. We may now ask therefore whether this abrogation renders the Act invalid.

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[1] No. 47 of 1970. S. 2 of the Act provides: "All land in the Western Province is hereby vested in the President as a Reserve within the meaning of land under the Zambia (State Lands and Reserves) Orders, 1928 to 1964".

It is pertinent to indicate here that legislative powers of the Republic vest in the Zambian Parliament[1] and an Act of Parliament is valid save only as is inconsistent with the Constitution.[2] It is therefore to the Republican Constitution we must look for the validity of this Act. The relevant provision is that which deals with the protection of property from deprivation without compensation. On this point the Constitution is clear. The taking of property such as by vesting is expressly allowed if it is "for the purpose of the administration . . . of such property . . . by the President in implementation . . . of a policy designed to ensure that the statute law . . . relating to or affecting . . . land . . . enjoyed by Chiefs and persons claiming through or under them shall apply with substantial uniformity throughout Zambia".[3]

In view of this Constitutional base upon which the Act must stand or fall, it can hardly be doubted that the Act in issue is valid. If any remedy were sought, it would certainly not be from provisions of the Constitution; and equally it is doubtful that the Agreement provides one, even implicitly.

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[1] See s. 63, Constitution of Zambia, Act No. 27 of 1973.

[2] See Feliya Kachasu v. Att. Gen., S.J.Z. No. 10 of 1969 (H.C.) where an allegation of violation of a fundamental right pursuant to the Education Act, Blagden, C.J., held that the Act did not derogate from the provisions of the Constitution. Cf., B.O. Nwabueze, Presidentialism in Commonwealth Africa, London, 1974, pp. 170-171.

[3] See s. 18(2)(y), Constitution of Zambia as amended by Constitution (Amendment) Act, 1970 (No. 44). The Northern Rhodesia (Constitution) Order-in-Council 1963 (S.I. No. 2088) has since been superseded. S.112 of this Order protected the rights of Litunga and people of Barotseland. This was the last time during the Colonial period that the said rights were again protected.

Accepting that the Act is valid, and there has to date been no challenge, this leads us to (b) -- the effect the Act has. Obviously it is the conversion of Lozi land into reserves, as the Act says. This, however, does not reveal much. In vesting the land in Western Province in the President, the inescapable suggestion is that some person or persons have been divested of their title. This person or these persons can only be the Litunga and the Lozi people. As for the Litunga, the suggestion that he has been divested of title can only stand on the assumption that he was the ultimate owner of Lozi land. We need not go too deeply into Lozi land tenure beyond observing that this assumption needs qualification. It suffices to indicate that Gluckman, the authority on this topic, suggests that an individual could own land independently of the Litunga.[1] The effect of the Act, however, is quite evidently to remove the power of the Litunga to regulate land use as reserves fall within the domain of legislative regulation to the extent that specific Acts have been made applicable.

As for the Lozi people, the vesting of their land in the President apparently divests them of their individual titles. Although in strict theory this is the import of the vesting Order, in practice it is hard to conceive how the President's title can

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[1] See M. Gluckman, Essays on Lozi Land and Royal Property, Rhodes Livingstone Papers No. 10, pp. 13 et seq.

be inconsistent with individual rights in land since reserves are a creation of a land interest 'for the sole and exclusive use of the natives of Zambia'. The President by virtue of his title, in law or practice, it is submitted, cannot exercise that title inconsistently with individual rights in land. In other words this title is subject to the subsisting customary practices of the Lozi people like in other places. To this extent the alteration in the status of Lozi land hardly suggests any radical departure in policy. What it does suggest is an ultimate title in the President.

After this notable government attempt to obtain uniformity in the status of land, further developments of policy continue to emerge without any indication of systematic treatment of the matter. The whole land question appears to have been tackled on a piecemeal and ad hoc basis. Every issue that attracted immediate attention was disposed of on that basis.

In this context absentee landlords were singled out and precipitated the passage of the Lands Acquisition Act, the intent of which was made clear by the Minister of Land and Natural Resources, Mr. Kalulu. On an occasion in the National Assembly after the passage of the Act, he declared: "We will spare no time in making sure that the teeth of that Act are put to use . . . It is evil to live in a country where parcels of land are possessed by absentee landowners living like dogs in a manger . . . the sooner this exercise was done, the better".[1] An appraisal of this Act must, however, be

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[1] See N.A. Debates, 26th February 1970, session 7th January-25th March 1970, cols. 1625-1626.

postponed to a more suitable chapter on the legislative control of land use.[1]

A more significant incident of this period to which we may address ourselves now is the institution of the Leadership Code. This has revealed the Party thinking and has been the tool of its implementation in so far as political life has had a bearing on land matters.

(ii) The Leadership Code

After much political thought had been given to the subject in the late 1960s, the Leadership Code was granted statutory force[2] to regulate acquisition of property interests on the part of those designated as leaders. A "leader" as defined by the Code is a holder of a specified office, which virtually includes anybody in the public service in receipt of a minimum annual income of K2,500. The private sector is therefore exempt.[3] Considering that the latter has diminished with successive State control of most organisations, it can be appreciated that the definition is far reaching.

In relation to the ownership of land, or any interest therein or indeed any income arising from such ownership, there are restrictions imposed on such leaders. The following are the statutory norms

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[1] See chapter 8, infra.

[2] See Part IV of the Constitution and S.I. No. 108 of 1974 embodying the Leadership Code. For the Tanzanian Code which is similar in its import, see the Arusha Declaration, 5th Feb. 1967 in J.K. Nyerere, Ujamaa-Essays on Socialism, Oxford University Press, 1968, pp. 35-36. For the implementation of the Code to the various categories of Leaders, see B.O. Nwabueze, Presidentialism in Commonwealth Africa, op. cit., pp. 380-381.

[3] See reg. 2 and first schedule of the Code.

of prohibition:[1]

(a) a leader who is a citizen of Zambia shall not be entitled to own or occupy any land or other real property whatsoever outside Zambia;

(b) a leader shall not own or occupy land exceeding ten hectares on which his dwelling house is or is to be situate; and

(c) a leader shall not let his dwelling house unless he is transferred from the place where such house is situate.

A leader can, however, retain his ownership of land and any benefits deriving therefrom if he elects not to receive a salary in respect of a specified office or offices of which he is the holder.[2] Compliance with the Code is mandatory and enforceable against a defaulting leader.

Thus where a leader opts to retain his office, he must dispose of any property acquired outside the limits of the Code within a specified period to a person other than his spouse or child.[3] On failure to observe the terms of this order, the leader shall vacate his office once allegations of breach of the Code are proven or admitted.[4]

In regard to its efficacy, the Code invites a number of observations. Firstly in regulating the ownership of land, the

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[1] See reg. 4 of the Code.

[2] Ibid., reg. 5.

[3] Ibid., reg. 10.

[4] Ibid., regs. 11(1) and 13(2).

Code excepts land under customary law (Reserves and Trust Land) from its provisions.[1] In this omission and exception, the Code must be defeating whatever purpose it intends to achieve in respect of the other category of land. If in the contemplation of the Code amassing of parcels of land is an evil, it certainly could not be a lesser evil in Reserves and Trust land. Secondly, in allowing ownership where a leader opts not to receive a salary from his office, it is doubtful that efficiency in the occupation of the office can be guaranteed where there is an absolute lack of incentive. This is so because where a leader would derive an income from the ownership of land, he is prohibited to be in receipt of another income from his office. It would have been a more meaningful rule that a leader should vacate his office in all instances where he opts to retain his ownership. This would avoid the necessary conflict between attending to a source of income and management of affairs of an office from which there can be no income. And thirdly in the effective implementation of the Code, it appears doubtful that there could ever be adequate supervisory machinery over private dealings of so many citizens. In large part the success or failure of the Code regulations must rely on the extent of bona fide observance by the individual leaders.

The Leadership Code cannot fully be appreciated in isolation from the politics of Zambia. Its evolution and making must be

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[1] See reg. 20 of the Code.

sought in the political ideology of the ruling Party, the United National Independence Party. The Party's thinking as typified by the President's utterances adopted a political philosophy of "Humanism", the essence of which is to create Zambia into a classless man-centred society in which the exploitation of one man by another is to be entirely eliminated. To this extent the Party has devoted itself to the eradication of all forms of tendencies to exploitation. President Kaunda, expounding on 'Exploitation of Man by Man' as a prelude to the Leadership Code, has revealed the Party thinking as aimed at deterring the emergence of a class of individuals who through the acquisition of economic power could pose a threat to the well-being of the less resourceful citizens. Expressing this fear, he declared:[1]

> An economic class can organise itself to control the economic and social destiny of a country. They can organise themselves to accumulate money and property, influence the party and government to pursue policies favourable to their interests and ultimately move the nation on a road in which only their interests are secure and guaranteed regardless of the misery and suffering endured by the rest of their fellow men.

The Party's commitment is to prevent the formulation of such economic class by bridging the gap between the 'haves and have nots', through a socialistic approach in the distribution of wealth.[2] To achieve this through the Leadership Code, the Code proceeds on one cardinal principle namely "a leader shall not carry on any business

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[1] See A Nation of Equals -- The Kabwe Declaration, Z.I.S., 1972, p. 35.

[2] See Ibid., p. 49.

or receive any emoluments other than those payable to him in respect of the specified office or offices which he holds".[1] For our purpose in this discussion the definition of business is significant as this includes commercial farming, and letting or sub-letting of property.[2]

It is in this context that the ownership of land as a source of income, i.e. commercial farm-land or any land, or likely to be used as a source of income, has been prohibited. Renting falls in this category too except that besides being an extra source of income, it has been considered more than any other an area of exploitation.[3] It might of course be suggested that excessive rent charges could as well be regulated by rent control provisions, and in this regard Government ought to have concentrated on improving the machinery of rent regulation.[4] But as has been pointed out all these policies must be appreciated within the framework of the current political thinking.

It is within this Party's political thinking that the latest land reforms have been decided on and implemented thus marking a substantial departure from the colonial heritage.

C. The 1975 Land Reforms

The uncertainty in land policies finally came to an end

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[1] See reg. 3.

[2] See reg. 2.

[3] See Towards Complete Independence, Address by President Kaunda to the UNIP National Council held at Matero Hall, Lusaka, 11th August 1969, Z.I.S. p. 39.

[4] For a discussion on the ineffectiveness of rent control, see chapter 8, pp. 537 et seq., infra.

with President Kaunda's 30th June 1975 announcement. On that date the President announced land reform measures which were to take effect immediately on 1st July 1975. They can be summarised thus:[1]

(1) Farmland:

All land held by commercial farmers under freehold title was converted into leasehold title for 100 years; and unutilised tracts of this land were to be taken over by the State.

(2) Land in Residential Areas in Cities and Towns:

Freehold titles to this land was converted into leasehold title of 100 years; all sales of vacant lands (excepting developments on land) were prohibited; and all vacant and undeveloped plots were to be taken over by either local authorities or the Central Government.

(3) Real Estate Agencies:

These were closed down from any further operations forthwith.

(4) Rent Control:

All blocks of flats for renting out to individuals, rented buildings owned by individuals whose value or cost had been realised, and all properties rented by Party officials and civil servants were to be taken over by local authorities.

This was the culmination of what hitherto had merely been declarations of intent. As early as 1970 the President had announced the government's decision with regard to the conversion

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[1] See Address by . . . President Kaunda to the National Council of UNIP, Mulungushi Hall, Lusaka, June 30-July 3 1975, Z.I.S., pp. 64-65 and pp. 67-70.

of title from freehold to leasehold. With the importance attached then to these reforms a sub-committee had been appointed to work out the machinery to implement the proposals. Nothing, however, immediately materialised to effect the proposals. The nearest approach to implementing this policy was the appearance in the One Party State Constitution, three years later, of provisions that any law implementing a comprehensive land policy or conversion of title from freehold to leasehold could not be inconsistent with private property interests.[1] No such law falling under these exceptions was, however, immediately enacted.

On house renting, the Party's thinking on phasing out private ownership of all rented properties had also been made clear. Delivering this message and the reason for it the President declared, "In future no individual will be allowed to build houses for rent. The question of accommodation, therefore, must henceforth be left to the State, with its institutions . . . This is a field in which there is extensive exploitation of the common man. We will not allow it."[2]

It is now necessary to appraise these reforms vis-a-vis the Party's theoretical basis and the machinery of implementation.

(i) The theoretical basis of the land reforms

The whole tenet of the reforms hinges on President Kaunda's thinking (and indeed that of the Party) that land must remain the

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[1] See s. 18(2)(y) and (z) of the Constitution.

[2] See A Nation of Equals, op. cit., p. 57.

property of the State, a premise which in no way departs from the traditional heritage. In fact in his announcement of the reforms, the President prefaced the decision with a reiteration of the Party's political line dwelling essentially on the ideology of "Humanism". In relation to land, the Party's conception so far as can be ascertained from the ideological text, albeit meagre, is this:

> Land, obviously, must remain the property of the State today. This in no way departs from our heritage. Land was never bought. It came to belong to individuals through usage and the passing of time. Even then the chief and the elders had overall control although . . . this was done on hehalf of all the people.[1]

Regrettably, of course, this does not adequately reflect on the concept of ownership. The chief and elders are regarded as being on par with the modern state vis-a-vis land ownership. The overall control the former had must necessarily be equated with some kind of ownership on behalf of the people. Whatever right an individual had in land must then be envisaged as less than full ownership. Hence the justification that absolute ownership must rest in the State.

This point of view which visualizes ownership as not vesting in the individual, such individual merely having a right of user, is more ably put by Tanzanian President Nyerere, ostensibly Kaunda's ally in political thought. Distinguishing African land tenure from

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[1] See K.D. Kaunda, Humanism and a guide to its implementation, Z.I.S., Lusaka, p. 14.

the Western conception of individual ownership, he says:[1]

> To us in Africa, land was always recognised as belonging to the community. Each individual within our society had a right to use the land because otherwise he could not earn his living . . . But the African's right to land was simply the right to use it; he had no other right to it, nor did it occur to him to try and claim one.

This conception which apparently sees a right of user in land as not equivalent to ownership does, however, overlook a more juristic perception of ownership. "A person has rights: ownership is the name given to one particular type of right . . .".[2] Singular though a right may be, one owns land who owns or has an exercisable right over such land. The quantity of rights is only of relevance in determining /in whom the greatest interest vests. To the extent, therefore, that the Nyerere proposition negates ownership of an individual by maintaining the distinction between community ownership and an individual's mere right of user, as though such a right were a mere licence, authorising that which would otherwise have been unlawful, it must, with respect, be impugned. If the Kaunda version, as it suggests, contemplates an individual's right as falling short of ownership, similar remarks are pertinent.

In fairness, however, a more juristic approach to this conception cannot be imposed on the two political exponents. It suffices

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[1] See J.K. Nyerere, Ujamaa-Essays on Socialism, op. cit., p. 7.

[2] See G.W. Paton and D.P. Derham, A Textbook of Jurisprudence, fourth ed., Oxford Clarendon Press, 1972, p. 522. Cf., G.W. Keeton, The Elementary Principles of Jurisprudence, 2nd ed., London, 1949, p. 73.

if their expositon can approximate itself to any legally intelligible concept. The Nyerere exposition appears amenable to an interpretation of superior-subordinate land relationship vesting the plenary title or allodium in the land in the community, the individual's right being derivative from and subordinate to that of the community. This definition and arrangement of interests has been acknowledged in African land tenure. Elias has thus visualised African tenure as being a complex of rights in that the rights of the individual members often co-exist with those of the group in the same parcel of land. The individual members, however, have definitely ascertained and well recognised rights within the comprehensive holding of the group. Depicting the extent to which an individual's right is derivative and subordinate, Elias observes: "The chief is everywhere regarded as a symbol of the residuary, reversionary and ultimate ownership of all land held by a territorial community".[1]

Reference to the rights of a chief is, however, deprecated for it wrongly assumes that all African societies have chiefs. The term 'corporate' to denote a person or group of persons is more fitting as it would relate to acephalous societies too. To the extent, honetheless, that the local conditions can show the existence of such a setting, this conceptual framework must be accepted. With this proviso the insistence by a modern African State that it places itself in this akin social setting, albeit modified, as the only substitute for the community, chief or headman,

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[1] See T.O. Elias, The Nature of African Customary Law, Manchester University Press, 1956, p. 164.

is, it is submitted, quite a sound justification.

Turning to the Zambian situation, however, this justification can only be tenable if it can be shown that such has been or is the case in customary land tenure. In this regard it is submitted, with respect, that customary land tenure in Zambia has never been and is not such as would justify the generalization that an individual's land rights were or are in all instances derivative from the community[1] for which the State can purport to be the substitute. The only available argument consistent with "heritage" relates to the prohibition of land sales. There is evidence that customary law does not recognise that land, the bare earth, is a saleable commodity for a cash consideration.[2] The tenor of this proposition of course, can only stand on the premise that customary law, in this respect alone, is not amenable to the pressures exerted by a cash economy.

With these remarks we may now conclude by examining the machinery to implement these land reforms.

(ii) An appraisal of the machinery of implementation

(a) Methods of implementing land reforms

The Land (Conversion of Titles) Act[3] is the main legislation attempting to bring about these reforms. In achieving

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[1] See chapter 2, pp.142 et seq., supra.

[2] Ibid.,pp. 149 et seq.

[3] Act No. 20 of 1975. See Appendix 1.

the cardinal theme that land must remain the property of the State, s. 4 of the Act provides:

> All land in Zambia shall vest in the President and shall be held by him in perpetuity for and on behalf of the people of Zambia.

To give force and meaning to this provision it is supplemented by the prohibition of any transaction or dealing in land without the consent of the President. S.13(1) thus provides:

> Notwithstanding anything contained in any other law or in any deed, instrument or document, but subject to the other provisions of this Act, no person shall subdivide, sell, transfer, assign, sublet, mortgage, charge, or in any other manner whatsoever encumber, or part with the possession of, his land or any part thereof or interest therein without the prior consent in writing of the President.

The Requirement of consent and its consequences.

The significant consequences of this consent are that the President in granting it can attach such conditions and terms as he thinks fit to be binding on all persons and in so doing shall not be questioned in any court or tribunal.[1] As can be observed the vesting of the legal ownership in the President is not titular but is attended with all the incidents consistent with such ownership. Primarily the President as owner of the land is the only person with the absolute power of disposition. No other disposition can take effect without his consent. In the exercise of this power the President may fix the maximum amount that may be recieved, recovered or secured in any land transaction.[2] This

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[1] See s. 13(2), Act. No. 20 of 1975.

[2] Ibid., s. 13(3).

includes an amount of debt or advance in respect of a mortgage or charge to be created on the land.[1] And in determining this amount there is this important proviso:

> Provided that in fixing any amount under this subsection no regard shall be had to the value of the land apart from the unexhausted improvements thereon.

In excluding the value of land as an irrelevant factor and in arming the President to veto any land transfer by withholding his consent, s. 13 accomplishes the land reform resolution (a) that no more sales of vacant and undeveloped land are to take place in urban areas and in part (b) that such land should be taken over by local authorities. In effecting (a) the President will certainly not sanction a cash consideration as in fixing the price regard for the value of land excepting unexhausted improvements is to be ignored.

The natural effect this will have on present owners of vacant land is that they will be discouraged to effect any transfer of such land because there is no economic incentive. If this situation is not altered, there would be immense difficulties with the scramble free land is likely to invite. It is probably in this context that (b) above can be useful.

The takeover of vacant lands and rented properties.

The takeover by local authorities of vacant land is the only effective way of disposing of such land. In this regard, however, the Act is lacking. All that the Act achieves is a no sale situation but cannot compel a private transfer or takeover by a local authority. In the event of private negotiations to effect transfer failing to culminate in an agreement,ultimate resort can only be had to compulsory acquisition

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[1] See s. 13(3)(d), Act No. 20 of 1975.

without compensation for which the Lands Acquisition Act[1] provides the machinery.

In this respect the transfer of rented properties from private ownership to the State through its institutionscan also only be effected by compulsory acquisition in the event of failure in private negotiations. Compensation would, however, here be in issue as developed land is not similarly treated as unutilised and undeveloped land.[2] In addition to this, owners of vacant land and rented properties who are leaders can be compelled to transfer their land by virtue of the provisions of the Leadership Code. Those, who besides being leaders are also Party officials are in addition amenable to sanction through the Party disciplinary machinery. For Party members a directive to surrender and transfer rented properties is a Party instruction disobedience of which can invite expulsion from the Party.[3] Surrender and transfer in these circumstances may well be less onerous than inviting political incrimination.

In the aspects just indicated the Act is lacking in implementing (b) and will have to be supplemented by other enforcement machinery. There are further practical difficulties in the provisions of s. 13 of the Act.

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[1] See Part IV, relating to compulsory acquisition without compensation of unutilised and undeveloped land, Lands Acquisition Act, cap. 296, Revised Laws. (The Act is discussed more fully in chapter 8, infra.)

[2] Ibid., Parts II and III.

[3] For obligations which Party membership entails, see chapter II particularly s. 6(1)(i) of the UNIP Constitution. For Party rules see Ibid., Standing Orders particularly s.5(1)(d), Annexture A.

Definition of land and the effect of the Act on land under customary law

In restraining any transactions without the President's consent, s. 13 applies to land; and land as defined in the Act includes "land of any tenure".[1] This raises the question whether these provisions apply equally to land under the customary law sector. On strict construction this appears to be the position thereby requiring any land transaction under customary law to have the President's consent. The essence of the President's power is to regulate those unfair practices affecting land transfers as are not in accord with the Party line. It can hardly be suggested that land under customary law precipitated government concern. On the contrary it was freehold tenure which is said to have done so. The question posed with regard to land under customary law cannot be regarded as hypothetical if sales of land in this sector are taking place.[2] Viewed in this context, the practical difficulties of supervising dealings in land under customary law are real.

What makes the obtaining of consent for any dealing in land enforceable is the existence of a registration machinery for such land interests. Under the provisions of the Lands and Deeds Registry Act,[3] which has not been extended to interests under customary law, any document which purports to grant any interest in land for a term longer than a year must be registered. Failure to

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[1] See s. 3.

[2] See chapter 2, pp. 149 et seq., supra.

[3] See Part II, particularly ss. 4 and 6, cap. 287. Revised Laws. (Discussed in more detail in chapter 9, infra.)

register renders any such document and any interest thereunder null and void. This in itself is a sufficient sanction obliging parties to any dealing to comply. In complying with this registration process, consent of the President cannot be dispensed with unnoticed by the Registrar of Lands and Deeds. Thus in practice the requirement of having consent would be enforced.

The absence of a similar registration machinery for land interests at customary law renders transactions such as sales impossible to detect and restrict. It might of course be suggested that on the assumption that customary law does not recognise sales, the occurrence of sales, if any, would be taken care of under that law. But if, as has been observed, scarcity of and pressure on land in a money economy does create an exchange value,[1] recognition of this situation in customary law is apt to cause a variance in policy between the two categories of land. If this is not desired, it is well to mention that machinery be sought to bring the customary sector under constant supervision, no doubt a cumbersome task.

We may now look at title conversion, a central theme of the new land policy.

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[1] See C.M.N. White, "A Survey of African Land Tenure in Northern Rhodesia", J.A.A. Vol. 12, No. 1, p. 5. Cf., Lord Lugard, The Dual Mandate in British Tropical Africa, op. cit., pp. 280-281.

(b) Analysis of the titles conversion legislation

S. 5 of the Act converts all freehold titles or land held in fee simple and all leases granted by or held of the President or deemed to have been so granted or held for a period longer than a hundred years into a statutory leasehold. Those leases deemed to have been granted by or held of the President are leaseholds granted through the head-lease system,[1] whereby the State granted a lease to a local authority, which in turn sublet the lease, with a reversionary remainder before determination, to a tenant. S. 6 describes a statutory leasehold as being a hundred years effective from the 1st July 1975. Any lease of which the State through the President is not lessor or grantor becomes a sublease held from the statutory leaseholder all subsisting conditions and terms to continue in force to the extent not inconsistent with the statutory lease.[2]

In interpreting the effect of these provisions the Tanzanian legislation, which if not relied on, ought to have been looked at,[3] is quite useful.

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[1] For the head-lease system in the country till discontinued, see Handbook to the Federation of Rhodesia and Nyasaland, W.V. Brelsford (ed.), London, 1960, p. 232. For the recommendation to terminate the head-lease system, see Report of the Land Commission, August 1967 op. cit., pp. 123 et seq.

[2] See s. 8.

[3] For the Tanzanian influence in title conversion, see R.W. James, "Mulungushi Land Reform Proposals -- Zambia". E.A.L.R., op. cit., p. 128.

Comparisons between the Zambian and Tanzanian titles conversion legislation.

Under the Freehold Titles (Conversion) and Government Leases Act[1] in Tanzania, all land which immediately before the appointed day was vested in any adult person in fee simple in possession, which term includes any freehold estate, vests in such person only a 99 year lease with the freehold interest extinguished.[2] The effect of this conversion in Tanzania is to create a government lease of which the lessee is a government tenant. In Zambia the same end has been achieved by vesting the land in the President with all lesser interests being held from him. Thus in essence the exercise is the same although there is a difference in formula. In the conversion process, the Zambian legislation concentrates also on subsisting leases for a period longer than a hundred years, a lease quite peculiar to Zambia in contrast to Tanzania.

The formula for the downgrading of interests subsisting prior to the passage of this legislation in both countries is open to criticism. In Zambia a sublease held from the statutory leaseholder which had previously a term of more than one hundred years has for its duration now only one hundred years less one day. The proviso to s. 8(1) makes this quite clear when it declares:

> Provided that the term of any such sublease, unless it expires earlier, shall expire one day before the expiry of one hundred years . . .

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[1] Act No. 24 of 1963.

[2] Ibid., s.5(1). Cf., J.P.W.B. McAuslan, "Control of Land and Agricultural Development in Kenya and Tanzania", in East African Law and Social Change. African Contemporary Monographs No. 6, p. 181.

Thus for instance, where A, owner of Blackacre in fee simple, granted B a lease in excess of one hundred years before 1st July 1975, A now has a reversionary interest of only one day and B a statutory lease. Under the Tanzania Conversion Act the same result is achieved by the creation of a "derivative lease"[1] which is a lease or sublease which could have been granted, inter alia, by an individual before the appointed day. In this case too, if such derivative lease has for its residue on the appointed day a term exceeding ninety nine years, such residue "shall be diminished to the statutory term" less a nominal residue of ten days.

The objection, which apparently might have been an oversight, is that such an arrangement is more favourable to the lessee than lessor. A more fair rearrangement of interests could have been achieved without defeating the object of conversion. Under previous arrangements such owner of a fee simple estate in granting a lease could not reasonably have expected a reversionary interest of only one day or ten days of the residue. James, interpreting this arrangement, sees the nominal residue as maintaining the status quo of landlord and tenant between the grantor and grantee of the lease before the appointed day. In this regard he observes:

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[1] See ss. 4 and 7(b).

> . . . The reservation of this nominal reservation allows the reversioner, by virtue of it being legal, sufficient power at law to control the property in the sub-tenants' hands subject to the overriding rights of the Republic. The reversion although nominal, maintains the status quo of a landlord and tenant relationship and leaves the tenant only an underlessee. The government lessee continues to have the same control over his tenant as he had before the passing of the Act and further he has an interest expectant to take effect in possession on the premature determination of the sub-lease.[1]

It is submitted, with respect, that the nominal reversion grants the statutory lessor or tenant no more power at law to effect control over the subtenant than the original lease provided; and that power is only to be derived from the terms and conditions of the lease to the extent that they have not been superseded by legislation. Neither does the reversion provide the basis for landlord-tenant relationship for, in seeking a remedy or redress (in the event of a tenant's default), the landlord cannot rely on the reversion. Both Acts could in fact have recognised the subsisting relationship without any provision for a nominal reverter. The reverter however, it may be suggested, is necessary to facilitate administratively the State's ultimate reversion at the determination of the statutory term.

Besides the interest expectant on premature termination of the sublease, which is independent of the statutory provisions,

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[1] See R.W. James, Land Tenure and Policy in Tanzania, op. cit., p. 149.

the statutory tenant, it is submitted, ought to have been given a longer residue by a proportional diminution of the sub-lessee's interest. Where the previous residue of the interest granted was a specific number of years in excess of the statutory term, this residue could still be retained by reducing the sub-lease on a pro rata basis. Thus where A had a lease of 999 years of which 200 years were sublet to B, the diminution of 999 years to a statutory term need not ignore A's residue of 799 years. Of course where a freehold estate is involved, such as a fee simple, the pro rata diminution must be difficult although a recognition of this superior interest could still help in arriving at an arbitrary figure.

For the long leases although the suggested formula could be employed on a private footing, the original lessor certainly lacks an enforceable right as the lessee is well covered under the Zambian Act. In this regard s.18 provides:

> Save as provided in this Act, no compensation shall be payable by the President or by any person in respect of the conversion of the nature of title in land or in respect of the extinguishment, restriction or abridgement of any rights or interests in or over land resulting from the operation of the provisions of this Act.

The Act does not in fact provide any compensation in any of the provisions.

Although the Tanzanian Conversion Act ignores this anomaly like its Zambian counterpart, it does nonetheless recognise possible hardship in the case of beneficial interests created

by land settlements under the Settled Land Acts, 1882 to 1890. All land settlements on the appointed day excepting land vested in a person for a fee simple in possession become vested in a trustee of the settlement for a statutory term and thereupon every freehold legal estate created under settlement ceases to subsist at law and is converted into an equitable interest in the term vested in the trustee.

The likely hardship on beneficiaries is that subsisting limitations or trusts of the settlement created prior to this conversion could not with any certainty be modified commensurately to the diminution of the settlement interests. To cater for this situation the Tanzanian Conversion Act provides:[1]

> Any person entitled to any beneficial interest . . . created by or under a settlement . . . may apply to the Court for an order varying the limitations or trusts of the settlement.

Thus the court has discretion on this application to vary, revoke and substitute the limitations or trusts if in its opinion it is satisfied that the conversion or diminution affects the relative values of the beneficial interest.[2] This appears a commendable and flexible formula for readjusting such interests within the conversion scheme. No similar provision exists under the Zambian conversion legislation. Although it might be conceded that the

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[1] See s. 9(1).

[2] Ibid., s.9(2).

occurrence of settlements in Zambia is restricted by the Trusts Restriction Act,[1] this Act, however, does not deny the existence of trusts or settlements in those few instances which are recognised. Provisions like the Tanzanian model could have very well been extended to such cases.

Another category of interest, which is adversely affected without being taken into account under both the Zambian and Tanzanian schemes, is that of the money-lender and lending institutions. Under the Zambian Act, a mortgage or charge now attaches to unexhausted improvements on the land and is thus deemed extinguished in regard to land apart from the unexhausted improvements.[2] The disadvantage to the money lender lies in the fact that a sum of money was lent at the time of the mortgage on the security of the land for the value it had. To exclude the value of land from unexhausted improvements makes the securing of money lent, in the event of default of payment, commensurately diminished. The sale of land including improvements is, however, permissible in securing the now diminished sum. It is provided inter alia in s. 10(2):

> Nothing in subsection (1) shall be construed as debarring the sale or transfer of any land together with the unexhausted improvements thereon in the exercise of any right or power derived from or arising out of any mortgage, charge . . .

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[1] Act No. 64 of 1970, discussed in chapter 7, infra.

[2] See s.10(1).

This assurance, however, appears to be of very limited use as it does not enable the realisation of the security to the extent of money lent. There can be no doubt, nonetheless, that this situation is deliberately created to conform with the policy of no sale of vacant and undeveloped land.

However unfair these anomalies may appear in the diminution of property interests, it appears difficult to criticise or attack them on any constitutional footing. The Zambian Constitution appears adequately framed to provide validity for the Act. As has already been indicated, nothing done under the authority of any law can be impugned as contravening the right to property to the extent that such law gives power to the President to carry out a comprehensive land policy or converts titles to land from freehold to leasehold. Pursuant to this constitutional authority, the Act expressly abrogates any property interests inconsistent with its provisions. In this regard even the strict constructionist view of the common law (which subsists in Zambia to the extent that the common law applies), that a statute which impliedly deprives an individual of his property ought to be construed in favour of such individual unless the deprivation is expressly provided for,[1] seems untenable.

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[1] See Maxwell on the Interpretation of Statutes, twelfth ed., London, 1959, pp. 251-256, particularly pp. 251-252.

On the effect of a mortgage on conversion of title in Tanzania, it appears to correspond to the Zambian provisions although with less clarity. Acknowledging subsisting interests attached against the converted land, s.6(1) of the Act provides:

> The extinguishment, conversion or diminution of any interest in accordance with the provisions of this Act . . . shall not destroy or defeat any other interest . . . subsisting in or against any land which, prior to the appointed day, was vested in any person . . . but every such other interest shall, according to its nature, title and extent. . . (b) be itself converted and diminished to the extent, if any, necessitated by any conversion or diminution of the interest . . . against which it subsists . . .

A mortgage being an interest in or against land is certainly included in this provision. Its diminution,however, is in respect of a leasehold interest only. It does not appear excluded from land and improvements thereon as under the Zambian provisions.

One of the aspects for which the Zambian Act can be commended is the provision for renewal and compensation in the event of termination of a lease. A statutory leaseholder has a mandatory right of renewal of the statutory lease so long as the terms, conditions and covenants of the lease, the breach of which might render the lease liable to forfeiture, have been observed.[1] This right of renewal is, however, not available to a lease granted after the commencement of the Act, the duration of which is for a specified term of years not exceeding one hundred years. Renewal at the expiry of this lease is at the discretion of the

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[1] See s.7(1).

President.[1] As the Act is silent on the renewal of leases of lesser periods than one hundred years previously granted by the State, it would appear that extension of such leases is also at the discretion of the President. There appears, however, no justification for conferring an automatic right of renewal on the statutory lease alone. In Tanzania renewal of a government lease is at the discretion of the Commissioner,[2] and a previous perpetual right of renewal has been expressly extinguished.[3] Notwithstanding this discretion in the event of forfeiture at the instance of the government, the tenant could obtain redress from the Land Tribunal.[4]

As to compensation under the Zambian Act, on the determination of either lease by effluxion of time, the leaseholder or any person beneficially entitled to the land at the time of determination shall be recompensed a just and fair sum in respect of all unexhausted improvements.[5] Under the Tanzanian Act, the more usual mode of provision in respect of improvements on the land is to allow the tenant on determination of the lease to "enter upon the former leased land and sever and remove any fixture which he might have severed and removed prior to the termination of the

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[1] See s.(12)(i).

[2] See s.16(1), Freehold Titles (Conversion) and Government Leases Act.

[3] Ibid., s.7(2).

[4] Ibid., s.29.

[5] See s.16.

lease".[1] The fixture contemplated here does not seem to correspond to the common law concept of severable and permanent fixtures. The criterion of fixture under this Act is that "the fixture possesses a special value for the tenant . . .".[2] It thus appears that even a permanent fixture could be removed on condition that damage caused by severance or removal is repaired.[3] The only time, however, that compensation for improvements could be paid to a tenant is when on determination of a government lease a right of occupancy is granted to a rightholder, who would have to furnish this compensation to a previous tenant.[4]

This facility of conferring a benefit on a leaseholder for unexhausted improvements should be noted as a significant right unknown even to the common law. Under the common law, "a tenant had no right to exact compensation from his landlord for any improvements which he might have made during his tenancy; except under an express agreement with the landlord or by virtue of the custom of the country where the holding lay".[5]

The right to unexhausted improvements, under both Acts operates notwithstanding forfeiture. This in the Zambian case

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[1] See s. 23(1).

[2] See s. 23(2).

[3] See s. 23(3).

[4] See s. 22(1).

[5] See R.A. Eastwood, Williams on Real Property, 24th ed., London, 1933, p. 129.

is, however, limited to statutory leases. There is no express provision with regard to non-statutory leases.

In all, the significant achievement of the Zambian Conversion Act is that it has marked a departure from past policy. Whether, however, Zambia will go as far as Tanzania in the passing of the Government Leaseholds (Conversion of Rights of Occupancy) Act, 1969[1] remains to be seen. This Act in Tanzania supersedes the 1963 Conversion Act and rests on the argument that administration of leases was technically cumbersome because of the lessee's legal rights making the task of application generally difficult.[2] The conversion of leases for the unexpired term of years into rights of occupancy under the Land Ordinance does not have the effect of extinguishing interests previously conferred. Thus all subsidiary interests, such as derivative leases, mortgages and any other encumberance, still subsist and attach to the rights of occupancy.[3]

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[1] Act No. 44 of 1969.

[2] See R.W. James, Land Tenure and Policy in Tanzania, op. cit., p. 164.

[3] See J.S. Read in Annual Survey of African Law, Vol. III, 1969, N. Rubin & E. Cotran (ed.), p. 146.

PART III

THE CHOICE OF LAW PROBLEM IN LAND DEALINGS

In this part we highlight the vacuum created by retaining pre independence legal provisions which are no longer suitable in regulating transactions in land. We explore the problems in the choice of law resulting from the interaction between the various systems of law. We conclude by indicating alternative provisions of law that might help remove uncertainties and hence facilitate dealings in land.

CHAPTER 7

THE LAW APPLICABLE TO DEALINGS IN LAND

In this Chapter we attempt to indicate and appraise the unsatisfactory state of legal provisions which at present apply to transactions and devolution of interests in land. The inadequacies in the choice of law rules create uncertainties as to the law applicable in a conflict of law situation. The problem has been brought about with the removal of restricting land transfers within a racial group. It will be recalled that the evolution of Reserves, Trust land and Crown land was designed to create a land tenure with specific categories of interests reserved exclusively for members of either African or European race. This state of some kind of apartheid in land classification effectively curtailed a conflict of law situation arising from the creation of land interests alien to the inherent nature of the class of land involved. With Independence the situation has changed. New factors have emerged: discriminatory practices of confining land transfers within a racial group have disappeared; and the Zambian has now, inter alia, access to wealth granting him a power to acquire land outside his ethnic boundaries [1] while at the same time submitting in large part to his customary law. [2]

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[1] For an acknowledgement of the post independence scramble for farms along the line of rail by wealthy indigenous Zambians, see N.A. Debates, 27th February 1973, session 10th January-2nd March 1973, col. 1641.

[2] Cf., A.M. Susman, "State Land and Customary Law: The Application of Customary Laws of Succession to Land held under 'English' Tenure", Z.L.J. Vol. 5, 1973, at p. 127.

Regrettably, however, the law remains the same as that before Independence.

The artificial insulation between the different systems of land laws obtaining in the country meant that there was no call for special rules to be laid down governing conflicts between transactions in the two systems in land. On the contrary, legislative provisions anticipated primarily a conflict of law in purely inter-personal relationships. In this regard the law merely provided for such occurences between the races. Even between Africans there is virtually no anticipation that problems of land tenure could involve more than one system of customary law.

This Chapter will, however, reveal that the reception of English law and the existence of different systems of customary law do pose a situation which invites urgent attention to provide more specific rules of choice of law. It is proposed in this Chapter to review the reception and application of English law and then examine the choice of law problem within the context of the local statutory provisions. Having done this the Chapter then proceeds to suggest how the law can be amended.

At the outset, we might, however, summarise the systems of law that apply to existing categories of land. In the case of Reserves and Trust land, as indicated being essentially interests under Customary law, it is this law which is applicable. In the case of leasehold the general law, a term which also denotes the residuary English common law, applies. The other body of law in this category

is to be found in local legislative enactments.

A. Reception and application of English law

Until recently in matters of land outside the customary law domain, English law was heavily relied on. There is no doubt that conveyancing practice followed the English form and thereby conveyed interests under English tenure. But this was not without authority for English law, like in many other African commonwealth countries, was imported into Northern Rhodesia as received law.

The standard formula embodied in the Zambian reception clause reads: [1]

> Subject to the provisions of the Zambia Independence Order, 1964, and to any other written law --
> (a) the common law; and
> (b) the doctines of equity; and
> (c) the statutes which were in force in England on the 17th August 1911 (being the commencement of the Northern Rhodesia Order in Council 1911); and
> (d) any statutes of later date than that mentioned in paragraph (c) in force in England, now applied to the Republic, or which hereafter shall be applied thereto by any Act or otherwise;
> shall be in force in the Republic.

While this mode of reception should be expected to pose problems of application, courts in Zambia never seem to have had any such experience. While the question has been posed as to whether the terminal date applies to both the common law and doctrines of equity, [2] Zambian courts have applied English decisions

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[1] See s.2, English Law (Extent of Application) Act, cap. 4, Revised Laws.

[2] See K. Bentsi-Enchill, "The Colonial Heritage of Legal Pluralism", Z.L.J. Vol. 1, no. 2, p. 10.

although in principle acknowledging the persuasive value of such judicial opinions. [1] While courts in West Africa notably have wrestled with the difficulty of determining which are the English statutes of general application at the various territorial/terminal dates, [2] courts in Zambia never seem to have had to face this consideration. [3]

As for the wholesale application of English law prior to and after the terminal date, there is of course an earlier justification in the different but significant wording of the preceding reception clause. The 1911 Northern Rhodesia Order in Council, in conferring both civil and criminal jurisdiction in the High Court, declared as to the application of English law: [4]

> Such civil and criminal jurisdiction shall, as far as circumstances admit, be exercised upon the principles of and in conformity with the substance of the law for the time being in force in and for England . . .

This provision was restated in the 1924 Order-in-Council in defining the jurisdiction of the High Court. [5] Prior to 1963, however, the High Court Ordinance [6] contained also a reception clause of English law in similar words as the current version. This clause was,however,

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[1] For an exposition on the role of English precedent, see W.L. Church, "The Common Law and Zambia", Z.L.J., Vol. 6, 1974, pp. 23-54, particularly, pp. 23-39.

[2] See A.N. Allott, New Essays in African Law, op. cit., pp. 48 - 54 ; and K. Bentsi-Enchill, "The Colonial Heritage of Legal Pluralism", Z.L.J. op. cit., pp. 13 et seq.

[3] See for example Russell v. Attorney General 1969/HP/No. 499 (unreported) where the English Fires Prevention (Metropolis) Act 1774 was applied without much discussion as to the criteria of a statute of general application.

[4] See Art. 21(2).

[5] See Art. 27(2).

[6] See s.11, High Court Ordinance No. 18 of 1933.

subject inter alia, to the Order-in-Council, which at the time was the 1924 Order. In Kayela v. Botes, [1] confronted with the question whether English law (which included the post 1911 period) was rightly applied to the territory, Woodman, A.C.J., finding no circumstances of exclusion or modification as would fall in the words: "as far as circumstances admit", ruled that the current English law on the issue was applicable.

With the deletion in the High Court jurisdiction to apply English law so liberally, there can now be little justification to be unmindful of the terminal date: 17th August 1911. Thus the post 1911 common law and doctrines of equity are not applicable to Zambia. [2] As for the absence of difficulties in applying the pre 1911 English statutes, this might be explained by the lack of insistence in the current reception clause, or indeed any other previous one, that such English statutes be of general application, as expressly stipulated in other African common law jurisdictions. [3] Whether reference to English statutes should be interpreted as meaning statutes of general application is a matter upon which there is no Zambian judicial elaboration. The rationale, however, for an English statute of general application -- suitability for general application outside England [4] - may justify such inference. On this

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[1] 4.N.R.L.R. 183.

[2] For a similar conclusion on the effect of the terminal date, see A.N. Allott, "The Authority of English Decisions in Colonial Courts", [1957] J.A.L. Vol. 1, No. 1, pp. 26-27.

[3] See s.83, Courts Ordinance, cap. 4, Laws of the Gold Coast, 1951; s.14, Courts Ordinance, cap. 211, Laws of Nigeria, 1948; s.37, Courts Ordinance, cap. 7, Laws of Sierra Leone; and s.2, Law of England (Application) Ordinance, cap. 3, Laws of Gambia, 1955.

[4] See A.N. Allott, New Essays in African Law, op. cit., p. 50.

basis an English local statute must by its very nature be quite unsuitable for Zambian conditions or indeed any other African country.

Whatever unsatisfactory result may be or might have been obtained from the reception of English law, the answer seems quite obvious -- legislative pruning. The reception clause itself has quite conveniently been made subject, inter alia, to any other written law.

Besides the latitude in the reception clause, courts have also readily applied English law because of being acquainted with this law. In re Estate Oosthuizen [1] and In re the Estate of Trombas [2] are illustrative of this situation. In the first case, a testator devised property to his children as tenants in common and added a direction that none of them was to sell his or her share without the consent of the others. Upholding the common law principle of freedom of alienation by striking out the limitation on sale, Robinsons, J., held:

> In law it is clear that tenants in common have a unity of possession, but a distinct and several title to their shares. A tenant in common is, as to his own undivided share, precisely in the position of the owner of an entire and separate estate. It is also clear that a power of alienation is necessarily and inseperably incidental to an estate in fee. If therefore, lands devised to A and his heirs, upon a condition that he shall not freely aliene, [sic] the general rule is that the condition is void.

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[1] 4 N.R.L.R. p. 150.

[2] 4 N.R.L.R. p. 154.

The second case too contained a similar ratio decidendi on freedom of alienation. In this case, the testator made a will leaving one shilling to his eldest son and the remainder of his estate "to be divided equally" between his other two children. To this however was attached the condition "that their sole heirs and beneficiaries shall be their sons in respect of any property or other benefits that may derive from my estate". Rejecting this condition Palmer, A.J. held: [1]

> Except for the shilling . . . the rest of the testator's estate is given . . . absolutely and then subsequently there is a condition which attempts to cut down this gift. This condition, if enforced, would seem to have the effect of restricting the right of alienation. If it does this the condition is repugnant and the gift takes effect absolutely.

James has criticised this importation of the common law rule without questioning its suitability to local circumstances. Commending the West African Courts in contrast, he remarks: [2]

> . . . One finds that the West African Courts have adopted a wise view in that if it is an African who left property and has directed that the property shall not be sold, the Courts may find that it was his intention to leave property as family property, particularly if the beneficiaries are of a class which could be subject to that type of ownership.

James' observation certainly underscores the need for a cautious reception of English law. To the extent that the two Zambian cases create a precedent, it must be recorded that it is an unfortunate one. But as the testator and beneficiaries in issue

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[1] at p. 155.

[2] R.W. James, Land Tenure and Policy in Tanzania, op. cit., p. 53.

were not subject to or indeed did not subject themselves to any other law than English law, the application of that principle of law to the facts before the court was, it is submitted, quite appropriate.

Now, however, the application of English law to that class of land to which it was previously exclusively applicable has been severely curtailed by the effect of statutory enactments. The combined effects of the Trusts Restriction Act [1] and the Land (Conversion of Titles) Act have substantially reduced the scope of operation of English law. Let us now look at the effects of these two Acts on the application of English law.

(i) The effect of the Trusts Restriction Act

This Act states as its intended objective "to restrict the creation of settlements, trusts and future interests". This restriction is effected by provision in s.3 which states:

> Save as hereinafter provided, after the commencement of this Act no person shall --
> (a) settle any property; or
> (b) limit any property in trust for another; or
> (c) make any disposition whereunder property vests in possession at a future date.

S.4 contains exceptions to this prohibition, notable among which are:

> (a) a disposition whereunder property is limited to, or in trust for, a minor on his attaining a specified age not exceeding twenty-one years;

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[1] No. 64 of 1970.

(b) a disposition whereunder property is limited to, or in trust for, a widow, either for her life or for some other period, with a gift over in favour of children, if such disposition contains a provision that on the re-marriage of the widow the property shall forthwith vest beneficially in such children;
(d) a trust in favour of or for the benefit of a person of unsound mind or a minor;
(i) a trust terminable at the will of the beneficiary.

Under these limited exceptions future interests can be created. Taking the exception of a trust for a minor this creation is limited to take effect within twenty-one years of such minor's age. The consequences of creating a trust to take effect outside the twenty-one years limit is that the disposition "shall be treated for all purposes as if it had been limited by reference to the age of twenty-one years". [1] Thus such a trust creation is not void but takes effect within the permitted period. As for the widow's trust, it is important to note that this can only be created on condition that there is a gift over to children and that these become beneficially entitled to the residue on the re-marriage of the widow. In other words a trust merely created for the widow shall not take effect and must inevitably be void. It is alarming, however, to observe that no similar facility is available at the instance of the wife for the husband. The justification for this appears hardly available. It may well have been a drafting oversight.

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[1] See s.7.

A trust in favour of a person of unsound mind or a minor appears unlimited in point of taking effect. There is just no express limitation in the creation of this trust. A contradiction here arises in referring to a minor. In the other instance it has been seen that such a trust must take effect within the minor's age limit of twenty-one years. If the intent of the Act is to restrict creation of future interests of a minor in the manner indicated, then the absence of limitation in respect of this minor defeats this intent. There is good sense in not imposing any restriction in the case of a person of unsound mind for the period of mental incapacity, however long this may be, is what necessitates the creation of such trust. It is suggested hence that the unlimited duration of such trust be confined to a person of unsound mind alone. In fact there was no need to make provision for minors in <u>two</u> subsections.

As for the lack of limitation in point of time in case of a trust terminable at the will of the beneficiary, the presumption, which prompted this relaxation, must be that the nature of this trust is an adequate limitation in itself. A beneficiary would desire the maximum benefit of the interest created and would thus terminate any restricted trust to realise this benefit.

An infringement of the provisions of the Act will certainly render any such creation ineffective. Thus s.5(1) (c) stipulates: "a disposition whereunder property vests in possession at a future date shall be ineffective to create or vest any such interest".

But the consequence of an ineffective transaction is not to divest the property interest of the immediate beneficiary who becomes vested of such interest immediately and without restrictions. This effect of the Act is made clear by provisions of s.5(1) which declares:

> (a) a settlement shall have effect as a disposition in fee simple or absolutely, as the case may be, to the tenant for life;
> (b) a trust shall have effect as a disposition in fee simple or absolutely, as the case may be, to the beneficiary.

Thus as to (a), the effect of the Act would have been to vest a fee simple absolute in a life tenant where the remainder was to vest in another beneficiary at a future date. For example where A was seised in fee of Blackacre for which he made the following grant -- to B for life remainder to C and the heirs of his body, B would have been immediately vested with a fee simple absolute with the remainder failing. As to (b), any trust instrument which created successive future interests for various categories of beneficiaries would have vested an interest in fee simple absolute in the first beneficiary. Thus where A was a fee simple owner of Blackacre and by trust instrument created these interests -- to B in trust for C during his life; and on his death B to stand possessed for D for his life, would have vested a fee simple absolute in C with the legal interest in B and subsequent equitable interest in D failing.

Thus the effect of the Trusts Restriction Act has been practically to make all pre 1911 English future interests obsolete.

In this regard the well known case of Marapodi & Others v. Anderson & Another [1] declaring the rule in Whitby v. Mitchell, better known as the rule against perpetuities, applicable to Northern Rhodesia is no longer good law. In this case Patterson, C.J., quoted Megarry and Wade's restatement of the rule with approval:

> "Stated in its simplest form, the rule was as follows:- If an interest in reality is given to an unborn person, any remainder to his issue is void, together with all subsequent limitations. Thus if land was limited
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> 'to A for life, remainder to his daughter for life, remainder to her children and their heirs (A having no daughter at the time of the gift),
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> the life estates of A and his daughter were valid but the remainder to the daughter's children was void. Further, if the children had instead been given mere life estates, followed by a fee simple in favour of B, the gift to B was void as well as the gift to the children."

The point of contrast between the two types of limitations as to future interests is that almost in all cases where a future interest could have passed under the rule against perpetuities, it would have offended the Trusts Restriction Act; while in those rare instances, notably a trust for the widow with remainder to the children, the interest would have passed under the Act but would have offended the common law rule if the time involved were too remote. In this limitation of the common law, the Act has been superseded also by the land (Conversion of Titles) Act. Thus reference in provisions of the Trusts Restriction Act to an interest in"fee simple or absolutely" must now be substituted by a leasehold

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[1] 1961 R & N.L.R. 262 at p. 266.

interest. The Trusts Restriction Act does, however, bring the provisions in regard to family property more in line with the customary law of succession and less like English law.

(ii) The effect of the Land (Conversion of Titles) Act 1975

The abolition of freehold tenure by this Act extinguishes all its incidents, statutory or common law. With regard to settlements and trusts of land, this Act diminishes the affectiveness of these devices. Settlements and trusts have been, inter alia, devices of assigning interests in land by a process of carving out lesser interests from the greatest/interest one has and postponing the taking effect of any such interest to some future date for those intended beneficiaries.

The historical evolution of land settlements (within which context the common law has been inherited in Zambia) clearly indicates that the motive for such settlements was to tie up the land within succeeding generations of a family. This process of tying up assumed a freehold estate from which lesser interests could be carved out and limited to specific beneficiaries without exhausting the entirety of the interest; thereby preventing land being disposed of outside a family. Burn's summing up of land settlements in the historical perspective is here pertinent: [1]

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[1] See E.H. Burn, Cheshire's Modern Law of Real Property, op. cit., p. 70. Cf., D.B. Parker and A.R. Mellows, The Modern Law of Trusts, 3rd ed., London, 1975, pp. 2-3.

> . . . The inclination of a fee simple owner, an inclination deeply rooted in parental anxiety and distrust, is to make what is called a settlement by which he retains the benefit of ownership during his own life, but withholds the entire ownership in the shape of the fee simple from his descendants for as long as possible by reducing them, one after the other, to the position of mere limited owners . . . The fee simple of infinite duration is divisible into shorter periods of time each of which may be allotted successively to a number of persons, with the result that while these periods are running there is no person able to dispose of the entire ownership.

The return to leasehold estates under the Act renders the use of trusts and settlements impracticable. In this practical limitation of the common law, this law only remains relevant to incidents of leasehold tenure. Thus in the creation of future interests only a trust for the sale of leasehold property appears possible. But this again would have to be within the contemplation of the Trusts Restriction Act. Of more relevance, however, to the common law will be the regulation of the contractual relationship created between parties by a lease where the lease is silent. In the express regulation of this relationship the Land (Conversion of Titles) Act is the major if not the only source of regulation. To the extent that the Act is a comprehensive code, the common law will have equally been effectively ousted. The Privy Council decision in Premchand Nathu & Co. v. Land Officer [1] lends support to this proposition in its holding that the Tanganyika Land Ordinance was ". . . intended to be a complete code regulating the respective rights of the Crown and the occupier". It must follow that it is to such legislative enactment

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[1] [1963] A.C. 177.

you must exclusively refer in the determination of landlord tenant relationship. Only if such a statute is lacking in certain respects would the common law be admitted.

The pre 1911 English statutes in matters of land are to the same extent superseded. As for English Acts of later application for which the reception clause grants provision for their adoption, there is only one that has been specifically adopted [1] and this is the Conveyancing Act, 1911.

Previously the application of either customary law or common law to the respective land categories appears not to have been attended/with any special difficulties. The problem arises, however, when there is a choice of more than one system of law which might apply in a given case.

B. Internal conflict of law and the choice of law problem

The conflict of laws can arise between customary law and the general law (including English law) or between one body of customary law and another. The situation, it must be conceded right from the outset, is unsatisfactory because the internal law does not provide particular and adequate guidance on all issues of conflict. The relevant provisions are so general that the assumption must be that they apply to all situations including land transactions.

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[1] See schedule to British Acts Extension Act, cap. 5, Revised Laws. This although apparently a pre 1911 Act became operative on 1st January 1912. See s.16(2), Conveyancing Act, 1911, 1 & 2 Geo. 5.c.37.

The relevant provisions appear in aid of subordinate courts and not the High Court, a matter which invites comment in respect of the latter's jurisdiction. In the case of a subordinate court, in addition to its jurisdiction in administering the general law, has also power, albeit granted negatively, to administer customary law. Thus the Subordinate Courts Act as materially relevant provides: [1]

> Subject as hereinafter in this section provided, nothing in this Act shall deprive a subordinate court of the right to observe and to enforce the observance of, or shall deprive any person of the benefit of, any African customary law, such African customary law not being repugnant to justice, equity or good conscience, or incompatible, either in terms or by necessary implication, with any written law for the time being in force in Zambia.

From this recognition of customary law the legislature contemplating difficulties of application where some other law other than customary law is in issue made further provision. In this regard the same provision proceeds:

> . . . Such African customary law shall, save where the circumstances, nature or justice of the case shall otherwise require, be deemed applicable in civil causes and matters where the parties are Africans, and particularly, but without derogating from their application in other cases, in civil causes and matters relating to marriage under African customary law, and to the tenure and transfer of real and personal property, to inheritance and testamentary dispositions, and also in civil causes and matters between Africans and non-Africans, where it shall appear to a Subordinate Court that substantial injustice would be done to any party by strict adherence to the rules of any law or laws than African customary law.

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[1] See s. 16, cap. 45, Revised Laws.

In this latter respect there are two important provisos, namely:

(i) that African customary law shall not apply if expressly or impliedly excluded by the party claiming the benefit of it; and

(ii) in the event of no express rule, justice, equity and good conscience are the guide.

In respect of the application of customary law in local courts, in which the bulk of litigation involving this law is disposed of, there appears only an imprecisely worded provision in the words: [1]

> Subject to the provisions of this Act, a local court shall administer
> (a) the African customary law applicable to any matter before it in so far as such law is not repugnant to natural justice or morality or incompatible with the provisions of any written law.

From these provisions flow a number of observations revealing inadequacies.

Observations:

(i) The absence of jurisdiction in the High Court to administer customary law

This creates an anomalous situation of preventing in theory a superior court from expounding rules of guidance where legislative provisions are lacking. The current High Court Act [2] contains no express provision conferring on the High Court jurisdiction to

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[1] See s.12(1), Local Courts Act, cap. 54. Revised Laws.

[2] Cap. 50, Revised Laws.

administer customary law. This omission entails strictly that the High Court has no original jurisdiction, and in its appellate jurisdiction [1] lacks the power to administer customary law. In a search for the basis of this Court's jurisdiction to administer customary law only ss. 24 and 34 have any relevant bearing on the matter. The latter provision provides modes for ascertaining customary law either with the assistance of persons well versed in this law or from books of authority. Subsection (1) declares when this is to be done in the words --

> The Court, may, in any cause or matter in which questions of African customary law may be material to the issue --

This provision, it is submitted, hardly seems sufficient in itself to confer a power to administer this law in respect of both the original and appellate jurisdiction. Reference to customary law seems merely incidental to the issue which probably might have occurred under some other cause of action than customary law. S. 24, on the other hand, seems to confirm the view that in respect of original jurisdiction, the High Court has no power to entertain any cause under customary law. Hence under this provision the High Court has power to transfer any such matter brought before it which in its opinion should be disposed of by a competent local court having jurisdiction. Although the proviso to the provision requires the Court to satisfy itself that such transference is not contrary to the interests of justice or that it would not occasion undue inconvenience

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[1] For the High Court's appellate jurisdiction from subordinate courts, see s. 28 of the Subordinate Courts Act, cap. 45, Revised Laws; and s. 56 of the Local Courts Act, cap. 54, Revised Laws.

to the parties, it is submitted, that this in itself is not a grant of original jurisdiction. Reliance cannot either be placed on s.5 of the Act which empowers a presiding judge in any civil cause to conduct a trial with the aid of assessors should he so decide. The nature of this provision does not deal with the question of jurisdiction but trial with assessors.

Reflection on earlier provisions makes the question of jurisdiction all the more curious. The Northern Rhodesia Order-in-Council 1911, specifically granted, inter alia, jurisdiction on the High Court to administer customary law. As materially relevant it was provided: [1]

> In civil causes between natives the High Court and the Magistrates' Courts shall be guided by native law so far as that law is not repugnant to natural justice or morality . . .

The High Court Ordinance in 1933 amplified this jurisdiction by conferring it in the same language and to the same extent as the provision already indicated in respect of subordinate courts. [2] This provision continued to run into 1958. It was on this basis that the High Court in Lembemba v. Nswima [3] had no hesitation in entertaining jurisdiction in a contract matter between two Africans allegedly entered into under customary law. In this regard Mosdell, Ag. J., confidently resolved:

> At the outset I have to decide, both as regards procedure and substantive law, whether the law to be applied here is Native Customary Law or English

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[1] See art. 35.

[2] See s.17, Ordinance No. 18 of 1933.

[3] H.C.C.C. No. 449/57, reported in [1958] J.A.L., Vol. 2, No. 2 at p. 129.

> Law . . . By virtue of section 17 of the High Court Ordinance, cap. 3, I have jurisdiction to apply Native Customary Law in whole or in part . . .

The sudden omission of this provision in the High Court Act can only lend itself to one conclusion -- divesting of jurisdiction in matters of customary law. This anomaly is not novel as it also presented itself in Uganda. As to whether the revocation of s.20 of the Uganda Order-in-Council conferring power on the High Court to be guided by "native law" had the effect of extinguishing jurisdiction to administer this law, Slade, J., in Wamala v. Sebutemba [1] was disposed to think that that was the net result. This omission has also been effectively discussed with two opposing views emerging. Morris and Read hold the view that the omission is not fatal to jurisdiction as the High Court had an implicit authority to administer customary law by virtue of it appellate jurisdiction from African customary courts, and in the laternative the Crown's prerogative might have provided a residual source of authority. [2] To this line or argument Allott has entered the caveat:

> . . . With the greatest respect, these would appear somewhat shaky foundations upon which to rest so fundamental a power as that of the High Court to apply customary law. Agreed that it could lead to absurd results to give a High Court appellate jurisdiction in a customary court case but fail to give the High Court authority to apply the appropriate law. Resort to the prerogative would seem of no avail here, except perhaps during protectorate times. 3

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[1] [1963] E.A.631.

[2] See H.J. Morris and J.S. Read, Uganda: the development of its laws and constitution, op. cit., pp. 241-242.

[3] See A.N. Allott, New Essays in African Law, op. cit., p. 127.

Morris and Read base their view in part on the distinction between "being guided by" customary law, the provision omitted, and "administering" it, the latter being different from and quite independent of the former. This argument would appear less forceful in Zambia where the provision subsequently omitted was differently phrased and the import of which is to confer the right of observance and enforcement of customary law on the High Court. It could perhaps only be conceded in respect of the appellate jurisdiction in that a power to apply such law is necessarily incidental. [1] To the extent, however, that the deletion affects this Court's original jurisdiction, the omission, it is submitted, is fatal. If by any means it can be ascertained that the omission reflects on the legislature's intent to deprive the Court of this jurisdiction, then the conclusion that the High Court lacks original jurisdiction is inescapable. If the preamble is anything to indicate the legislature's intent, then the Zambian High Court Act reveals this explicitly in the message -- "An Act to amend the law with respect to the jurisdiction and business of the High Court . . .".

There can of course be no doubt that the absurdity is obvious. The High Court has except for original jurisdiction, supervisory, review and appellate jurisdiction. [2] In spite of the weight of legal arguments to the contrary, the assumption, however, that the High Court has original jurisdiction to apply customary law seems to have

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[1] Silungwe, J., (as he then was), unhesitatingly applied the Ila customary law of succession in Chizobe and Othrs. v. Chongo, an appeal from the lower court. See 1971/HP/20 (unreported).

[2] For a review of these powers, see Kaniki v. Jairus S.J.Z. No. 12 of 1967 (H.C.).

prevailed. Thus in Mwiindwa v. Gwaba, [1] Cullinan, J., in a suit involving a dispute as to ownership of land under customary law proceeded to determine the issue without even acknowledging any problem of jurisdiction. The issue of jurisdiction in this case may well have been blurred by the common law form of the action -- "a claim for damages for wrongfully entering the plaintiff's land and ploughing thereon, for an injunction restraining the defendant from a repetition thereof . . .".

Whatever practice may have established in this matter, it is submitted that this is at variance with the law. The only satisfactory way of granting jurisdiction is by expressly saying so.

(ii) Choice of law rules

(a) Where the parties are Africans

Where the parties to a civil cause or matter are Africans, African customary law shall be deemed to apply. In a subordinate court this is so save where the circumstances, nature or justice of the case shall otherwise require. This reservation clause has nothing to do with the "repugnant" clause which is a condition precedent to the application of customary law. In the application of customary law in a local court no such reservation is ever attached.

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[1] 1973/HP/1049, (unreported). For the case commentary in respect of jurisdiction, see M.P. Mvunga, "Residence as a Determinant of Land Rights under Customary Law", Z.L.J. (forthcoming).

No difficulties can arise in the application of this law between Africans where such law is the same. Where there is a divergence between two systems of customary law, then problems commence and in this neither provision helps.

The reservation is to be exercised only where the nature or justice of the case compels the abandonment of customary law. Hence as between African parties with different systems of customary law the issue with regard to the applicable law is still outstanding. The difficulty has, however, been alleviated in many civil causes because the nature of the litigated matter could be resolved without specific reference to one system of customary law. This at least has accounted for the reduced incidents of conflict in local courts notwithstanding the divergence in the various systems of customary law.

Epstein, in his study of urban courts, attributes this to the flexibility in the pleading pattern before such courts at the base of which is an invitation to the court to restore social harmony. [1] The quest for social harmony in the pleading pattern, he observes, is "common to all the tribal legal systems of the territory". Moffat, acknowledging that there is no territorial customary law applicable to all Africans with tribal customs on civil matters differing greatly between the different tribes, explains the formula adopted by local courts within this divergence to avert conflict in the imposition of

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[1] See A.L. Epstein, Politics in an Urban African Community, Manchester University Press, 1958, pp. 213-215.

the standard of reasonableness relative to the local urban conditions. [1]

It may be added that although these observations are confined to urban local courts, there should be no marked difference even in the case of rural local courts. Social harmony appears to be the criterion underlying the corpus of African customary jurisprudence. In a penetrating analysis of African customary law, Driberg certainly subscribes to the theme of social harmony which he calls the principle of maintenance of the "equilibrium". Indeed in this conclusion he draws no distinction between urban and rural conditions. [2] But even granted the need for social harmony neither Epstein's nor Moffat's observed formula can be suggested as enduring and adequate for all cases. In purely inter personal relationships the tilt in the social scales can quite practically be balanced by a reconciliatory search for social harmony. But the divergence in customary laws can be so fundamental, particularly in the distribution of property, that the solution has just got to be specific identification of the appropriate law to be applied.

In such instances lack of an elaborate definition of choice of law rules will have to impose on courts an onerous task. The case of Re the estate of Munalo [3] indicates the gravity of the situation created by the lack of specificity in the choice of law rules.

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[1] See R.L. Moffat, "African Courts and Native Customary Law in the Urban Areas of Northern Rhodesia", J.A.A. Vol. IX, No. 2, April 1957, pp. 75-78.

[2] See J.H. Driberg, "Primitive Law in Eastern Africa", Africa, Vol. 1, 1928, pp. 63-72 particularly p. 65. For a similar but later version of Driberg's conception of African Customary Law, see The International and Comparative Law Quarterly, November 1934, pp. 230-246.

[3] 1973/HP/641 (unreported).

Reference in the relevant provisions to "African customary law" as the law to be applied begs the question -- which customary law in a multiplicity of such laws? In the case just cited the High Court was confronted with which customary law to apply. Commenting on the jurisdiction of a local court to administer customary law, Doyle, C.J.,noted the inadequacy of the provision:

> At first sight it would appear that a local court would administer the African customary law local to it. As, however, the jurisdiction of a local court relates to the area for which it is constituted, this would be impracticable as the different tribes of Zambia each have to some degree differing customary law. 1

In this case the deceased, a Kalanga from Rhodesia, died intestate resident and domiciled in Zambia. The applicant, widow of the deceased, was seeking distribution of the estate under English probate law which applies to Zambia. The respondent on the other hand opposed the application arguing that Shona law should apply. Satisfied that the relevant law was African customary law, the learned judge had to define what this law was. In this he had to search for an indicator which was to ascertain the particular customary law relevant to the issue. In this task Doyle, C.J., relied on the definition of African in previous enactments including the previous Native Courts Ordinance. Finding that the term "African" included those Africans from outside Zambia, his lordship concluded that this inference must still subsist notwithstanding the lack of definition in the Local Courts Act. On this premise the learned judge defined African customary law as relating to the definition of African and this he held must have been

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[1] at p. 4.

in the contemplation of the legislature. Finding that the deceased had not divested himself of Shona law under which in fact his marriage was contracted, his lordship concluded: [1]

> Prima facie this estate is to be administered and distributed by Shona customary law. The deceased has not in my opinion lived in a manner to divest himself of this law. Indeed the fact that when he wished to be married, he did so in accordance with Shona customary law, shows a contrary intention.

Okoma Phiri v. Njilamanda Phiri [2] is another such case involving a decision as to which system of customary law is applicable. This case involved the devolution of a deceased's intestate estate. Deceased was a Chewa, a matrilineal people, who married a Ngoni woman from the neighbouring patrilineal people. The plaintiff, son of the deceased, brought suit against the defendant, his uncle, who was deceased's brother, for having acquired the estate in preference to deceased's children. The defendant's argument was that according to Chewa law of succession, he, the defendant, was the one entitled to deceased's estate as children of the marriage could not, according to this law, inherit their father's property.

On the marriage to a Ngoni woman, however, the deceased paid 'chimalo' (dowry) [3] and 'maloolo' (cattle given to the wife's father, a transaction necessary to deem children of a marriage to be on the husband's side) according to Ngoni custom which is unknown among the

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[1] at p. 6.

[2] Decided in Mpezeni's Local Court, "B" Grade, November 1968 (full citation unavailable) (unreported).

[3] As evidence of the Ngoni customary law with regard to 'chimalo' -- dowry, see Njomvu v. Mawele. In the Mpezeni Local Court, "B" Grade, Case No. 58 of 1969 (unreported).

Chewa. In upholding the plaintiff's claim the court ordered the defendant to relinquish the estate as deceased's compliance with the Ngoni marriage incidents had manifestly indicated that he and his wife wished to be bound by Ngoni customary law in any matter relating to marriage and succession.

In the absence of any elaborate choice of law rules the provisional approach appears to be identifying which external factors might point to a particular body of law preferred to be applied. Exclusive reliance on judicial intuition may, however, be asking too much. While advancing the necessity for specific rules, nonetheless, the Ghana and Tanganyika experience in attempting to legislate for choice of law provisions cannot be ignored. Thus it has been observed of the 1960 Ghana choice of law rules, that despite introducing the notion of personal law, uncertainty as to what this law is and on what criteria it is to be determined "is one of the major weaknesses of the rules". [1] The 1963 /Tanzania choice of law rules on the other hand while avoiding the Ghana weakness proceed on membership to an African community as a basis for the application of customary law. In so doing, however, it has also been observed that there is no adequate guidance in ascertaining what community is and the criterion of membership to such community. [2]

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[1] See A.N. Allott, New Essays in African Law, op. cit., at p. 137.

[2] Ibid., pp. 138-139. For a review of the choice of law rules in Ghana and Tanzania, see pp. 133-141.

(b) Where the parties are an African and non-African

In this situation too, African customary law must be applied if it appears to the court that the application of any other law would result in substantial injustice. This situation, however, differs from the one just discussed in that there cannot be the question of more than one body of customary law. The issue, however, is one of determining whether or not substantial injustice would be occasioned by refusing to apply customary law.

A similar Ghanaian provision in the choice of law rules received interpretation in Koney v. Union Trading Co. [1] This was a breach of contract case arising between a Ghanaian African and the defendant 'non-native' company in which judgment was entered for the plaintiff African. The defendant appealed to the Court of Appeal for West Africa arguing that the breach complained of was statute barred by the Statute of Limitations, 1623. The plaintiff respondent relied on s.19 of the Supreme Court Ordinance, which in all material respects resembles the Zambian provision, pleading that customary law which has no time bar be applied. On the issue of whether or not substantial injustice would be occasioned by refusing to apply customary law Graham Paul, J., reviewed the provision in the words:

> . . . In causes and matters between natives and non-natives the onus is upon the party, seeking to apply 'such native customary law' to satisfy the Court 'that substantial injustice would be done to any party by strict adherence to the rules of any law or laws other than 'native customary law'.

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[1] (1934), 2 W.A.C.A. 188.

Finding no bona fide reason to explain the delay on the plaintiff's part to bring the action in time so as to justify reliance on customary law, his lordship held that the plaintiff had failed to discharge the onus.

On the facts before the Court, this decision is illuminating on the issue when in such circumstances customary law is to be preferred or not. On the broader issue however, it is not clear whether the principle is to be applied to all transactions including dealings in land, the criterion merely being the burden of proof. It would appear from this decision that it should still be possible to apply customary law even in land disputes if its non-application would result in substantial injustice.

(c) Mixed choice of law rules

Whoever may be the parties in the transaction in the above instances customary law shall not apply under the following conditions: [1]

(1) where "it shall appear, either from express contract or from the nature of the transactions out of which any civil cause, matter or question shall have arisen, that such party agreed or must be taken to have agreed that his obligations in connection with all such transactions should be regulated exclusively by some law or laws ! . ."; and

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[1] See s.16 of the Subordinate Courts Act. Cf., pp. 418-419, supra.

(2) where no express rule is applicable to any matter in issue. In the latter instance the court "shall be guided by the principles of justice, equity and good conscience".

Lembemba's case [1] is not only illustrative of these two choice of law rules but also reveals the lack of adequate guidance to the courts. The facts of this case were that the plaintiff, son-in-law of defendant, entered with the defendant into a vague and ill-defined contract by which the plaintiff was to work in defendant's shop. The shop was in an urban area in which both parties had spent most of their time. At the premature end of rendering his services, the plaintiff sought remuneration for working in defendant's shop. The issue here was under what remedy could remuneration be granted when as both parties were of the same tribe, there subsisted under their customary law the rendering of free services to a father-in-law. In determining this issue, the High Court was confronted with a situation where from the nature of the transaction customary law never appears to have been intended to apply and yet the alternative law was not adequately indicated either. Accepting this situation Mosdell, Ag. J., said ". . . I am of the opinion that the present case is illustrative of the fact that Africans of the standing of the plaintiff and defendant have emerged from the state in which their transactions with each other are intended to be governed entirely by Native Custom, into, at any rate, the perimeter of English law. Such Africans appear

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[1] Already discussed in respect of jurisdiction, see note 3, p. 421, supra.

to have a glimmer of knowledge of the conception of the English law of contract". On the more fundamental issue of what law to apply in the absence of any express indication, his lordship opted for a mixed law approach without giving it any specific name. He thus resolved:

> . . . In deciding the issues at stake in this case, therefore, I must be guided partly by the principles of English law of contract, and partly by Native Custom, Bemba Native Custom, as both parties are of the Bemba tribe, and the principles of justice, equity and good conscience. My whole approach in deciding the issues herein in the absence of any clear intention of the parties that English law or Bemba Native Custom should apply is guided by the principles of justice, equity and good conscience.

The net effect of this whole approach is that the learned judge took a mixture of English law and Bemba custom and equated this to justice, equity and good conscience. Interpreting this formula into a remedy of a novel kind, the learned judge concluded:

> . . . In sum, then, I find that the parties to this action have partially emerged from the sphere of total Native customary law to the boundary at any rate of the sphere of English law to the extent that the Bemba Native Custom of free service of a son-in-law to his father-in-law, even for two or three years, has been displaced by the doctrine of <u>quantum meruit</u> in English law or compensation for services rendered under what I may term modern customary law.

With this interpretation of the inadequately defined choice of law rules, the deductions that can be made are as follows: [1]

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[1] Cf., editorial note in [1958] J.A.L., op. cit., p. 128.

(1) Where parties expressly or impliedly opt for a specific law or laws other than customary law, that law should apply;

(2) in the absence of any expression the applicable law should be determined by reference to other relevant and known legal systems -- primarily English law and customary law; and

(3) the decision as to which system (or mixture of systems) to apply is reached by having regard to what is just and equitable in the circumstances of the case.

In relation to land transactions there is, however, no known instance where these rules have been applied. But even in the absence of such instance the mere generality of the provisions indicates that they are not necessarily excluded from applying to land transactions. The absurdity, however, of extending these rules to govern dealings in land is self-evident. Accepting that the intention of the parties inferred from the nature of the transaction can influence what law should apply, the parties can opt for the application of any other law to a land transaction. Thus in theory a customary land interest can be converted into an English interest and vice-versa, with the attendant consequences of the applicable law merely by the volition of the parties. There can be no other more forceful criticism of how ill-adapted these rules are in relation to land than Allott's. Commenting on the old style West African rules of which the Zambian provisions are regrettably still the replica, he observes: [1]

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[1] See A.N. Allott, New Essays in African Law, op. cit., p. 306.

> . . . the assumption underlying the rules is that the law to apply is essentially chosen by the parties. By an illogical extension and "deeming" of intention, choice of a particular form of transaction may be taken . . . to choose the law which is subsequently to govern the interest passed or created by the transaction. But in so far as property rights are a matter of tenure, their nature and scope may be independent of the will of the holder: I cannot, by unilateral exercise of volition, choose that my interest in land in England shall be held under African customary law.

Apart from these general rules there are, however, other specific rules which are designed to cater for land transactions. We can here address ourselves to the adequacy and suitability of these rules.

(d) Choice of law rules vis-a-vis land transactions

Appraisal of the legislative provisions

In relation to land the Subordinate Courts Act provision includes this rule -- "in civil causes and matters relating . . . to the tenure and transfer of real . . . property, and to inheritance and testamentary dispositions" between Africans, African customary law shall apply. Here again the question which customary law in a multiplicity of such laws should apply is still an open one. To the question is it the lex situs or personal law of the land-holder? the provision is silent. S.12 of the Local Courts Act is in this regard also silent. A local court is to administer the customary law applicable to any matter before it. Where the matter before it is land, the provision still begs the question which customary law is to apply.

On a broader inspection of other related provisions, it appears, however, that it is the lex situs which should apply. S.8 of the Local Courts Act conferring civil jurisdiction on a local court has an important provision which says that "civil proceedings relating to real property shall be taken in the local court within the area of jurisdiction in which the property is situate". It must be noted that this provision is also somewhat unsatisfactory in that its emphasis is on geographical jurisdiction. Hence it might be asked whether the import of bringing suit within the area in which the property is situate is that the local law of the area should apply. Mutanda v. Hatembo [1] did very little to resolve whether local jurisdiction connotes application of local law. This was an appeal to the High Court involving a land dispute from a local court within whose area the land in question was not situate. Ordering trial de novo, Muwo, J., held that the only local court of competent jurisdiction is that in which the land is situate.

Notwithstanding this lack of clarity it is submitted that local jurisdiction must of necessity connote the application of the local customary law. Since tenure of land is by local customary law, that this law is the applicable one is an inescapable conclusion. The Ghana choice of law rules are in regard to disputes involving title to land more express, although not entirely comprehensive. Rule 4

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[1] 1971/HPA/21 (unreported).

stipulates that in the application of the Rules "to disputes relating to titles to land due regard shall be had to any overriding provisions of the law of the place in which the land is situated". [1] In so far as this connotes "the law of the place in which the land is situated", Allott questions: "does this refer to the customary law of the place; or to that law as affected by statute; or to that law including its own indigenous internal conflict rules?" [2]

A similar provision in Zambian legislation would not be open to the same criticism. The law of the place would certainly mean customary law as land under this law has a special status by which it has been virtually removed from general statutory provisions. Statute law, except for the Reserves and Trust Land Orders, has had no effect in regard to customary land tenure. Hence the local customary law would have to include the internal conflict of law rules under that law. In the case of any other land it is the general law -- English law and local statutory provisions, which applies. In this the only relevant consideration is the classification of land: does it fall under customary law or not? Thus in Municipal Council of Luanshya v. Daka [3] the classification of the land interest in the lower court as not being subject to any special

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[1] See Courts Act, 1971, No. 732.

[2] See A.N. Allott, "Ghana: The Courts Act 1971", [1972] J.A.L. Vol. 16, No. 1 p. 61.

[3] 1969/SZ/169 (unreported) p. J/4.

law other than general law met with no opposition. For purposes of guidance, however, there is need for specific rules now more than ever before.

The generality of the provisions of the Act in the aspects examined reveals that they are inadequate to deal with the present situation. Admittedly, the anomalies expressed were not in practice actually felt because no occasion arose.

The situation is now ripe with unanswered practical difficulties. Can interests in land acquired under customary law be disposed of by a mode alien to this law?; can a leasehold interest acquired outside the customary law be disposed of under customary law?; and in the process of these transfers does the nature of the interest become converted to that of the law under which the mode of transfer was effected? [1] These and a number of other related questions can only be answered in a bid to identify new rules of choice of law. It is necessary to examine transfers under testate and intestate succession and transfers inter-vivos.

C. A search for new provisions

(i) testacy

In the matter of the Will of Neville Hwalima [2] the testament-

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[1] For an acknowledgement of the possibility of conversion of interests through various modes of transfers due to uncertainty in the law, see C.M.N. White, "Land Law and Administration in Zambia", Intern. Assoc. of Legal Science, op. cit., p. 170. For an illuminating discussion of the subject in the Nigerian context, see A.E.W. Park, "A Dual System of Land Tenure: The Experience of Southern Nigeria", [1965] J.A.L. Vol. 8, No. 1, pp. 1 et seq.

[2] 1968/HN/No. 252 (unreported).

ary capacity of an African in Zambia under the English Wills Act, [1] 1837 was expressly put beyond doubt in the words:

> . . . an African may accept the jurisdiction of an authority other than his customary authority just as at common law a person is entitled to subject himself to any jurisdiction of his choosing . . .

In accepting this capacity however, the learned judge was quick to qualify this power as not extending to disposition of land. Needless to say, the rationale for a power of disposition is the exclusive ownership of the testator in the property, the subject of his legacy. In so far as this qualification can be related to land under tribal tenure, it can only be accepted on the assumption that customary tenure does not recognise individual ownership. In other words the assumption must be that land acquired under customary law is the subject of various concurrent interests, i.e. clan, family etc. In so far as this qualification purports to convey the impression that such is the universal feature of customary tenure, it is with respect submitted that it is a misconception.

Discarding the impression that individual tenure was inconceivable in Zambia, Doyle, C.J., in Ex parte Njobvu [2] observed:

> . . . Even accepting that the general concept of ownership in tribal land is a usufructuary title which would not endure after death, this does not exclude the possibility that amongst certain African peoples and tribes there may be individual ownership of tribal land. Such ownership was suggested as being in existence in at least some parts of the then Northern Rhodesia by . . . White.

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[1] 7 Will. 4 & 1 Vict. c. 26.

[2] 1971/HP/1096 (unreported) at pp. 3-4.

If one accepts that in some circumstances an African may hold land under individual tenure, it is submitted that land under customary law may be capable of testamentary disposition. The Botswana case of Fraenkel & Makwati v. Sechele [1] is illustrative of the basic assumption that ownership of rights in property is the basis for testamentary disposition of such rights. In this case testamentary disposition by the testator to the second appellant, a concubine, by codicil was being challenged by the respondent as not being in accord with Tswana custom. Murray, A.J.A., delivering judgment of the Court reversing the lower court's decision held: ". . . the judgment of the High Court was erroneous in holding (1) that though the deceased had testamentary capacity, such capacity was limited by the necessity that his will should be in compliance with Tswana tribal law and custom and (2) that the various codicilliary bequests to the second appellant with the exception of the gift . . . in Clause 1(a) were totally invalid". As to the effect of the testator's personal rights in the property, the learned judge observed:

> It must be emphasized that this court expresses no opinion as to whether in fact the deceased had such personal rights in the property mentioned in the codicil as to entitle him effectively to dispose of the same: this is a matter for determination by the person who has to administer the deceased's estate.

Although the Court expresses no opinion, it appears implicit

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[1] Reported in J.A.L. [1967] Vol. 11, No. 1 p. 51.

that, if on the determination by a proper authority it is found that the testator had no personal rights in the property, the codicil could not effect a transfer. The Court does not either expressly indicate by what law this determination is to be made. [1] This action however being an allegation based on customary law, it would appear that this law is relevant in ascertaining the existence or non-existence of proprietary rights. In this regard it may be concluded that in matters of testamentary capacity the only significance of customary law in restricting this capacity is whether or not individual ownership over any property is recognised by customary law as vesting in the testator.

Accepting the premise as has been urged that what is of essence to testamentary capacity is the testator's exclusive proprietary rights, important consequences follow. By this acceptance it means that a land interest under customary law can by the process of testamentary disposition be converted into some other tenure, i.e. an English interest. By the conversion of such an interest so must the subsequent applicable law also have been converted. Thus a testator can by will dispose of an English interest to pass as an interest under customary law and vice-versa. West Africa provides the most unique instances of consequences of the conversion process of the first kind. Thus in Jacobs v. Oladunni Bros., [2] the testator, owner of a fee simple, devised by will the

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[1] Cf., N.N. Rubin, editorial note in J.A.L. [1967] op. cit., p. 52.

[2] (1935), 12,N.L.R.1. at p. 2.

fee simple to all his children to "remain and be retained as a family property in accordance with native law and custom". Defendants having attached the real property in execution of judgment against three of the testator's children, the plaintiff, the fourth child, sought the attachment to be released. Rejecting the argument that children were tenants in common of the English fee simple, Graham Paul, J., recognised and confirmed that the land in issue no longer was a fee simple but "family property".

In this regard, however, the Zambian situation is distinguishable by the limitation in the existence of English freehold interests. To this extent the conversion of English interests must in principle relate only to lesser estates such as leases as indeed will be more amply demonstrated in the following discussion on intestacy. The second instance of conversion from customary law remains however more probable. It suffices to indicate merely that this is a sequel to testamentary capacity. In the absence of any legislative guidance, the practical difficulty is to be able to determine, to what extent an indigenous Zambian can divest himself entirely of customary law by testamentary disposition. Indeed finding no legislative guidance in such matters Doyle, C.J., in Ex parte Njobvu [1] quite appropriately remarked: " . . . to what extent, if any, can an African governed by customary law divest himself in whole or in part of that law".

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[1] at p. 6.

The Malawi Wills and Inheritance Act, [1] inter alia provides quite a useful model in resolving the question of extent of testamentary capacity. Although testamentary capacity is granted to all adult persons of sound mind [2] and in the exercise of this capacity only the testator's intention should prevail, [3] there are important limitations attached. A testator cannot ignore a beneficiary who falls within the category of dependant, [4] a term which adequately takes into account all those relations who could under customary law have been entitled to a share in the estate. Although the term dependant appears to be too broad, there is sufficient discretion vested in the court to grant or refuse provision taking into account the totality of the circumstances prompting the application by the dependant for provision in the estate. [5]

Similarly even under English law testamentary capacity is not unqualified. There is a designated category of beneficiaries such as children who in special circumstances of disability have to be reasonably provided for under the provisions of the Inheritance

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[1] Act No. 25 of 1967. For a discussion of this Act, see S. Roberts, "The Malawi Law of Succession: Another Attempt at Reform", [1968] J.A.L., Vol. 12, No. 2, pp. 81-88.

[2] See s.4(1).

[3] See s.10.

[4] For definition of "dependant" which includes "issue", see s.2.

[5] See s.14 particularly subsection (3).

(Family Provision) Act, 1938. [1] Hence a definition of beneficiaries, in the Zambian context, with an elaboration of circumstances under which they cannot be ignored and an indication of the proportion of the estate to which they can lodge a claim might be an effective way of answering the doubt as to the extent of testamentary capacity. In this suggested enactment there ought to be an adequate reflection of the social context of modern Zambia.

(ii) intestacy

This is a more probable area of uncertainty in the law in Zambia today. The complexity of the problem is underlined by two recent conflicting High Court decisions in Chimpampwe v. Registrar of Lands and Deeds [2] and Ex parte Njobvu. [3] In both cases the facts in issue were similar involving the inheritance of leasehold property of deceased intestates. The deceased were both subject to customary law although the nature of the land interest was an English tenure in State land. The issue in either case was whether the interest could devolve on a customary law heir according to that law. In the first case Chomba, J., holding that such land interest being unknown to customary law could not be governed by this law, said: [4]

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[1] 1 & 2 Geo. 6. ch. 45.

[2] 1971/HN/1039 (unreported).

[3] For a case commentary on the two decisions, see A.M. Susman, "State Land and Customary Law: The Application of Customary Laws of Succession to Land held under 'English' Tenure", Z.L.J. op. cit., pp. 127-137.

[4] at pp. 4-5.

> . . . That property was held under a lease. Leasehold property can be assigned, alienated or acquired only according to certain set statutory provisions. The relevant Statute in this case is the Conveyancing and Law of Property Act 1892. Therefore since the property can only be acquired in terms of statutory provisions and as such acquisition or collection is incidental to the act of administering the property it cannot at the same time be said to be property which falls to be administered or distributed in terms of African customary law.

If there were any such specific law governing alienation or transfer of leasehold property as cited in the Conveyancing and Property Act 1892, his lordship's conclusion could not be questioned. But that there is no such specific statutory law governing the issue before the Court became apparent on inspection of the relevant statutory provisions. The 1892 Act appears erroneously cited because its perusal reveals no relevant provision having any direct bearing on the matter at bar. The Act [1] primarily dwells on regulation of lessor-lessee relationship on a limited scope. The Conveyancing and Law of Property Act 1881 in so far as it may have any bearing on land transfers after a person's death only empowers his personal representatives to complete a contract of sale 'of the fee simple or other freehold interest' subsisting and enforceable against the person's heir or devisee at the time of death. [2] This can hardly be suggested as such statutory provisions as regulate exclusively transfers of leasehold property as in the instant case. The Real Property Act 1845 in its relevant aspects

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[1] See ss. 2-5, 55 & 56 Vict. c.13.

[2] See s.4(1) 44 & 45 Vict. c.41.

merely requires feoffments, partitions, exchanges, leases, assignments, and surrenders to be by deed or else the transaction "shall be void at law". [1] This quite evidently hardly bears on the substantive issue of devolution of a leasehold estate.

The only apparently relevant statute is the Land Transfer Act 1875 which specifically dwells on devolution of real property on a person's death. It may well be that the learned judge was thinking of the provisions of this Act. This Act establishes a real representative on whom a legal interest in real estate devolves and vests upon a person's death. In this regard it is provided: [2]

> Where real estate is vested in any person without a right in any other person to take by survivorship it shall, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time as if it were a chattel real vesting in them or in him.

His lordship declined the local court's appointment of the applicant as administrator (personal representative) of deceased's intestate on the premise that "local courts are not the proper forum in which to make an application for appointment of an administrator to administer real property which is held under a statutory title, like the lease in the present case". [3]

The learned judge, it may be observed, draws no distinction between real property and a lease which might indicate that he was

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[1] See s.3, 8 & 9 Vict. c. 106. Cf., The Statute of Frauds 1677 which requires leases for a longer term than three years or at a lower rent to be evidenced in writing. S.1 29 Car. 2, c.3.

[2] See s.1(1), 60 & 61 Vict. c.65.

[3] at p. 5.

mistakenly under the impression that the Land Transfer Act regulated the statutory title to leasehold property. However,the Land Transfer Act expressly says that it applies to real property and not leasehold. Hence its provisions are not relevant to a leasehold estate. It is true however that in its effect of vesting a real estate in a personal representative it puts realty on the same footing as a chattel real, i.e. a lease. It is only in this regard that provisions of the Land Transfer Act could be said do not differ from the law relating to leases. But a lease is not vested in the personal representative by provisions of this Act. The vesting of leasehold property in the personal representative is on the authority of the common law. In fact the creation and transfer of leasehold property are still in part governed by the common law. [1] This in turn, it is submitted, must diminish the justification that leasehold property is characterised by a statutory title. The ousting of customary law on this premise entails the application of common law. The application of common law, however, can only be justified upon the clearest indication of it being the relevant law -- the personal law of the deceased.

It is in this regard that the Chimpampwe case reveals the inadequacy of the choice of law rules in an intestacy. Without alluding to the decision in this case Doyle, C.J. appears to have wrestled with the choice of law issue more commendably and effectively

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[1] See E.H. Burn Cheshire's Modern Law of Real Property, op. cit., Chapter 1, pp. 365 et seq., and pp. 802-803. Note that the Law of Property Act, 1925 does not apply to Zambia and no corresponding legislation exists. As between private parties the common law is still in force, the Land (Conversion of Titles) Act, 1975 notwithstanding.

in Ex parte Njobvu. Emphasising the fallacy of having to determine the applicable law by looking at the nature of the property instead of the deceased's personal law, his lordship asserted: [1]

> . . . It is not the nature of the assets in the estate which determines distribution, it is the person with his personal law which determines that question.

Finding customary law capable of distributing leasehold property in the same manner that customary land is disposed of, his lordship concluded: [2]

> . . . If African customary law has provided for the distribution of pieces of land held in individual ownership, it could be expected that little difficulty would be encountered in distributing under African Customary Law a piece of leasehold land.

On the determination of the personal law as being the applicable law his lordship is correct even upon the authority of the common law, which itself has long acknowledged that succession to the personal estate (which includes leasehold property) of an intestate is governed by the law of his domicil at the time of his death. [3] If Chomba, J.'s fear in the Chimpampwe case was that the effect of applying customary law to an English leasehold interest was to create occasion for converting the interest to one under customary law, his decision would be understandable. The judge in the Njobvu case appears to have given no thought to this effect of his ruling.

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[1] at p. 2.

[2] at p. 4.

[3] See A.B. Keith, Dicey's Conflict of Laws (5th ed.), London, 1932 at pp. 799-800.

Doyle, C.J.'s conclusion in allowing distribution under customary law invites the task of resolving whether this entails an assimilation of an English interest into customary tenure. Is the term distribution to be confined, if ever possible, to rules of distribution under customary law as distinct from the nature of the interest distributed? The distinction between the two appears subtle for the process of distributing an English tenure under customary law seems to have the effect of converting the English interest into a customary one. There is authority to this effect in other African common law jurisdictions.

In West Africa on the death intestate of a man subject to customary law his estate devolves equally in undivided shares on his family as family property. [1] Thus if the intestate left a fee simple estate, the devolution is directly on the family converting such fee into family land. In Miller Bros. v. Ayeni, [2] a Nigerian case, a man who owned an English fee simple interest died intestate leaving three sons. The appellants, judgment creditors, wishing to attach the estate against respondent, who was their judgment debtor, were met with opposition at the instance of the other two sons claiming a joint family interest in the land. The Full Court held that these sons became joint owners of the family estate under

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[1] See T.O. Elias, Nigerian Land Law, (4th ed.), London, 1971, p. 117. For Ghana, see K. Bentsi-Enchill, Ghana Land Law, op. cit., pp. 184 et seq.

[2] (1924), 5 N.L.R. 40.

customary law and were not tenants in common under English law for which execution of a judgment debt in respect of one of them would have been possible. Subsequently in Smith v. Smith [1] Van Der Meulen, J., rejected the claim of one of the three children to the deceased's fee simple intestate estate. This son claimed that he was solely entitled to the joint family estate as heir at law under English law on failing to obtain consent of the others in executing a mortgage.

The effect of this inheritance in converting the English interest into a customary one is self-evident. The incidents of tenure, under the two systems, are distinguishable as evidenced in the restriction on alienation of family property which hitherto had been a freehold estate. Restriction on freedom of alienation is certainly repugnant to an English freehold estate. While the Ayeni case has decided that a joint family interest cannot be attached in execution of judgment, the Smith case has decided that the interest is not severable either. Ogunmefun v. Ogunmefun [2] and Olowu v. Desalu [3] have gone further to decide that a joint family interest could not be alienated without the concurrence of other joint owners.

In the devolution of an intestate estate, it must be observed that these cases do not distinguish between the customary rules of

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[1] (1924), 5 N.L.R. 102 at p. 105.

[2] (1931), 10 N.L.R. 82.

[3] (1955), 14 W.A.C.A. 662.

intestate succession: rules specifying who the beneficiaries are, and the nature of tenure under which the successors inherit the land. Although the Zambian customary rules of distribution, diverse though they may be, may not exhibit the same features as the West African joint family interest, they are bound to differ from the English incidents of ownership.

A more obvious instance of difference is the classification of land under English law into real property and chattels real. On this hinges important consequences of devolution of an intestate estate. Realty on intestacy under the English common law prior to the 1925 Property Act devolves on the heir-at-law who is primarily ascertained on the principle of primogeniture: the heir at law, if a child of the deceased, would be the eldest son. Leasehold regarded as personal property, subject to the rights of a widow or widower, went to the next of kin. [1] This distinction is unknown at customary law and does not influence devolution of an estate. Without digressing too much into the incidents of inheriting an intestate estate, it is sufficient to indicate that such inheritance is subject to various concurrent interests of deceased's relations. The person inheriting the estate although he might appear the legal owner must recognise and apportion a share to other entitled relations [2] of the deceased. Thus whatever classification of the land interest the

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[1] See R.A. Eastwood, Williams on Real Property, op. cit., pp. 390 et seq.

[2] See for example the class of beneficiaries among the Bemba, W.T. McClain, "The Rights of Widows Under Customary Law" in Mfula & Staebler (eds.), (unpublished symposium papers), 1971, p. 89. Cf., discussion of land under customary law, pp. 179 et seq., supra.

preferential right of the widow who decides to remain at the husband's abode cannot be ignored. [1]

Thus in an intestacy the problems of what law to apply in determining devolution and the nature of the interest intended to be conveyed are unsolved. In the available legislative provisions, the problem relating to the nature of the interest intended to be conveyed seems utterly ignored. The Local Courts and Administrator General's Acts dwell on the applicable law by way of excepting the application of customary law.

S. 38 of the Local Courts Act dealing with the administration of intestate estates under African customary law stipulates instances when a local court should not proceed to deal with these estates. These circumstances are, if

(a) the local court is satisfied that a properly interested party has made application to the High Court for an order relating to the administration or distribution of such deceased's estate;

(b) a properly interested party or the Administrator-General has made application to the local court claiming that the deceased's estate should not be administered in terms of African customary law; and

(c) the local court is satisfied that it is in the interests of justice to transfer such application to the High Court.

Commenting on (a) and (b) above in Re Estate Munalo, [2] Doyle,

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[1] See W.T. McClain, "The Rights of Widows under Customary Law" in Mfula & Staebler (eds.), op. cit., pp. 88-89.

[2] at p. 3.

C.J., observed:

> . . . there are or may be circumstances in which an African's estate should not be administered or distributed according to African customary law. No indication is given of what these circumstances are but it seems to me that they must either be because African customary law never applied to the particular African or that he had in some way divested himself, perhaps by his way of living, [1] from the application of customary law.

Apart from attempting to indicate circumstances in which customary law should not apply this is an acknowledgement of a deficiency in the provisions.

As for the Administrator-General's Act, when first enacted in 1925 was expressed as not applying to estates of "natives". No such exclusion now exists. Hence the Act applies to estates of all persons in Zambia. Thus under s.7 the Administrator-General "may apply to the court for probate or letters of administration" where a person dies leaving property in Zambia. Of the instance in which this may be done is:

(d) where the deceased has died intestate as to his property in Zambia.

Considering now that such deceased could be an African, legislative guidance as to what law would have to be followed would have been helpful. [2] There is, however, nothing specific in this regard.

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[1] For the South African test that an African has ceased to be governed by customary law due to adoption of a new style of life, see James Tarr & Othrs. v. Estate Late James Tarr N.A.C. N & T Vol. 12, p. 75. Cf., E.G. Unsworth, "The Conflict of Laws in Africa", Rhodes-Livingstone Journal No. 2, December 1944, pp. 53-54.

[2] The problem does not arise where English law is the relevant one as the probate jurisdiction of the High Court expressly states: "The jurisdiction of the Court in probate causes and matters shall, subject to this Act and any rules of court, be exercised in substantial conformity with the law and practice in force in England on the 17th August 1911 . . .". See s.11(3) High Court Act, cap. 50, Revised Laws.

Reference to the Court where application for probate or letters of administration is to be made appears significant as revealing that both English and customary law are contemplated to be applicable under the Act. "Court" is defined to mean "the High Court or any court subordinate thereto to which jurisdiction hereafter may be given". [1] Subordinate courts, as we have earlier seen, have express jurisdiction to apply customary law.

S. 32, however, gives a strong indication that customary law is not even contemplated under the Act. It is thus provided: [2]

> This Act shall not apply to the administration of the estate of any person to which the provisions of subsection (1) of section thirty-six of the Local Courts Act apply, unless the Court shall have first made an order or given directions that such estate shall not be administered in terms of African customary law.

The provisions of the Local Courts Act are those relating to the appointment of an administrator of an intestate estate. So, where this is the case, the Administrator-General cannot proceed with the application for letters of administration unless customary law has been declared inapplicable. The Administrator-General may still, however, apply to the local court that the intestate estate should not be administered under customary law on the sole ground of the interests of justice. Provision in this regard states: [3]

> Nothing contained in this Act or in any other written law shall require or be deemed to require the Administrator-General, except where he thinks it is in the interest of justice so to do, to make an application to a local court claiming that the estate of a deceased person should not be administered in terms of African customary law.

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[1] See s.2.

[2] See s,32(1).

[3] See s.32(2).

Commenting on both Acts in relation to the provisions empowering the High Court to determine the exclusion of customary law from applying Doyle, C.J., in Ex parte Njobvu conceded the insurmountable difficulties in the choice of law. His lordship remarked: [1]

> Little if any guidance has been given in either . . . the Local Courts Act . . . or in . . . the Administrator-General's Ordinance, [2] as to the principles upon which the High Court is to act in determining whether or not an estate is to be distributed in accordance with African customary law. I can see very difficult questions arising in respect to these matters.

His lordship went further to plead for legislative guidance.

As this discussion is in the context of choice of law rules and their resulting failure in regard to land interests, we may do well to refer briefly to the Malawi Wills and Inheritance Act as a possible model. [3] This Act recognises the situation where a holder of an English estate may have his customary law apply to his intestate estate. To avoid any anomaly specific provision is made in regard to the devolution of such an estate. S16(1) acknowledging that customary law would otherwise have applied states -- "This section shall apply to the intestate property of the estate of a person to whose estate customary law would, but for this Act, apply".

The Act proceeds to apportion and distribute the estate on a

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[1] at p. 6.

[2] As amended by Act No. 14 of 1968. See in particular s.4.

[3] Cf., The Kenya Law of Succession Bill, 1970 [Kenya Gazette Supplement No. 12 (Bills No. 3)] trying to implement recommendations of the 1968 Commission on the Law of Succession. No reform has yet been effected in this regard.

set proportional ratio between statutory beneficiaries and customary law heirs. This ratio varies between the two prescribed geographical areas. In one area the ratio between both classes of beneficiaries is on a half share basis. In the other area the apportionment ratio weighs more in favour of the customary law heirs with the remainder distributed to the statutory beneficiaries. In either of these cases the man will have died leaving "a wife, issue or dependant surviving him". [1] But notwithstanding the provision made to customary heirs, "the customary heirs of a deceased man shall not be entitled to any share in the household belongings used by a widow of the deceased during his lifetime, or in the doors, windows, or other fittings of any house provided for a widow of the deceased in which she wishes to continue to reside". [2] The statutory beneficiaries are the wife, issue and dependants of the intestate, and as to distribution of the estate between them principles for guidance are enumerated. [3] Customary law is to apply exclusively only when a deceased man leaves no wife, issue or dependant surviving him and in the case of a deceased woman. In the latter case however, "where the woman dies leaving children, such children shall be solely entitled . . .". [4] Where a deceased person left no issue, the estate

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[1] See s.16(2).

[2] See s.16(3).

[3] See s.17(1). For the principles of distribution, see sub-sections (1) (a) -- (e).

[4] See s.16(4) (a).

escheats to the Government. [1]

The Act goes further to provide for the devolution of immovable property in respect of which a person not domiciled in Malawi dies intestate. [2] Proportions of distribution amongst named beneficiaries are stipulated with the estate escheating to the Government on the failure of any issue. To these rules there is, however, an important proviso where the deceased is a member of a minority community in Malawi living according to established custom. In this event where such custom governs rights of inheritance, the Court shall apply such customary law instead. It is in this regard thus provided: [3]

> . . . if the Court is satisfied that the deceased was a member of a minority community among whom an established custom existed prior to the coming into operation of this Act, governing the rights of inheritance to property to which this section applies, the Court shall direct the distribution of such property according to that custom.

The Malawi model of rules of distribution, as far as they go, provides adequate guidance in the choice of law rules. It is quite clearly stipulated when customary law is or is not to apply and if not applicable upon what principles courts are to rely and which statutory rules they are to apply. If the rules of distribution alter the nature of the interest distributed, this cannot deprive the statutory beneficiaries of their share in the estate.

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[1] See s.16(4) (b).

[2] See s.18.

[3] See s.18 (3).

Where customary law is, however, declared to be the applicable law, it is not clear whether the conversion of an English land interest into a customary one is desired or indeed even contemplated. In this respect the probable uncertainty in the law must be all the more in Malawi than in Zambia as private land interests which include freehold estates are still recognised. [1] Indeed there still exists provision in Malawi to convert customary land into private land under the Customary Land (Development) Act. [2] When this is done the land so converted is registered under the Registered Land Act. [3] Thus the intestate freehold estate of a Malawian to whom customary law applies must still invite questions as to what effect customary rules of distribution have on the distributed non-customary land interest.

(iii) Transfer inter-vivos

If it is accepted that individual tenure is recognised by customary law and, as argued earlier, a testator holding such an interest should have capacity to dispose of it by will, it must also be true that in transfers inter-vivos a landholder has in principle the capacity to dispose of all or any interests in land which is his.

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[1] "Private land" means all land which is owned, held or occupied under a freehold title, or a leasehold title, or a Certificate of Claim or which is registered as private land under the Registered Land Act. See s.2, Land Act, cap. 57:01 Laws of Malawi. For land classification in Malawi, see P.H. Brietzke "Rural Development and Modifications of Malawi's Land Tenure System," Rural Africana, Current Research in the Social Sciences No. 20, Michigan, Spring 1973, pp. 60-61.

[2] Cap. 59:01 Laws of Malawi.

[3] Cap. 58:01 Laws of Malawi.

Hence a situation for conversion of interests by conveyance is quite probable. Thus a landholder can alienate a lesser or absolute interest subject only to such conditions that the grantee be resident or attached to the community in which the land is situate. [1] There is apparently nothing offensive to any law in this/in so far as one is not giving away what he has no power to give: nemo dat quod non habet. Indeed in West African common law jurisdictions there is a chain of authority supporting this proposition. [2]

Important practical consequences flow from this acceptance. Thus a Zambian who owns land under customary law can dispose of the whole interest whatever it is or carve out lesser interests in form of leases or indeed life estates. Under such a situation it could hardly be suggested that the interest created and the attendant applicable law are customary. But neither this law nor the interest can be impugned as being inconsistent with customary law if the latter recognises individual ownership.

West Africa is ripe with instances of conversion of interests by a conveyance in English form of a customary interest. Although it does now appear fairly settled that an absolute interest at customary law is not necessarily the same as an English fee simple (although it

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[1] For the role of residence in the tenure of land under Customary law, see pp. 142 et seq., supra.

[2] See for example the Nigerian case of Kabiawu v. Lawal, 1 All N.L.R. 329 and the Ghanaian case of Roura & Forgas Ltd., v. British Bata Shoe Co. Ltd., [1961] G.L.R. 339.

might be its equivalent), [1] from such an interest can be carved and conveyed lesser interests in a mode and with consequences more akin to English law. Thus in Nwangwu v. Nzekwu [2] there is nothing which hindered the passing of a lease to the Colonial Development Corporation by virtue only that the grantor was holder of an absolute interest at customary law and not a fee simple. Leases in this regard being contractual are easily explainable in that the lessor can quite appropriately use an English form of conveyance with all the substance of English law that has interpreted such documents. Ollenu's conclusion in this respect is: ". . . Mortgages, leases and licences are interests which are contractual not indigenous, therefore their nature is determined by deeds, documents or agreements creating them, evidencing the terms of the contract". [3] And to this type of lesser interest we may add, following the maxim nemo dat quod non habet any interest lesser than that absolutely owned in customary law.

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[1] See the Privy Council decision in Oshodi v. Balogun (1936), 4 W.A.C.A.1P.C. influencing judicial opinion in Coker v. Animashawun 1960 L.L.R.71 (High Court of Lagos) and Alade v. Aborishade (1960), 5 F.S.C.167. For general conclusions of law on the subject, see A.N. Allott, New Essays in African Law, op. cit., pp. 331 et seq. For an illuminating discussion on the nature of land interests under customary law in Ghana, see S.K. B. Asante, "Interests in Land in the Customary Law in Ghana -- A New Appraisal", U.G.L.J., op. cit., pp. 99-139 particularly pp. 104-132.

[2] (1957), 2 F.S.C. 36.

[3] See N.A. Ollennu, "Changing Law and Law Reform in Ghana", [1971] J.A.L., Vol. 15, No. 2, p. 148.

A life estate as a freehold interest under English law thus quite appropriately falls under this designation. On this premise by grant a customary interest can be converted into a life estate without any contradiction in principle.

It remains to suggest that these probable practical questions invite an overhauling of the conveyancing laws of Zambia for purposes of clarity and guidance. [1] It only needs sufficient economic pressures on customary land to reveal the probable difficulties thus discussed.

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[1] For a legislative attempt in Ghana to resolve problems related to modes of conveyancing, see Conveyancing Decree, 1973, N.R.C.D.175.

PART IV

CONTROLS AND FACILITIES

For various reasons, British policy in regard to land within its Dependencies was to retain strict control over its use and disposition. This should already be clear from previous Chapters in which we discussed the various declared categories of land and the powers of the Governor over dispositions.

The purpose of this Part is to examine a few of the main enactments which purported to put into effect land policy both before and after independence. In the area of control it is not possible to deal with all the legislation which regulates or controls dealings or other dispositions of land. It is proposed to discuss the acquisition of land for public interests, the control of the development of land, the regulation and control over the letting of premises.

There are, of course other forms of control over land use, for example the restriction of the rights of a landholder under the Mines and Minerals Act, under the Water Act, under the National Parks and Wildlife Act, under the Forests Act and under the Natural Resources Act. The enactments for our discussion relating to control of land use have been selected because they portray special difficulties in implementing land policy, particularly after Independence. In this regard an attempt is made to indicate reasons for the failure to implement declared policies and suggestions are also made on how objectives of the said policies can be achieved.

But in as much as there has been Government concern to control land use, thereby restricting rights of a landholder, importance was also attached to assuring a landholder's rights. In this regard facilities through the machinery of land registration have been provided. This Part also discusses these facilities. Since the land registration machinery was initially for European settlers, we shall also appraise what has been done and can be done in extending registration facilities to the rest of the country.

CHAPTER 8

THE STATUTORY CONTROL OF LAND USE

A. The Lands Acquisition Act

The power of a State to acquire land compulsorily for what has been designated as public purposes appears well settled and accepted as an attribute of political sovereignty.

In Zambia compulsory acquisition of property by the State is now governed by the Lands Acquisition Act. [1] Prior to the passage of this Act in 1969, compulsory acquisition of land both during the colonial and post-Independence periods was regulated by the Public Lands Acquisition Ordinance. [2] This Ordinance was very restrictive on the Government's powers of compulsory acquisition. [3] The Governor (and after 1964 the President) could only acquire lands required for specified public purposes. This acquisition was further conditioned on payment of compensation. Compensation payable was either as agreed upon between the parties or in default of agreement was to be assessed according to the market value of the land at the time of acquisition. The specified public purposes related to acquisition of land for public utility such as construction of a railway, township, airport, provision of sanitary services etc.

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[1] Cap. 296, Revised Laws.

[2] Cap. 87, Laws of Northern Rhodesia (1958 ed.).

[3] See in particular ss. 2, 3 and 13.

The Government could not therefore compulsorily acquire land outside the provisions of this Ordinance. By 1969 it became evident that the post-independence Government of Zambia was not happy with the state of the law relating to compulsory acquisition. The scope of development requiring land had broadened. The Government had become more concerned with the vast tracts of land which were idle either for speculative purposes or because the owners had since left the country. It was felt that this type of idle land did not justify compensation, particularly when at the time of purchase the price for this land was six pence per acre. [1] Since at that time the Constitution of the country contained an entrenched provision relating to protection of rights, the law on compulsory acquisition could not be amended without first amending the Constitution. After amendment of the Constitution, [2] the way was cleared for the repeal of the Public Lands Acquisition Ordinance and the enactment of a new Lands Acquisition Act.

Under the Lands Acquisition Act "The President may, whenever he is of the opinion that it is desirable or expedient in the interests of the Republic so to do, compulsorily acquire any property of any description." [3] Unlike under the repealed Ordinance the President's power to acquire land is not restricted to specified public purposes.

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[1] See N.A. Debates, session 2nd December-18th December 1969, col. 105.

[2] See Constitution (Amendment) No. 5 of 1969.

[3] See s.3, Lands Acquisition Act.

Whether the President's opinion is conclusive on the matter of desirability and expediency in the interests of the Republic, does not, however, appear to be beyond doubt. Two possible views can be put forward on this provision. One view is to read the provision literally and to hold that the President's opinion is conclusive in as much as he is the sole arbiter of public interests. The other view would impose an objective test: thus if it can be shown that no public interest will be served by an acquisition, a proposition no doubt quite onerous to discharge, the President's decision is open to challenge in the courts. [1]

This latter view appears supported by subsequent provisions of the Act which for the avoidance of doubt have declared certain issues not justiciable. Thus any defect in the process of serving notice to effect the acquisition will not have any invalidating result and neither will adequacy of compensation be challengeable after having been ultimately determined by the National Assembly. [2] It could well

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[1] The Supreme Court of Zambia had occasion to comment on the words "in the opinion of the President" under s.2(1) of the Inquiries Act, Cap. 181 which empowers the President to appoint a commission of Inquiry if in his opinion it is for the public welfare. The Court said: ". . . the words . . . clearly make the matter one for the subjective decision of the President, and it has never been doubted that a decision made under a power expressed in such terms cannot be challenged unless it can be shown that the person vested with the power acted in bad faith or from improper motives or extraneous considerations or under a view of the facts or the law which could not reasonably be entertained". See Nkumbula v. The Attorney General, Appeal No. 6 of 1972 at p. 6. (unreported). It is submitted that if an acquisition serves no public interests, that is an indication that the President acted inter alia from extraneous considerations.

[2] See ss. 7(4) & 11 (3).

be argued, that if the President's opinion were conclusive, this would similarly have been expressly exempted from challenge.

After the President has resolved to acquire property, it becomes the duty of the Minister responsible to serve notice on persons interested in such property for the purposes of giving them an opportunity to settle any outstanding dispute by court proceedings or to yield up possession within a specified period. [1]

Having granted the power of compulsory acquisition and laid down the procedure to effect the same, the Act proceeds to provide for compensation. There are two types of acquisition -- namely (i) acquisition with compensation and (ii) acquisition without compensation. Award of compensation depends on whether the land acquired is developed and utilised or undeveloped and unutilised. Thus the Government policy underlying what is compenssable or non-compenssable land is the use to which the land is being put. The Government was concerned particularly with unused land held by absentee landlords. Clarifying Government's intention in this regard, Mr. S. Kalulu, then Minister of Lands and Natural Resources, assured the National Assembly: "Our intention in the Bill is to get hold of the absentee landlord. He is the chief culprit we are aiming to get hold of." [2] In any other case where land was being properly utilised,

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[1] As to the procedure of service of notice, see ss. 5-7 & 11(1).

[2] See N.A. Debates, session 2nd December-18th December 1969, col. 371.

the Minister reiterated the Government's intention to pay adequate compensation at market price on compulsory acquisition. This, however, did not include cases "where the property is not being used productively in the interests of the nation." [1]

Summarising Government policy on compulsory acquisition, it can be said that compenssable land is that which is being productively used. Non-compenssable land, on the other hand, is that which is either unutilised or being utilised unproductively.

The Act defines which land is undeveloped and which in unutilised in the relative context of rural and urban areas. Land is deemed to be undeveloped "if it is inadequately developed bearing in mind the national need", but without derogating from the generality of this criterion, land does not cease to be so undeveloped by reason only that:

(a) it has been fenced or hedged; or

(b) it has been cleared, levelled or ploughed; or

(c) it consists of a cleared or partially cleared site of some former development; or

(d) it is being used, otherwise than as an ancillary to adjacent land which is not undeveloped or unutilised land. [2]

In the case of land in the rural area being put to agricultural, pastoral or mixed agricultural and pastoral use, the presumption is that it is not undeveloped unless it has not been used for the aforesaid

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[1] See N.A. Debates, session 2nd December-18th December 1969, col. 106.

[2] See s.15(3).

purposes during the two years preceding the publication of notice to yield up possession. [1]

As will be observed, the provision does not spell out what is meant by national need. Unless this term is specified in the terms and conditions of tenure, a landholder will be at a loss as to what development is required. The tenant whose lease has been held from the State is in a more advantageous position in so far as development conditions were attached in the tenancy. These conditions provide a yardstick for gauging what national need means in terms of development. Another question underscoring the imprecision in definition has been posed: ". . . when in point of time is land undeveloped?" [2] This in part has been answered with regard to rural land for which the time to be deemed undeveloped is the two years preceding the publication of notice to yield up possession. Unfortunately, the difficulty with this is that the time computation is in retrospect, and thus a landholder could very easily be caught unawares. The only other relevant provision clarifying time computation is s.15(5). This provision states, inter alia, that no compulsory acquisition can be effected within six months following "the acquisition by the owner of his title to or interest in the land". This serves as an indication that six months is the minimum period for development after which if the land is undeveloped it becomes subject to the provisions of the Act.

Unutilised land has also been defined in the relative context

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[1] See proviso to s.15(3).

[2] See G. Care, in Annual Survey of African Law, N. Rubin & E. Cotran (ed.), Vol. IV, 1970, at p. 175.

of rural and urban areas. In the case of the former, land will be deemed unutilised "if having regard to the character and situation of the land and all other relevant circumstances, the exploitation of the land is not in accordance with good estate management". [1] But just as "national need" as a criterion of development is unclear, so is "good estate management". Unless the standard of estate management is so well established that it ought to be known to all landholders, the term is imprecise.

As for urban land, the term unutilised is reserved for:

(i) premises which have fallen into disrepair and are unoccupied at least three months before publication of notice;

(ii) land used for purposes of cultivation or pasturage when in fact it is not zoned for that activity; and

(iii) land inhabited in dwellings of persons not having a good title to it. [2]

Notwithstanding the queries raised, the validity of this Act in its effect appears to be beyond question. The Constitution authorises such an Act. Thus the Constitution affirms that nothing contained or done under the authority of any law shall be taken to have contravened the right of property to the extent that it can be shown that such law relates to and affects "abandoned, unoccupied, unutilised or undeveloped land, as defined in such law". [3] The adequacy of

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[1] See s.15(4)(a).

[2] See s.15(4)(b).

[3] See s.18(2)(J).

compensation, as provided under the Act, has equally been sanctioned by the Constitution, which in similar language declares the ultimate determination of the National Assembly on the matter not justiciable. [1]

We can now address ourselves to the provisions relating to the two types of acquisition.

(i) Acquisition with compensation

Compensation for acquisition will only be paid if the land in issue is developed and utilised.

In the essessment of compensation for the land which cannot be acquired without compensating the owner, the Minister or, in the event of disagreement, the National Assembly shall act in accordance with specified principles. [2] Two of these principles are worth noting. These are:

(e) where only a part of the land held by any person is acquired, probable enhancement of the value of the residue by virtue of proximity to the acquired lot shall be taken into account; and

(g) no allowance shall be made for any probable enhancement in the future of the value of the land to be acquired.

The discrimination between the two situations in evaluating the probable value appears hard to justify. In the first instance probable enhancement of value is a relevant consideration while this is not so in the second case. The first consideration has a

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[1] See s.18(4).

[2] See s.12.

diminishing effect on the actual sum to be reimbursed to a land-holder. The sum would have to be reduced in the first case by probable enhancement of value of the residue. But assuming that the residue became subsequently the subject of an acquisition order, the earlier probable enhancement if not yet mature could not be realised due to the consideration embodied in (g). This apparent unfairness appears now incidentally remedied by provisions of the Land (Conversion of Titles) Act, 1975 which, as we have seen, disregard the value of land except for improvements. [1] Hence the advantage stipulated in (e) at the instance of the State must be obsolete.

Where the amount of compensation is in dispute, the matter is to be resolved as already stated by the National Assembly. Once the amount has been so determined: "No compensation determined by the National Assembly . . . shall be called in question in any court on the grounds that it is inadequate". The question has, however, been asked whether determination by the National Assembly in disregard of the specified principles is not open to question? [2] On strict interpretation of the provision, the National Assembly is to be guided only by the enumerated principles and hence disregard of the same does render the matter open to challenge.

(ii) Acquisition without compensation

S.15 governs land in this category. It is thus provided:

> (1) Notwithstanding anything contained in this Act or any other law, but subject to subsection (2), no compensation shall be payable in respect of

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[1] See Chapter 6, pp. 386 and 396 supra.

[2] See G. Care, in Annual Survey of African Law, op. cit., p. 175.

undeveloped land or unutilised land.

(2) Save where the land acquired is unutilised land to which an absentee owner is beneficially entitled, compensation shall be payable in respect of the unexhausted improvements on unutilised land:

> Provided that such compensation shall be limited to the value, for the purpose for which the land is acquired, of such unexhausted improvements.

Apart from authorising acquisition without compensation, it is important to note that even where an absentee owner is entitled to compensation, this will be denied if the unexhausted improvements on unutilised land are not related to the purpose of acquisition.

For purposes of this provision unexhausted improvements means permanent fixtures attached to the land including crops and growing produce. [1] Absentee owner, on the other hand, has two meanings. In the case of an individual, it is a person who is not ordinarily resident in Zambia. In the case of a partnership, co-ownership or a body corporate, it is the individuals who have directly or indirectly effective control of land in Zambia while not being ordinarily resident in the country. [2] A criticism can be made of the provision entitling an absentee owner to compensation for the unexhausted improvements. In its present form the provision creates occasion for the State to acquire land for a purpose quite unrelated to the unexhausted improvements. In this way the State can, if it wished, deliberately

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[1] See s.15(6).

[2] See s.16.

avoid payment of compensation for which the provision is intended. It appears that such an absentee landholder has merely to rely on the good faith of the State.

As to the efficacy of the Act, there are a number of difficulties that have been experienced in its administration. These difficulties relate to both acquisition with compensation and without compensation. It is particularly the latter type of acquisition which has proved difficult, thereby hampering Government efforts to provide land for development.

We can now look at the difficulties of administration.

(iii) Problems in the Administration of the Lands Acquisition Act

The main difficulty in acquiring land with compensation has been the lack of Government funds for this purpose. Mr. B.R. Sharma, Commissioner of Lands between 1970-1974, was quite emphatic on this.[1] In his recollection, during his tenure as Commissioner, he managed to secure only a token sum of K50,000 for purposes of compensation. For a large country like Zambia, this is a negligible amount for purposes of acquiring land needed for development. Current quotations of properties from the Zambia National Building Society range from K30,000-K60,000 per property.

Mr. Walubita, Assistant Commissioner of Lands, who is also involved in field inspection of properties expressed the same view

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[1] Interview with Mr. B.R. Sharma on 27/4/1977 at Lusaka.

with regard to acquisition of land with unexhausted improvements. [1] In his experience provisions of the Act relating to acquisition with compensation have been used often only where there is a Government Ministry requiring land for a specific project for which money has been provided. In such cases the said Ministry would approach the Lands Department, after spotting suitable land, to process acquisition. This was the case with the Ministry of Agriculture which wanted a certain parcel of land owned by a private landholder for a re-settlement scheme. The Ministry provided the Lands Department with the necessary funds and acquisition with compensation was thus carried out on its behalf.

The lack of provision of funds for compensation must, however, underline Government intentions of wishing to use the Act primarily to acquire those parcels of land which are not subject to compensation. But even this has been severely hampered by both problems of administration and inadequacies in the law. Shortage of skilled staff and transport have been cited as the main factors accountable for administrative difficulties. This is reflected by the absence of systematic field investigations in locating which properties are un-utilised and undeveloped. Mr. Sharma attempted to have a list of idle and vacant land compiled but the list was far from being complete. At the moment, according to Mr. Walubita, knowledge of the location of such land is haphazard, depending entirely on reports from members of the public. But even where field investigations are made some field

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[1] Interview with Mr. Walubita on 29/8/1977 at Lusaka.

officers lack a sense of judgment in ascertaining which land falls within the category available for acquisition without compensation. In one recent case from Livingstone in the Southern Province, a field officer reported that Farm No. 3368 was undeveloped and unutilised. When the Assistant Commissioner of Lands visited the farm to verify the report, it was discovered that the farm had in fact a number of improvements.

It may be suggested that since the terms "undeveloped" and "unutilised" lack precision, the terms be simplified by relating them to a minimum monetary value to be attached to developments on the land. Thus such a minimum monetary value could be used as a guide in determining whether such land is unutilised and undeveloped. The current practice devised to avoid difficulties arising from the legal terminology appears to be in accord with this suggestion. Mr. Walubita pointed out that currently the Department of Lands avoids acquiring land which is in use if the owner is resident in Zambia. Illustrating this practice, he gave the example of a farm owned by an Indian in the Chisamba area of the Central Province. The Indian, owner of the farm, lives in town while his workmen live on the farm. There is a garden and a borehole on this farm. The Department of Lands abandoned attempts to acquire this farm without compensation. It would be more helpful if a monetary value were pegged to the minimum use of land. Besides providing guidance, this would ensure that the Act applies to land inadequately used which is below the specified minimum.

In addition to these administrative difficulties, Mr. Kawamba,

Commissioner of Lands between 1974 and 1977, observes that determination by the President whether it is in the interests of the Republic to acquire land takes some time. [1] In his recollection such determination can take as long as a year to be conveyed to the Commissioner of Lands. By the time this is done the state of land might have been improved not to warrant acquisition without compensation.

All that can be said of the typical administrative problems is that it is necessary to improve the efficiency, number and quality of the personnel. The legal problems of the Act, on the other hand, relate to procedure and the lack of legal provisions in certain instances to facilitate acquisition. Section 11, which provides the procedure in the event of dispute as to the amount of compensation payable or the right to acquire the property, has had very frustrating effects on the Act. The proviso to this provision requires the Minister to pay into court an amount which he regards as just before taking possession if the right to acquire without compensation is being disputed by the landholder. This is the preliminary requirement under this section before proceedings are instituted for the court to resolve the dispute as to the right of acquisition.

This provision in the view of the Department of Lands has virtually discouraged acquisition without compensation where a landholder disputes the right of acquisition. The Government has quite often found itself in a situation where there is no money to be

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[1] Interview with Mr. C. Kawamba on 12/4/1977 at Lusaka.

deposited in court and therefore abandons taking possession for failure to meet the procedural requirement. This proviso, the Department of Lands observes, has given a landholder undue advantage in that all that need be done to foil the Government's intention of acquisition is to dispute the right of acquisition. Mr. Sharma recalls this procedural requirement was used during his tenure of office as Commissioner of Lands to frustrate Government efforts of acquiring undeveloped and unutilised lands.

There appears to be a sound argument for removing this anomaly. The intention of the Act is clearly that undeveloped and unutilised land can be acquired without compensation. This intention should therefore be made possible without any hinderance. If a dispute as to the right to acquire exists, this should be resolved by court proceedings without requiring the payment into court of an amount regarded as just compensation. To require payment of compensation at that stage is defeating the very purporse of acquisition.

This anomaly, it is suggested, can be avoided in two ways, namely by either amending the proviso requiring payment into court or by the State avoiding taking possession pending judicial determination. The latter, it is submitted, is more reasonable. Payment into court only becomes necessary on taking possession. If possession is avoided, then the requirement of paying money into court falls away. This view was brought to the attention of the legal officer in the Lands Department. His reaction was that although this alternative was the only one under the proviso in question, there were instances when the

Government needed land urgently. [1] In such cases of urgency the taking of possession was necessary. He added that delay in taking possession can often involve heavy costs on the Government if a contractor (at times an international company) has already been granted the tender to carry out a development project. To accommodate this kind of urgency, it is suggested that the taking of possession without payment into court be confined to such cases only. But even then private rights of property should not be indiscriminately compromised. Hence any amendment of the proviso should include provision for judicial determination, by preliminary proceedings, as to the urgency of taking possession. This will avoid occasions of deeming every situation as urgent whenever the Government says so.

Section 8 is the provision which lacks other legal means of enforcement. This provisions allows the State partial acquisition of land owned by an individual. Regrettably, neither this provision nor any other law provides the means by which this could be accomplished. If the State purportedly proceeds to acquire compulsorily part of an individuals' land, there is no legal machinery available at the moment by which the State can become the registered proprietor of the acquired parcel of land. The entire unit of property is registered in an individual landholder's name. For the State to obtain title of a portion of this property, it is necessary to mark off this portion from the registered proprietor's title documents. The registered proprietor is, however, under no compulsion to surrender his title documents for

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[1] Interview with Mr. M.S. Dutta on 22/9/1977 at Lusaka.

the marking off exercise. In practice, Mr. Dutta, the legal officer in the Department of Lands, [1] says partial compulsory acquisition has had to be abandoned. This according to the legal officer has been in instances where an individual owns a large acreage with a building erected in one corner. The remainder of the acreage apart from the building would be unutilised and undeveloped, hence falling within the description of land that can be acquired compulsorily without compensation. But because of the legal difficulties of marking off, the options for the State are either to acquire the entire lot of the area or give up acquisition completely. Because of the lack of funds mentioned earlier the State has hardly resorted to the option of acquiring the whole property with payment of compensation for the unexhausted improvements (the building). Mr. Kawamba confirmed this restraint during his period of administration as Commissioner of Lands. In his recollection, had it not been for the marking off restraint, vast parcels of land could have been acquired without compensation.

The solution to this problem appears obvious and that is to amend either the Lands Acquisition Act or the Lands and Deeds Registry Act. This would permit marking off and thus secure registration of title for the portion of land acquired by the State.

Ss 2 and 20 of the Lands Acquisition Act have also created practical difficulties relating to outstanding mortgages on land

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[1] Interview with Mr. M.S. Dutta on 18/9/1977 at Lusaka.

proposed to be acquired. Under s.2 land subject to acquisition "includes any interest in or right over land, but shall not include a mortgage or other charge." When the transfer of land acquired is registered in the name of the President under s.19, the land under s.20 vests in the President "free from all adverse or competing rights, title, trusts, charges, etc." On the effect of this, James has observed: "The Registrar of Titles is reluctant to register the President as owner of land where there is an outstanding mortgage over it". [1] This is so because the then Registrar feared that to register title in the name of the President free from any encumberance would extinguish a mortgagee's subsisting rights. S.2 of the Lands Acquisition Act, it will be recalled, does not include a mortgage as such right that can be acquired compulsorily.

Mr. Aryee, the present Registrar, confirmed that it is still his practice to refuse registration of a compulsory acquisition order in the name of the President if there is a subsisting mortgage. He insisted, however, that his refusal to register can only be on the strength of a mortgagee's caveat, opposing registration of mortgaged property in the President's name. [2]

Mr. Walubita, the Assistant Commissioner of Lands, concedes that the Department of Lands is aware of this obstacle. Thus the

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[1] See R.W. James, "Mulungushi Land Reform Proposals - Zambia", E.A.L.R.,opt. cit., p. 125.

[2] Interview with Mr. C. Aryee, Registrar of Lands and Deeds on 26/4/1977 at Lusaka.

Department has equally been reluctant to acquire land to which an undischarged mortgage attaches. [1] Illustrative of this reluctance is the Mumbwa concession area in the Central Province. Concessionaires of this area who have since left Zambia obtained mortgages from various money lending houses in the hope of exploiting minerals. Mineral exporation, however, revealed no minerals, hence the concession area has been abandoned with the land remaining idle and unutilised. On the land being spotted as being subject to compulsory acquisition without compensation, the Department felt restrained because of outstanding mortgages.

This is a more difficult problem to resolve, taking into account mortgagee's interests. If the State were to discharge the mortgages, it would be paying for a liability which is not its own. But if the State refrains from acquiring such land, then this land will never become available for development. The Land (Conversion of Titles) Act has complicated the matter even further. Since bare land without improvements on it cannot be sold, this bars mortgagees to take foreclosure proceedings to redeem the mortgages. In this state of affairs it can only be submitted that national interest should prevail. It is thus suggested that s.2 and 20 of the Lands Acquisition Act be reconciled by amendment to allow the State to acquire without compensation land with a subsisting mortgage. Harsh though this may appear to be to mortgagees, they will still remain with a remote possibility of securing their money from mortgagors wherever they may be.

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[1] Interview with Mr. Walubita on 29/8/1977 at Lusaka. Cf., note 1, p. 474, supra.

In the present state of the Lands Acquisition Act, the Government objective of securing idle land for national development has not been completely achieved. In this respect, James has concluded: "In terms of achieving its original object the Act is a failure". [1]

B. The Town and Country Planning Act [2]

The primary task of this legislation is to control and regulate the development of land. The Act attempts to achieve this aim in the following ways:

1. by controlling the rights of a landholder to use and develop his land;
2. by requiring planning authorities to produce 'development plans'; and
3. by constituting planning authorities to supervise and control the use and development of land.

A landholder's rights in the use of land are controlled by requiring the landholder to obtain planning permission before the land can be developed. In granting planning permission for the use of land the relevant authority may attach conditions on how the land in question is to be developed. The same authority may even withhold planning permission which means the landholder cannot in this event utilise his land. In this way a landholder's rights are restricted in that he cannot do whatever he wishes with his land. In processing a

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[1] See R.W. James, "Mulungushi Land Reform Proposals - Zambia", E.A.L.R., opt. cit., at p. 125.

[2] Cap. 475, Revised Laws.

planning permission from a landholder, the relevant authority should, however, have regard to the development plan for the area.

It is for this very purpose of regulating land use that planning authorities are constituted to produce development plans. Having thus produced development plans, these authorities are then charged with the function of ensuring that land use is within the objectives of prescribed development. In this regard, the Minister responsible has the power to delegate his responsibilities to planning authorities both in urban and rural areas. [1] The practice in the constitution of these authorities has been to delegate planning and regulating responsibilities to local authorities in the major urban centres along the line of rail and to other broadly constituted bodies in the rural areas. While the former may have the advantage of liaison in the administration of related aspects of development, the disadvantage has shown itself to be a conflict of duty arising from local authority functions and those of a planning authority. But whereas this disadvantage cannot arise where a planning authority is independent of and separate from a local authority, the disadvantage has revealed itself in lack of co-ordination between the two bodies. This has often resulted in conflicting decisions in related areas of development invariably to the detriment of a land developer. These defects in the regulating machinery emerge throughout this discussion but will be more

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[1] See ss. 5 and 24.

particularly dealt with subsequently when evaluating the efficacy of the town and country planning machinery.

(i) Development defined

The Act defines development as "the carrying out of any building, rebuilding or other works or operations on or under land, or the making of any material changes in the use of land or buildings . . .". A notable exception to this is "the use of any land for the purpose of mining or agriculture, including the erection and use of buildings for such mining or agricultural purposes . . .". [1]

There has not been much dispute as to what is meant by development for most cases that have come before the Town and Country Planning Tribunal (hereinafter referred to as the Tribunal) have involved permanent erections on land. The Tribunal did however have occasion in Papenfus v. The Lusaka City Council [2] to give limited interpretation to the term "development" as it affected the case in issue. In this case the appellant appealed against the decision of the respondent planning authority in refusing her planning permission to run a day nursery for children over the age of 7 years. Previously, the appellant had been granted permission for the same occupation which related to children below the age of 7 years. Disregard of the age restriction contravened the Day Nurseries Ordinance -- hence the appellant believed that the cure for it was to seek planning permission.

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[1] See s.22(4)(g). For definition of "development" under the English Planning legislation and related questions of interpretation, see P. McAuslan, Land, Law and Planning, London, 1975, pp. 509 et seq.

[2] Before the Town and Country Planning Tribunal, Lusaka (unreported). Dated 2/10/1963 at p. 8.

The Tribunal, enquiring into whether there was any necessity for obtaining planning permission, commented on the effect of s.22(4) defining development: "No building operations were proposed here; at most what the appellant was trying to do was to make a change in the use of Stand 34B by opening her registered nursery there to children over the age of 7 years. In our view this could not be regarded as a "material" change in use". With this interpretation the Tribunal held: "The appellant required, accordingly, no planning permission, and her application for planning permission should not have been entertained, but dismissed in limine".

In Liebenberg v. The Municipal Council of Luanshya, [1] where the appellant sought to convert a derelict church into residential use, the Tribunal found no difficulties in ruling that this was development as it involved material change of the use. Thus the Tribunal said on this point: "The appellant's proposals to use the western portion of the plot for residential purposes (whether involving the demolition of the existing church building and the Bell Tower or not) do constitute "development" and as such do require planning permission. It would be a significant and material change of use".

It appears both from the provisions of the Act and the Tribunal's verdicts in the two cases that development involves physical

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[1] Appeal No. TPT/06/7/6 (unreported). Dated 21/8/1972 at p. 25.

constructions on land or material change of use of the same. All that need be said in this regard is that what constitutes development is a question of fact to be ascertained in each case. Some activities, such as permanent constructions, are too obvious to be disputed. Material change of user on the other hand will be determined mainly by the degree of change. [1]

As permission is required of the planning authority by an individual before he can undertake either 'development' or 'sub-division' it is convenient here to define 'sub-division'. Sub-division is defined as "the division of any holding of land into two or more parts, whether the sub-division is effected for purposes of conveyance, transfer, partition, sale, gift, lease, mortgage or any other purpose . . .". [2] This it must be noted has been one of the provisions used in regulating development of agricultural lands. Had the Town and Country Planning Act been the only legislation regulating the use of agricultural lands, the limitation would have been obvious. Control of agricultural lands under the Act could only have been effected when sub-division was in issue; and even then, this would have been so only with regard to areas affected by the town and country planning legislation. Quite besides this control of sub-division generally, the Agricultural Lands Act [3] is exclusively concerned with the beneficial use and occupation of agricultural holdings.

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[1] Cf., Birmingham Corporation v. M.H.L.G. [1963] 3 All E.R. 669.

[2] See s.22(3).

[3] Cap. 292, Revised Laws.

No dealings in land to which this Act applies can take place without the written consent of the President, which is processed through the Agricultural Lands Board, the institution assigned with the task of supervising good estate management.

In Kenya too although the planning legislation similarly controls sub-division of land generally, [1] any dealings in agricultural lands including sub-division involving more than twenty acres are exclusively regulated by the Land Control Act. [2] The theme of this Act is to assure the economic use of agricultural lands which quite recently was emphasised in the High Court case of In the Matter of Consent under the Land Control Act. [3] In this case it was held that the consent of the Land Control Board could not be dispensed with in the sale of the agricultural land in question. The facts of the case involved a lease of agricultural land which after execution received consent of the appropriate control board. This lease contained an option to purchase the whole interest of the lessor in the land. The board's letter of consent made also reference to the option to renew the lease for a further term. Subsequently the lessee exercised both his options of renewal and purchase of the lease. Satisfied that the original lease had been granted the necessary consent, application was presented to the Registrar of Titles to have the subsequent transactions registered. The Registrar refused

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[1] See ss.3(a)(1) and 10, Land Planning Act, cap. 303, Laws of Kenya (1970 ed.).

[2] See s.6, cap. 302, Laws of Kenya (1968 ed.).

[3] Misc. Cause No. 52 of 1971, reported in [1971] K.H.D.

registration because he felt that as this was agricultural land the transactions required the consent of the Land Control Board. Upholding the Registrar's refusal, the Court emphasised that for purposes of maintaining standards of good husbandry and ensuring economic development of agricultural land specific consent was required by law for a subsequent transaction such as the sale.

The effect of the recent Land (Conversion of Titles) Act has been to increase control of agricultural holdings. Under this Act, the Minister responsible is empowered to prescribe the maximum area of agricultural land which may be held by any person at any one time for any specified purpose. [1] One of the primary objectives of the former Agricultural Lands Ordinance, which as we have seen was to make provision for converting agricultural leases to freehold tenure through the lessee's option to purchase, [2] is now obsolete.

(ii) Preparation of development plan

A planning authority having been delegated the statutory functions has the responsibility of preparing a development plan for the area in question revisable every five years. The plan could however be modified or revoked earlier than the five year period of review if the planning authority submits to the Minister responsible as grounds of justification any of the following:

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[1] See s.17(1).

[2] See Chapter 5, p. 322, supra.

(a) that there are practical difficulties in executing the approved development plan;

(b) that new circumstances have since superseded the original approved development plan; and

(c) that there have been minor errors or omissions in the initial plan. [1]

In the preparation or modification of the development plan there is however provision for objection on the part of any interested party. In determining the matter, the Minister can initiate a public inquiry. [2] This procedure was in fact adopted In the Matter of Public Inquiry into the objections to Modification No. 8 to the Kitwe Development Plan. [3] In this inquiry, the Municipal Council of Kitwe, the planning authority of the area, wished to re-zone the land, the subject of inquiry from its use zone under the Plan (Car Park) to land for "General Business purposes". The argument for re-zoning was primarily based on commercial need for the scheme in the general interests of the public. The land in question was the property of the planning authority in its capacity as a local authority. The objection to the proposed modification primarily hinged on the lack of need as there was sufficient commercial land under the Plan. The ratepayers amongst many others, added this other reason -- that "the Local Authority is using its powers as Planning Authority to give

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[1] See s.18(2).

[2] See ss.15 & 49.

[3] Before J. Dare, held at Ndola (unreported). Dated 30/11/1964.

unto itself as a landowner capital appreciation consequent upon rezoning". The inquiry however ignored this fact as not being a planning consideration.

In its recommendation the inquiry however rejected, inter alia, the proposed modification on the following grounds, namely that:

(a) no sufficient circumstances had arisen to justify alteration of the approved development plan;

(b) there was little demand for further shops and offices in the town; and

(c) there was ample scope for "general business" development on land already zoned for that purpose.

This recommendation was accepted by the Minister [1] and thus the proposed modification was never effected. Notwithstanding the degree of ministerial discretion involved in the working of this machinery, the advantage is self-evident. The various interest groups can attempt to secure the protection of their land rights by challenging the soundness of the planning scheme.

An order for preparation of a development plan having been made or such plan having been approved in the areas affected, " . . . permission shall be required . . . for any development or sub-division of land that is carried out after the appointed day". The appointed day is 16th November, 1962. Permission is also necessary for areas

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[1] See L.V. Mitchell to Town Clerk, Municipal Council of Kitwe (undated).

within a twenty mile radius from those affected by the plan [1] and in such areas specified by the Minister by statutory notice. [2]

A development plan does not, however, bind the State except with regard to Reserves, Trust Land and Mine Townships. [3] In any areas other than those above mentioned, which are subject to development plans, "the Republic shall not carry out any development or sub-division of land without prior consultation with the planning authority of the area". [4] In the event of disagreement the matter shall be referred to the Tribunal, whose findings and conclusions are not binding on the Minister responsible who initiated the reference. [5]

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[1] Cf., Greyling v. Southern Planning Authority, Before the Town and Country Planning Tribunal, Lusaka (unreported). Dated 1/6/1964.

[2] See s.22(1) & (2).

[3] See ss.3(1) & 48.

[4] See s.4(1).

[5] See ss.4(2)-(8). For reference of such matters to the Tribunal, see Re The City Council of Lusaka v. The Director of Public Works, Appeal No. TPT/06/7/1/4 (unreported). Dated 22/2/1965; and Re The City Council of Lusaka v. The Director of Public Works, Appeal No. TPT/06/7/1/8 (unreported). Dated 31/3/1966. The recommendations of the Tribunal were in both cases accepted by the Minister. See L.V. Mitchell to Secretary, City of Lusaka Planning Authority of 8/3/1965, TPH/03/5/1; and Commissioner of Town & Country Planning to Secretary, Town & Country Planning Tribunal of 25/6/1966, TPH/03/5/8 respectively. From the acceptance of these conclusions, it would appear that the State is likely to accept recommendations on matters of technical proficiency.

(iii) Enforcement procedure

(a) Control of development

In processing a planning permission application " . . . the Minister or planning authority may grant permission either unconditionally or subject to such conditions as he thinks fit, or may refuse permission, and in dealing with any such application, the Minister or said planning authority shall have regard to the provisions of the development plan or approved development plan, if any, so far as material thereto, and to any other material considerations . . .". [1] In so far as the land developer may be adversely affected by decisions of planning authorities, he has recourse to the Tribunal which as constituted under the Act has review powers. [2] Appeal against decisions of this Tribunal lies to the High Court.

Two relevant criteria in determining a planning permission application emerge from the above provision. These are the material provisions of a development plan, where there is one, and any other material considerations. In an illustrative case of Total Oil Products (Rhodesia) (Pvt.) Ltd. v. Municipal Council of Livingstone [3] the Tribunal had occasion to elucidate on the relevant criteria for planning consideration. In this case the appellant wished to build in stages a petrol filling station and a block of flats on their site which was

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[1] See s.25(1).

[2] See Part II of the Act particularly s.11.

[3] Appeal No. TPT/06/7/5/1 (unreported). Dated 3/3/1964.

subject to the provisions of the Livingstone Approved Development Plan (hereinafter referred to as the Plan). Under this Plan the site in issue was zoned for residential use which meant that planning permission was only necessary with regard to the petrol station. Planning permission from the respondent planning authority which was also the local authority for the area was refused. The said permission was refused, inter alia, on the ground: "That the Council require the proposed development to be carried out concurrently and not by stages". Giving meaning to this ground, the Tribunal observed: ". . . the respondent Council were not rejecting the appellant Company's applications because of objections to the actual development which was proposed, but rather to the manner, and in particular to the sequence and timing, of the implementation of that development . . .". [1]

The Tribunal then addressed itself to the issue "Whether the rejection of the appellant Company's application was founded on proper planning considerations and intra vires the respondent Council". The Tribunal in answering the question relied on Lord Denning's test laid down in Pyx Granite Co. v. Ministry of Housing in which it was stated that for conditions attached to a planning permission to be valid ". . . those conditions . . . must fairly and reasonably relate to the permitted development . . .". [2] On this rationale the Tribunal held: [3]

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[1] At p. 9.

[2] [1958] 1 All E.R. 625 at p. 633.

[3] At pp. 21-22.

> The condition which the respondent Council are seeking to impose here has the effect of making planning permission contingent upon the due execution of what is really a collateral project which does not itself require any permission for its implementation. It seems to us that the respondent Council are attempting to use their powers for an ulterior object -- namely to ensure that flats are erected and soon erected on part of this site -- and this is not, in our view, a legitimate exercise of their powers or discretion.

In finding no planning objection to the grant of permission, the Tribunal rejected, inter alia, the objector's argument that he was likely to suffer from competition of another filling station sited directly opposite. "The incidence of competition arising from this arrangement", the Tribunal said, "is not a matter which the planning authority should take into consideration". [1]

The Tribunal emunciated the following principles -- namely that:

(a) when conditions are attached to a planning permission, they must relate to permitted development; and

(b) only planning considerations should be taken into account in processing applications for planning permissions.

Planning considerations as being a relevant criterion was again the subject of comment in Ball v. Western Planning Authority. [2]

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[1] At p. 26.

[2] 1966, Z.R.I. (T.C.P.T.).

In this case the appellant's farm fell in an area to which an order had been made that a development plan be prepared. The appellant applied for development permission to establish a bar on the premises. This was rejected, inter alia, on the ground that the establishment of a bar is prejudicial to the amenities of an area rural in character. On appeal the municipal council entered the proceedings as an objector opposing planning permission. The objection was that the appellant's bar facilities would prejudice the council's own institutions of similar character to be built within its boundaries in accordance with government policy.

On the evidence before it the Tribunal found no danger to the amenities of the area. On competition, relying on a ministerial view in England that it was not the function of the planning authority to safeguard established businesses from commercial competition, [1] the Tribunal ruled that such an interest " -- would not be a proper planning consideration to take into account in deciding whether or not to grant planning permission". [2] In the subsequent case of Patel v. Livingstone Municipal Council, [3] where objections from existing bar owners and operators submitted to the respondent opposed appellant's

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[1] J.P.L. 1954, p. 386.

[2] At p. 5.

[3] Appeal No. TPT/06/7/5/2 (unreported). Dated 26/6/1968 at p. 2.

original application for planning permission on the ground that there was no need, the Tribunal commented: "Need or lack of need is irrelevant to our considerations".

On what is meant by "material considerations" in the provision of the Act, the Tribunal in Greyling's case [1] conceded that the words were not capable of any specific definition as ". . . their interpretation must largely be a matter of common sense . . .". Citing one such instance, the Tribunal said: ". . . It would be common sense to inquire whether the proposed development involves a material change of use . . .". In this case the issue was whether establishment of a beer hall on agricultural land was not offensive to the amenity of the area? The planning authority decided that it was -- hence the rejection of development permission. Interpreting the term, the Tribunal expressed tacit agreement with the English case of Re Ellis & Ruslip -- Northwood U.D.C. where Scrutton, L.J., said: "It appears to mean pleasant circumstances, features, advantages". [2]

In upholding the appellant's appeal, the Tribunal relied on an English ministerial decision which emphasised the need "to preserve the rural character of the area" and "to prevent the increase of the scattered development extending . . .". [3] In this respect the Tribunal

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[1] At p. 8.

[2] [1920] 1 K.B. 343 at p. 370.

[3] See Heap's Encyclopedia of Planning Law and Practice, second series -- Vol. 1 at p. 5198, para. 5-400.

ruled that there was no such violation. [1] Amenity was again in issue in Malin v. The Municipal Council of Ndola & Kelway (objector). [2] The question for the determination of the Tribunal in this case was whether a day nursery school could suitably be established in a residential area. Upholding the objection and dismissing the appeal, the Tribunal ruled: "The area in which the premises are situate, being one zoned under the Ndola Approved Development Plan for Detached houses, is one which can be reasonably regarded as a good class residential area, and anyone building a dwelling house on a plot in that area might reasonably expect the privacy and quiet of such an area". The Tribunal added that this conclusion was justified because "The establishment of a Day Nursery School on the premises . . . must inevitably cause nuisance and annoyance to adjoining occupiers, particularly the Objector . . .".

The latest decision in Liebenberg's case [3] already referred to is also illustrative on the question of amenity. In this case planning permission for the conversion of a derelict and unused church into a dwelling house was refused. The respondent council which was also the planning authority argued that the whole area in which the church was situate is characterised by reverence and solemnity as places of public worship with some residential buildings ancillary thereto; and that to permit the alteration of the permitted use to residential purposes would alter the planning characteristics.

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[1] Cf., Sichone v. The Southern Planning Authority, Appeal No. TPT/06/7/16/1 (unreported). Dated 25/5/1968.

[2] 1965 Z.R. 162 (T.C.P.T.).

[3] See p.485, supra.

The Tribunal expressed this acceptance: "We accept that the question of 'amenity' is a material consideration, we accept that reference must be made to the Plan and that declared policies of the Planning Authority are material considerations". [1] After reciting English ministerial decisions, however, indicating some exceptional cases to preservation of the countryside amenity where the grant of permission is of more value than retention of the derelict condition of the building, [2] the Tribunal ruled that the application for conversion in the instant case ought not to have been rejected.

The Tribunal's reliance on English ministerial and planning directives will be dealt with subsequently. [3]

(b) Enforcement of planning control

The Act provides the machinery for the enforcement of the planned use of land. Provisions for enforcement relate to two types of situations -- namely: (1) where authorised or permitted use of land is being disregarded and (2) where such authorised or permitted use is sought to be varied or modified. Either situation is taken care of under the Act by procedure involving the service of an "enforcement notice".

S.31(1) governs the first situation and s.31(2) the latter. S.31(1) as materially relevant provides:

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[1] At. p. 21.

[2] See Heap's Encyclopedia of Planning Law and Practice, Bulletins of Selected Appeal Decisions, paras. 5-052, 5-429 & 5-502.

[3] See p. 505, infra.

> If it appears to the Minister or planning authority . . . that any development or sub-division of land has been carried out . . . without the grant of permission required . . . or that any conditions subject to which such permission was granted . . . have not been complied with, then the Minister or planning authority may, within four years of such development being carried out, or, in the case of non-compliance with a condition, within four years after the date of the alleged failure to comply with it, if he considers it expedient so to do having regard to the provisions of the . . . development plan, if any, and to any other material considerations, serve on the owner and occupier of the land . . . an enforcement notice . . .

An enforcement notice so served shall specify the alleged breach and may require that certain steps be taken within a certain period to remedy the breach; and for the aforesaid purpose the notice "may . . . require the demolition or alteration of any buildings or works, the discontinuance of any use of land or the carrying out on land of any building or other operations". [1] The notice takes effect at the expiration of such specified period not being less than twenty eight days after the service thereof. [2]

In Bendela v. Northern Planning Authority [3] the technical irregularity in the computation of time, which in this case was less than the minimum required, rendered the notice invalid. This being not the first such case before the Tribunal prompted it to advise the planning authorities to "relate the period of the notice to the individual facts of the case and only to utilise the minimum period

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[1] See s.31(3).

[2] See s.31(4).

[3] Appeal No. TPT/06/7/12/1 (unreported). Dated 21/8/1972. Cf., Kabwe Transport Co. Ltd. v. The Municipal Council of Kabwe. Appeal No. TPT/06/7/2/2 (unreported). Dated 30/5/1972.

where the matter is one of considerable urgency". [1] In this particular case no such urgency was ever apparent. The motive for such abrupt intended enforcement was not apparent either. Other cases however suggest that the procedure is misconceived and has on occasion been resorted to for purposes of punishment.

Kashunda v. The City Council of Lusaka [2] is a case in point. The appellant in this case ran into difficulties with the respondent in its capacity as local authority over the lack of building permission under the Public Health (Building) Regulations. After receiving reminders as to the need for such permission, the appellant submitted an application in this regard which was rejected. Subsequently the appellant submitted an application for planning permission to the respondent in its capacity as planning authority, and this too was refused. There was considerable delay in the processing of both applications for which there was no apparent explanation. The appellant was then at a much later stage served with notice under the Public Health (Building) Regulations to demolish and remove the buildings within 28 days. While this notice was being challenged by proceedings in the High Court, the appellant was subsequently served with an enforcement notice by the respondent in its capacity as planning authority. The enforcement notice related to all buildings under construction although planning objection was only with regard to some buildings.

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[1] At p. 10.

[2] Before the Town & Country Planning Tribunal, Lusaka (unreported). Dated 5/11/1971.

On appeal against this enforcement notice, the Tribunal found that there was no development permission but observed with alarm that the enforcement notice could be issued in the following year while the planning authority was aware that the appellant continued with constructions at great expense. The Tribunal quite expressly deprecated the punitive use to which the procedure was being put. The Tribunal emphasised that ". . . if a Planning Authority intends to utilise its powers to prevent unlawful or undesirable development, these powers should be used as a prophylactic measure at an earlier stage rather than as a punitive measure at a later stage . . .". [1]

As to the entirety of the buildings affected, the Tribunal noted: ". . . we find it difficult to understand why there was refusal of development permission and an Enforcement Notice for all structures . . . If the Respondent really has no planning objection to the two verandahs, it would seem to us unnecessary /and/ punitive to destroy them and then giving planning permission for their re-erection . . .". [2] As for refusal of planning permission, the Tribunal was limited by the nature of the appeal which related to the enforcement notice alone. Appellant's appeal against refusal of grant of planning permission was yet to be lodged.

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[1] At p. 11.

[2] At pp. 11-12.

In the recent case of Phiri v. The City Council of Lusaka [1] the abuse of the enforcement procedure was again condemned. On the proper use of the procedure, the Tribunal said: ". . . an Enforcement Notice need not necessarily require demolition of buildings. It may be confined to the discontinuance of use in cases where the buildings could be reasonably utilised for some other use which would not be objectionable to the Planning Authority". Unfortunately the Tribunal's disapproval of misuse and suggestions to use the procedure preventively appear no more than recommendations.

In the second type of situation where an enforcement notice may be issued s.31(2) as materially relevant provides:

> If it appears to the Minister or planning authority
> . . .
> that --
> (a) any use of land should be discontinued or that any conditions should be imposed on the continuance thereof; or
> (b) that any buildings or works should be altered or removed;
> then the Minister or planning authority may by an enforcement notice served on the owner and occupier require the discontinuance of that use, or impose such conditions as may be specified in that notice on the continuance thereof or require such steps as may be specified to be taken for the alteration or removal of the building or works, as the case may be.

Since such a planning decision might involve an interference with what hitherto may have been a permitted use of the land, the person disturbed is entitled to claim compensation from the authority

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[1] Appeal No. TPT/06/7/1/19 (unreported). Dated 19 & 20/2/1973 at p. 16.

at whose instance the notice is served.

(c) Compensation

A claimant for compensation need only show that he "has suffered damage in consequence of the order by the depreciation of any interest in the land . . .". On such proof the authority responsible is obliged to "pay to that person compensation in respect of that damage". [1] In Khumalo v. The Southern Planning Authority [2] compensation for intended demolition of appellant's building under an enforcement notice and loss of business resulting therefrom was rejected because the case did not fall within the provision for compensation. In this case the Tribunal found that the notice was lawfully issued as the appellant inadvertently did not obtain planning permission in a use zone reserved for an entirely different purpose.

In the Kabwe Transport Co., case [3] the Tribunal expressed the view "that section 31(2) is a much wider section and is available to a Planning Authority to use in proper circumstances whether the then present use of the land is a permitted use or not". In this same case the Tribunal had occasion to comment on how s.31(2) could appropriately be used. The appellant in the instant case was owner and in occupation of two adjoining plots one of which had the authorised use of an active transport yard. The other plot was

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[1] See s.35(2).

[2] Before the Town & Country Planning Tribunal, Lusaka (unreported). Dated 19 & 20/10/1971.

[3] At p. 20.

apparently not authorised to the same extent although the two were being used in conjunction for the same purpose. The respondent planning authority issued an enforcement notice against continued use of one of the premises for the purpose not so authorised.

Although holding the notice procedurally invalid, the Tribunal saw in this enforcement procedure transference of the nuisance from one plot to the other. Expressing its impressions and recommending on how best the nuisance could have been abated within the provisions of that enforcement notice, the Tribunal said: "If the Council had chosen to use its powers to compel the discontinuance of the use of both properties together and had been prepared to face up to the possible claim for compensation in respect of Plot 211 (the one for which the present use was authorised) we are of the opinion that the Council would have been acting properly, reasonably and in accordance with good Town Planning principles. To attempt to prevent Plot 210 alone being used for this purpose must inevitably increase the nuisance value . . . because the whole of the operations would then have to be carried out on Plot 211 which is, in its present state, not large enough for the purpose . . .". [1]

(iv) The efficacy of the town and country planning machinery

It will be apparent from this discussion that the town and country planning legislation has given rise to certain problems. The

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[1] At pp. 21-22.

adequacy of this machinery appears to hinge on the suitability of this town and country planning legislation in a developing country. It is here worth noting that the East African planning legislation [1] is relatively similar in objectives and implementation to the Zambian legislation. The Zambian Act is clearly traceable to the 1947 English corresponding Act -- hence the reliance by the Tribunal on English decisions. The English planning machinery has no doubt a wealth of experience, but in the first place it has given rise to many problems in England and secondly it applies there to very different stages of development.

It is in this regard gratifying to note that the Tribunal accepts that local conditions are primarily relevant. Thus on the value of English precedents, the Tribunal in Liebenberg's case, amongst others, revealed its disposition in the words: "English decisions and policy statements afford guidance, but they cannot be regarded as of direct application here". [2] In none of the cases perused however has the Tribunal come out with the conclusion that local conditions dictate departure from English practice. It may well be that the Tribunal has not yet discovered how to adapt the regulations to local conditions, but there is no doubt that unless this is done development control will not succeed. The insistence

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[1] For Kenya, see Land Planning Act, cap. 303, Laws of Kenya (1970 ed.); Uganda, see Town and Country Planning Ordinance, cap. 105, Laws of Uganda (1951 ed.); and Tanzania, see Town and Country Planning Ordinance, cap. 378, Revised Laws. For a discussion of the Uganda planning legislation, see G.W. Kanyeihamba, "Urban Planning Law in East Africa", in Progress in Planning, vol. 2, part 1, D. Diamond & J.B. McLoughlin (ed.), pp. 61 et seq.

[2] At p. 33.

by the Tribunal in accordance with English planning principles, that adequacy of facilities or the lack of them, and the protection of business interests are not relevant planning considerations cannot be allowed to go without criticism. Distribution of facilities evenly and the encouragement of the emerging and inexperienced businessmen appear to be the obvious fiat upon which development will have to proceed. To ignore even distribution of facilities would create an imbalance between areas resulting in apparent social and economic disparities. To make the average inexperienced businessman amenable to the law of demand and supply appears to have in part invited government reaction in protecting these businessmen by reserving certain areas for Zambians. [1] This may well have been viewed as an aid to generate business entrepreneurship hitherto inhibited by the various cumbersome legal processes. Much as it might be said that competition prompts efficiency and this falls outside planning considerations, protection of Zambian business interests has become government policy. Such a policy however repugnant to English planning considerations cannot be ignored.

It is here suggested that government policy in pertinent areas of planning is as much a relevant planning consideration. Hence it is as much the duty of the Tribunal to ascertain what that

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[1] See Towards Complete Independence (President Kaunda's speech to the UNIP National Council . . . .) op. cit., pp. 8 et seq.

government policy is and apply it. Thus in Ball's case where the local authority opposed planning permission on the basis that the appellant's facilities would be prejudicial to the local authority's sanctioned by government policy, it is suggested that the Tribunal should only have rejected this argument if there were no such policy in existence.

Ultimately however the answer may well be in readjusting the inherited legal machinery to suit the local circumstances. The town and country planning regulatory process, as it is now, has revealed its own limitations in its complex operation. Nobody appears to know what functions various agencies have in planned development. This was more aptly observed in Kashunda's case [1] already referred to. The Tribunal there observed: "As is often the case in appeals against a Planning Authority which is also a Local Authority, there seems to be in the minds of the parties considerable confusion of the duties and responsibilities of this authority in each of its two capacities". [2] Cases have already been cited where local authorities have amazingly been baffled into confusion in their dual capacity.

To these cases may be added: Duel v. The City Council of Lusaka. [3] In this case on appeal against the respondent's refusal to grant sub-division permission, it was disclosed in evidence that the

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[1] See pp. 500-501, supra.

[2] At p. 7.

[3] Appeal No. TPT/06/7/1/11 (unreported). Dated 30/1/1967.

Council as planning authority imposed some standard pre-conditions to such applications within the Lusaka Rural Development Plan. One of such conditions was that the land should be abutting upon the present Lusaka City boundary. To this condition the Tribunal reacted quite appropriately: ". . . The condition is an unreasonable one. The Lusaka City Council is charged as Planning Authority to deal with all applications for planning permission within the whole of the area of the Lusaka Rural Development Plan and it must at least give proper consideration to every such application on its merits, whether the land abuts on the city boundary or not. If it does not give such consideration, then obviously it is imposing a "development freeze" on the remainder of the area of the Lusaka Rural Development Plan and this, in our view, would be wrong". [1]

But even where a local authority is not a planning authority, the confusion often prompted by lack of liaison and communication between the related agencies is disturbing where this has been observed. Khumalo's case is an illustration in point. The appellant had been allocated the plot in question by the local authority, which was not the planning authority, for the building of a tavern. The local authority did this in the obvious belief that they had authority to do so without reference to any other authority. This area was in fact zoned for industrial use under the Development Plan. The appellant having constructed the building with the local

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[1] At p. 5.

authority's approval was subsequently served with an enforcement notice by the respondent planning authority requiring demolition of the structure. On appeal against the notice, the Tribunal while obliged to apply the law recorded its sympathy -- "We have great sympathy with the appellant. We are satisfied that throughout he acted in good faith and in ignorance of the requirements of the Ordinance, but it seems to us that we have no alternative but to administer the Ordinance as it is . . .". [1]

Acknowledging the prevailing break down in communication, the Tribunal put this on record: "There is a crying need for more liaison and co-operation between Local Authorities and Planning Authorities . . . otherwise the unfortunate situation which has emerged in this case will inevitably be repeated elsewhere". Pinpointing the contributory cause and entering a plea for simplification of the legislation, the Tribunal added: "An acute shortage of manpower in both Planning Authorities and Local Authorities is obviously one contributory factor to the difficulties. If that is likely to continue, we can only suggest that serious consideration should be given to simplifying the Town Planning Legislation in so far as it relates to areas outside the main towns in the country". [2]

This case highlighted the gravity of the situation for it

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[1] At p. 4.

[2] At p. 5.

revealed another 500 plots in the same area which had been developed without any development permission. On this situation the Tribunal cautioned: ". . . It appears that these buildings would be in jeopardy if Enforcement Notices were issued. This obviously requires urgent action by the Respondent working in close liaison with the Council". [1]

Bendela's case in the following year was yet another which revealed not only the lack of co-ordination but also rivalry between the local authority and the planning authority. The former was apparently asserting exclusive power to determine development in an area (a suburb) which belonged to it. In this case, like in the Khumalo case, the local authority made the land grant to the appellant, approving at the same time building constructions. The appellant quite inadvertently was unaware of the existence of the planning authority, let alone the need to obtain planning permission. Subsequently the appellant was served with an enforcement notice by the planning authority. On appeal against the notice, the Tribunal came out with this revelation: "There appears to be a regrettable lack of co-operation or communication between the Planning Authority and the Local Authority . . . the result . . . appears to be that there have been very many instances of unauthorised development permitted by the Local Authority without any reference whatsoever to the Planning Authority. It appears from the evidence that this may not be confined

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[1] At p. 5.

to Mansa alone but to other local authorities in the Provinces which are subject to the jurisdiction of Northern Planning Authority". [1]

Just as in the Khumalo case the Tribunal repeated its plea for simplification of legislation. To the land developer these administrative flaws and the burden imposed by the procedures in processing the necessary applications must be severe restraints in land utilisation. One mitigating factor however ought to be brought to light and that is, of the applications entertained for planning permissions by the various planning authorities the number disapproved is very small. The following table [2] shows this, In so far as these figures might provide an indication of the trend that most applications

Planning Permission Applications

Planning Authority	Year	Number of Applications	Disapproved
Northern	1971	70	3
Western		22	1
Southern		108	5
Lusaka		710	8
Kitwe		552	19
Ndola		448	15
Chingola		58	6
Kabwe		55	4
Livingstone		48	2
Luanshya		6	3
Mufulira		76	19
	TOTAL	2153	85

[1] At p. 11.

[2] Based on Annual Report of the Dept. of Town & Country Planning, 1971, Govt. Printer, Lusaka.

are granted, it might well be said that the land developer is not all that adversely affected. But considering what the Tribunal has had to say about certain planning authorities where refusal of planning permission was put in issue, it would not be entirely in the realm of unreasonable speculation to entertain the doubt that successful grants of permission necessarily reflect good planning considerations. It is therefore necessary to offer suggestions in an attempt to improve the efficiency of the planning machinery.

(v) Suggestions

The remedy for the difficulties in the planning scheme should be sought from the nature of the problems revealed. The solution, if it may be suggested, should be viewed in two perspectives -- namely in the short and long terms. In the short term it is suggested that the planning legislation be retained but the constitution and functions of planning authorities should be streamlined. Planning authorities must be more broadly constituted. The local authority, a wide range of representatives from land developers, and some technical experts, as might be scarcely obtained by the Government, ought to constitute a planning authority. But never must a local authority be the sole planning authority or excluded from such authority. This has the benefit of alleviating the problem of lack of communication and liaison.

Then related functions of development, i.e. preparation of a development plan, supervision of its implementation, the grant of legal facilities, such as planning permission and licences for the

realisation of specified purposes over the land, must remain the responsibility of the planning authority. This will facilitate coherent and co-ordinated action in ensuring that nothing in the lengthy procedure has been omitted. In the day to day administration, the planning authority might be left to delegate some of its responsibilities to a local authority while retaining the overall supervision.

The Tribunal being apparently the reservoir of wisdom must be assigned more active functions by being transformed from a reviewing body of errors already committed to an advisory bureau at the decision making level. On matters of difficulty and uncertainty the Tribunal, as an advisory bureau, should have a more active role in rendering enlightened opinions. As the position is now the Tribunal is left to act as a planning authority at the appellate level. This appears to be a mis-use of resources when the Tribunal's views could benefit a planning authority more in the course of planning considerations.

Illustrative of this apparent mistaken deployment of the Tribunal is the case of Patel v. Lusaka City Council [1] in which the respondent planning authority refused to grant the appellant planning permission allegedly on the ground that the wording of the development scheme did not provide for the use sought in the area in question. The president of the Tribunal, who alone is empowered to rule on questions of law, [2] proceeded to inspect provisions of the development scheme and

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[1] Appeal No. TPT/06/7/1/5 (unreported). Dated 30/9/1965.

[2] See s.11(1)(d).

upheld the appeal, ruling that the wording did not preclude the respondent authority from granting permission for the use sought. This case enhances the suggestion that valuable opinions of the Tribunal should be made more available to planning authorities at the decision making level than through the fiat of judicial review. The necessity for enlightened decisions is self-explanatory where planning powers are susceptible to misuse. Sir Desmond Heap commenting on the 1947 English planning legislation has more aptly put it: ". . . If the enhanced planning powers which the new Act creates ever got into unenlightened hands an unsatisfactory state of affairs would arise in which the private individual would find himself more planned against than planning . . .". [1]

If the present Tribunal's functions were changed as suggested above then judicial review could be more appropriately reserved to the High Court to which an aggrieved party may appeal. Having reduced deficiencies at the decision making level, the right of appeal might well be very rarely resorted to.

In the long term, planning must be by the people and not for the people as Sir Desmond Heap has again quite succintly put it: "Ultimately the only plan which people will enjoy is the one which, in effect, they make themselves. . .". [2] The land developer knows

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[1] See Sir Desmond Heap, An Outline of Planning Law, 6th ed., London, 1973, p. vii.

[2] Ibid., p. ix.

his needs and values and this can prove a safer reflection on the nation's as well. Experts must always be there but primarily their role is to enlighten decisions, present the same intelligently and educate on the need for planned development with priorities in the right order. This would entail an absolute revision of the present regulatory scheme. It is too complicated and costly for the average land developer. Planning control must facilitate development and not impede it. To this end the land developer must participate effectively in planning land utilisation on a simplified basis, be it at a district or provincial level.

McAuslan's prescription for the East African planning law could well be referred to here to emphasise the need for change in legislation. On the need for a simplified planning law he has advocated:[1] ". . . What is needed is a planning law, simple and straightforward enough for relatively inexperienced administrators and planners to operate, and developers, both public and private to comply with . . .". On the role of public participation in planning he has said:[2] ". . . Participation is now a very fashionable word in some English circles . . . but all that it means is those who are being administered or planned ought to have a hand in the administration or planning. Translated into the African scene, it does mean building on the traditions of communal self help which already exists in African society . . .".

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[1] See J.P.W.B. McAuslan: "Aspects of Urban Land Law with special reference to East Africa", in Seminar on Problems of Land Tenure in African Development, Afrika-Studiecentrum, Leiden, 1971, p. 38.

[2] Ibid., pp. 50-51.

The views expressed above as to the role of public participation and simplification of the planning machinery can, it is suggested, be implemented in the Zambian context by making full use of the leasehold tenure now adopted since 1975. Beneficial utilisation of land can be directed by attaching development conditions in lease grants by the State. Having thus attached development clauses in the lease, it would then become the lessor's obligation to supervise and enforce stipulated development. In this way regulation of development would become the direct concern of the Central Government. Control of development through the lease grant would in no way be a radical departure from present practice. All leases granted by the State have a development clause. This clause is however made subject to the Town and Country Planning Act. [1]

This type of control has the advantage of informing the tenant what can be done on the land just on acquisition instead of having to discover permitted development on applying for a planning permission. The experience of Mama Ester Antonyo is illustrative of a landholder's frustration on discovering subsequently that the intended use of land is not approved development. Mama Ester Antonyo is a Zambian businesswoman in Lusaka who has been a freehold tenant of sub-division 16 of Farm No. 609. Mama Ester was under the impression that on securing enough capital she could develop her land for any kind of business. [2] Her name is well known in the City Council of Lusaka because of the number of planning permission applications that have been turned down previously.

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[1] See for example clause 6 of a State lease granted for building of a residential house.

[2] Interview with Mama Ester Antonyo on 9/9/1977 at Lusaka.

Her latest application for a butchery business on her premises was turned down with one Councillor, a member of the planning committee, urging that she be advised "to follow what Council has planned and not Council to follow Ester". [1]

Simplification of the planning machinery can be achieved by providing the Commissioner of Lands with the available trained planners now scattered in the various planning authorities and under the Commissioner of Town and Country Planning. The latter is an office now in the Ministry of Local Government and Housing responsible for advising the Ministry on planning matters. With a pool of experts, the Commissioner of Lands on behalf of the State could then be the sole authority supervising land development throughout the country. For purposes of simplicity the office of the Commissioner of Lands should co-ordinate all related functions of land development so that on the grant of a State lease a land developer is able to develop his land without any further procedural impediment.

Mr. D. Katungu, a prominent Zambian businessman and formerly chairman of the Zambia Council of Commerce, was at pains in disclosing the distress of an average Zambian land developer under the existing procedures. [2] In his experience there is very little co-ordination between related institutions. Without reviewing in detail provisions of the Town and Country Planning Act, he expressed the wish that an objective standard be set for the guidance of businessmen or land

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[1] The author attended the City Council of Lusaka Planning Committee meeting on 8/3/1977 at Lusaka.

[2] Interview with Mr. D. Katungu on 21/4/1977 at Lusaka.

developers. It is submitted that the arrangement now being advocated will go a long way in redressing the dissatisfaction of a land developer.

For this scheme to work it must equally be pointed out that the theme should not only be regulation but provision of cheap services to the landholder. The requirement that a planning permission application be accompanied by a detailed plan can be very expensive. Many land developers, particularly in rural areas do not have the money to obtain services of architects. In rural areas the primary concern is to build a better house to live in. In the experience of the Southern Planning Authority applicants for planning permission in rural areas have often submitted very inferior plans of intended development. The Authority has however often encouraged such applicants to obtain standard plans for houses from the Building Branch of the Ministry of Power, Transport and Works. [1] Mr. Scander, the government planning officer who is also secretary to the Planning Authority, has gone further suggesting formulation of various standard plans for selection by individual developers. [2] It can only be emphasised here that the Ministry will have done great service to the nation in providing more of such standard plans.

To augment this scheme of regulation by attaching development conditions, it is suggested that there should be direct public participation in the zoning of areas for particular development projects.

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[1] One such plan for a type 313 low cost house was submitted by Mr. E.A. Hanamwinga before the Southern Planning Authority meeting of 22/4/1977 which the author had the opportunity to attend.

[2] Interview with Mr. Scander on 18/4/1977 at Lusaka.

All interested parties should be consulted in this process at the initiation of the Commissioner of Lands. The present Public Inquiry procedure is just not workable. It does not attract public attention.

There is agreement even among planners that under the existing provisions of the law in Zambia, there is just no public participation. Mr. Mulala, the Commissioner of Town and Country Planning in the Ministry of Local Government and Housing, conceded in the merit of public participation, adding that he himself has informally encouraged his planning officers to talk to land developers in the formative stages of a development plan. [1] Public participation will ensure that a development plan receives acceptance and will get rid of omissions which would otherwise occur without consultation.

Underlining the need for public participation disagreement arose in the City Council of Lusaka planning committee when a member of the committee, who is also councillor for a ward, discovered that the plan did not reflect the wishes of residents in his ward. [2] The committee deferred the matter so that the councilor's dissatisfaction is taken into account. Exposing further the adverse effect of lack of public participation, Mr. Katungu cited some instances when the zoning of an

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[1] Interview with Mr. Mulala on 18/4/1977 at Lusaka.

[2] The author attended the City Council of Lusaka Planning Committee meeting on the 8/3/1977 at Lusaka. Cf., note 1 at p.517, supra.

area does not in fact correspond to local conditions. [1]

In concluding the proposition is again advanced that the development and use of land should be regulated by attaching development conditions to State leases.

C. Rent control and regulation in letting of premises

Both residential and business premises are subject to statutory regulation. The primary purpose of this legislation is to protect the tenant by regulating rent for residential premises and ensuring that the tenant has security of tenure while in occupation of either residential or business premises. This legislative control applies to all residential and business premises in the country where the letting is by private landlords. Although there have been no statistics to show the size of the letting private sector the acute shortage of accommodation has resulted in heavy reliance on private landlords. These landlords are both individuals and firms. Let us now examine the relevant legislation affecting both types of premises.

(i) Residential premises

The Rent Act [2] as amended by the Rent (Amendment) Act [3]

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[1] In one case cited the planning authority turned down a planning permission application by a land developer who wished to put up two houses in a portion of an area zoned for agricultural use although the portion in question was unfertile. Interview with Mr. D. Katungu, formerly chairman of the Zambia Council of Commerce, on 21/4/1977 at Lusaka. Cf., note 2 at p.517, supra.

[2] No. 10 of 1972.

[3] S.3, No. 12 of 1974.

governs the letting of these premises. The Rent Act is primarily concerned with regulating the increase of rents, determining the standard rents, prohibiting the payment of premiums and restricting the right to possession of dwelling houses. It is however in this latter respect that it has been amended. The former Rent Control (Temporary Provisions) Act, 1968 has been repealed. [1]

In its s.3(1) the Rent Act states that "Subject to the provisions of subsection (2), this Act shall apply to all dwelling houses in Zambia . . .". Subsection (2) as amended [2] makes provisions of the Act inapplicable to:

(a) a dwelling house let to or occupied by an employee by virtue, and as an incident, of his employment;

(b) premises let by the Government save as to the rent charged in respect of any authorised subletting of the whole or part thereof;

(c) premises let by any local authority or the National Housing Authority save as provided in sections thirty-one and thirty-two A;

(d) premises for which an inclusive charge is made for board and lodging and in respect of which a permit in that behlaf has been issued under any written law; and

(e) premises held by the tenant under a lease for a term exceeding twenty-one years.

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[1] See s.34 of the Rent Act.

[2] See s.3 of the Rent (Amendment) Act.

And to this list may be added premises in the statutory housing and improvement areas which have been exempted from the Rent Act by the Housing (Statutory and Improvement Areas) Act, 1974. [1] Because of the absence of an elaborate machinery in these areas and more particulary in the improvement areas, rent determination was practically difficult and hence rent control unmanageable. There is now specific provision under the latter Act empowering the Minister responsible to devise regulations for rent control in both areas. [2] The Minister has not yet however devised such regulations.

The above enumerated dwellings to which the Act does not apply are self-explanatory.

(a) relates to accommodation provided to the employee by the employer as one of the conditions of employment. (b) relates to accommodation provided by Government to those in the civil service. This has long been one of the terms of employment in the civil service. This type of accommodation has been more expressly acknowledged as falling outside the provisions of the Rent Act in a case which came before the Commission for Investigations. [3] As for (c) all that need be said is that the exemption can be justified on

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[1] See s.48 & schedule 4.

[2] See ss.44(b) & 47(g).

[3] Case No. 30/74, Annual Report of the Commission for Investigations for the year 1974, Govt. Printer, Lusaka, 1975 at p. 9.

the basis that accommodation furnished by these institutions falls within the realm of control in which the Central Government has a say. Hence this in itself is provision for control. (d) relates to accommodation facilities such as are provided by hotels which are supervised under an entirely different machinery. (e) relates to leases exceeding twenty-one years.

Let us now look at situations where the Act is applicable. This can be done by examining two primary functions of the Act -- namely (a) rent regulation and (b) restriction on the right to possession of dwelling houses.

(a) Rent regulation

S.9 of the Act imposing restriction on rent increases states: "Subject to the provisions of this Act, the landlord of premises shall not be entitled to recover any rent in respect thereof in excess of the standard rent". This provision is fortified by s.10 which stipulates penal sanction for demanding or accepting rent in excess of the standard rent. Notwithstanding any other remedy under the Act, the infringement of s.9 makes the offender liable to either fine and/or imprisonment.

Related to this is the prohibition against requiring as a condition of the grant, assignment, renewal or continuance of a tenancy, lease, sublease, subletting or occupation of any premises that a fine or premium or other like sum be paid in addition to the standard rent. This is enforceable by similar penal sanction.

"Standard rent" is defined by the Act. [1] Power to determine the standard rent in any particular case vests only in the court. The court will make such determination either on application by an interested party or on its own volition. But on the landlord the obligation is imposed to apply for the determination of the standard rent within a specified period if this has not yet been done on coming into force of the Act. In determining the said rent, the court is to be guided by the definition although discretion is conferred to vary the rent from that defined if in the circumstances a computation of the rent as defined would yield an uneconomic return to the landlord; and if sufficient evidence is lacking upon which a computation can be made.

The landlord is, however, under limited circumstances allowed to increase the rent of premises let. A landlord may, by notice in writing to the tenant increase the rent

(a) where the rates payable by the landlord have since increased and the rent increased will be by a corresponding amount of such increase; and

(b) where the landlord has since the prescribed date incurred expenditure on the improvement or structural alteration of the premises (but this does not include expenditure on re-decoration or repair, structural or otherwise) and the increase in rent shall be by an amount calculated at a rate per annum not exceeding fifteen per centum of the expenditure incurred.

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[1] For definition of standard rent in respect of both unfurnished and furnished premises, see s.2(1) & (2).

The permitted increase attaches to the premises and as such there is no obligation on the landlord to serve fresh notice of the same increase to a subsequent tenant. [1]

Except as indicated above, the landlord cannot transfer any burden or liability previously borne by him to a tenant. But a transfer of rates to a tenant shall not be deemed as an increase in the standard rent if the said rent is reduced by a corresponding amount to the transferred liability. [2]

(b) Restriction on the right to possession of dwelling houses

Previously no recovery of possession of any premises or ejectment of a tenant therefrom or distress for the recovery of rent in respect of any premises could be effected under the Rent Act except by order of court. [3] Local authorities found this procedure quite cumbersome and demanding with the growing number of rent defaulting tenants. [4] This acted to deprive the tenant of the shield under the Act. S.3(2) which provides, inter alia, that provisions of the Act shall not apply to local authorities and the National Housing Authority is now made subject to a new provision (s.32A). [5] In response to complaints by local authorities this new provision prescribes the procedure for dealing with defaulting tenants.

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[1] See s.11(1) & (2).

[2] See s.11(3).

[3] See s.11(3).

[4] Cf., Debates of N.A. 13th March 1974, col. 2861.

[5] See s.3 of the Rent (Amendment) Act. Cf., p. 521, supra.

The newly inserted s.32A [1] now empowers a local authority or National Housing Authority, without any resort to judicial proceedings:

(a) to evict a tenant from the premises let to him if the tenant is in arrears of rent for a period not less than three months;

(b) to evict a tenant and any other occupier from the premises let to the tenant if the tenant has sublet the premises or any part thereof without the prior consent in writing of the leasing authority; and

(c) to levy distress upon the goods lying in the premises let to the tenant for the recovery of any rent due from the tenant.

There are however two important provisos to the power conferred under (a) and (b) above. In the event of (a) the tenant must be given one month's notice in writing to pay such arrears and must have failed to do so in whole or in part at the expiry of such notice. In the event of (b) the tenant must similarly be given one month's notice in writing to remedy the breach of unauthorised subletting and must have failed to effect the remedy at the expiry of the notice.

It is important to note that the effect of this new provision is not to repeal the effects of ss.13 and 14 of the principal Act (requiring resort to the judicial process). These provisions still

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[1] See s.4 of the Rent (Amendment) Act.

stand effective with regard to any private landlord other than the two authorities.

(ii) Business premises

Regulation in the occupation and letting of these premises is governed by the Landlord and Tenant (Business Premises) Act, 1971.[1] The primary object of this Act is to provide security of tenure for tenants occupying premises for business, which needless to say is so necessary, and to enable such tenants to obtain new tenancies in certain cases. Unlike its counterpart, the Rent Act, this Act is not concerned with the standardisation of rent although there is provision for determination of rent. This Act may thus quite conveniently be looked at in two parts -- namely (a) security of tenure for business premises and (b) determination of rent.

(a) Security of tenure for business premises

"Business", according to the Act, is defined as a trade, an industry, a profession or an employment but does not include farming.[2] It is worth noting that despite this clarity in definition, a subsequent provision excluding the application of the Act to certain tenancies expressly excludes agricultural holdings and residential premises.[3] This is tautologous. Subject to these exclusions however,

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[1] No. 34 of 1971.

[2] See s.2.

[3] See s.3(2) (a) & (b).

the Act applies to all business tenancies in Zambia. Some of the exclusions are of similar import as those under the Rent Act. A "tenancy" is defined as meaning: [1]

> a tenancy of business premises (whether written or verbal) for a term of years certain not exceeding twenty-one years, created by a lease or under-lease, by an agreement for or assignment of a lease or under-lease, by a tenancy agreement or by operation of law, and includes a sub-tenancy but does not include any relation between a mortgagor and mortgagee . . .

Having included a tenancy not exceeding twenty-one years in this definition, the subsequent exclusion in s.3(2)(d) of "premises held by a tenant under a tenancy for a term of years certain exceeding twenty-one years" from the provisions of the Act is equally tautologous.

What is meant in the definition by a tenancy "for a term of years certain" was the subject of interpretation in Musingah v. Daka. [2] The issue which confronted Doyle, C.J., was whether a term of years certain includes a tenancy for eleven months. It is here pertinent to bring to light one other tenancy excluded from provisions of the Act. The Act says it shall not apply, inter alia, to -- [3]

(g) premises comprised in a tenancy granted for a term certain not exceeding three months, unless --

(i) the tenancy contains provisions for reviewing the term or for extending it beyond three months from its beginning;
or

(ii) the tenant has been in occupation for a

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[1] See s.2.

[2] 1973/HP/339 (unreported).

[3] See s.3(2)(g).

> period which, together with any period during which any predecessor in the carrying on of the business carried by the tenant was in occupation, exceeds six months.

Without this provision, Doyle, C.J. relying on Hill and Redman's Law of Landlord and Tenant [1] was prepared to hold that the plaintiff's tenancy of eleven months would be excluded from the expression "a term of years certain". This would have been so as his lordship observed because "The ordinary meaning of a tenancy for years is a tenancy of which the term must be at least two years, and the commencement and duration of term must be capable of ascertainment with certainty". [2] Relying on the ratio in Re Land and Premises at Liss Hants [3] his lordship asked whether in the context of the Act a more extended definition could be given to the expression?

Interpreting s.3(2) Doyle, C.J.,said: "Section 3(2) . . . sets out in a number of paragraphs the exceptions . . . Paragraph (g) . . . relates to tenancies granted for a term certain not exceeding three months. These are excluded unless they comply with certain other specified conditions. This clearly implies that those tenancies granted for a term certain not exceeding three months which comply with the conditions are within the Act. If this is so, then the expression "a term of years certain" cannot have its ordinary meaning . . .". [4] On this basis the learned judge held that the

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[1] 13th ed., par. 18 and cases referred to therein.

[2] At p. 4.

[3] [1971] 3 All.E.R.330.

[4] At p. 7.

expression can be read as "a term certain not exceeding twenty-one years" and therefore includes the term certain of eleven months . . .". [1]

This decision was followed in Patel (Zambia) Ltd. v. Bancroft Pharmaceuticals Ltd. [2] One of the issues for the determination of the High Court in this case was whether a monthly tenancy is covered by the provisionsof the Act. Moodley, J., finding that the plaintiff's tenancy with his previous landlords was a monthly tenancy renewable and in fact had been renewed over a period of 12 years, was disposed to think that the Act applies. In this regard his lordship held: ". . . The plaintiff has been in occupation of the said premises for a period in excess of 6 months -- over 12 years in all. In applying the ratio decidendi in . . . Daka's case . . . one is inevitably led to conclude that the plaintiff's tenancy comes within the exceptions in paragraph (g) of section 3(2). . .".

In Morton Estates Ltd. v. Lusaka Auctioneers and Estate Agents Ltd., [3] Doyle, C.J., qualified his earlier ruling in Daka's case by holding that the Act did not apply to either a periodical tenancy or tenancy at sufferance or indeed a tenancy at will. Commenting on the Zambian provision by way of contrast with the corresponding English provision, [4]

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[1] At p. 9.

[2] 1974/HP/No. 629 (unreported) at p. 5.

[3] 1974/HP/78 (unreported) at p. 4.

[4] For the corresponding definition of "tenancy" under the English Act, see s.69(1), Landlord and Tenant Act, 1954 (2 & 3 Eliz. 2, c.56).

(the Zambian Act having been in part modelled on the 1954 English Act), his lordship observed: ". . . the Zambian Act applies to a tenancy by operation of law and is not restricted to a tenancy created by agreement. But . . . the Zambian definition refers to business premises for a term of years certain. It does not in terms include a periodical tenancy".

In this case, the defendant initially obtained a three year lease from the plaintiff with an option to renew for another two years. At the expiration of three years, the defendant did not renew the lease but continued in occupation of the premises. Subsequently, during the latter tenure, the plaintiff served notice on the defendant to give up possession at the expiration of the two years. Before the notice to quit expired, the plaintiff also wrote the defendant disclaiming that receipt of any money although expressed as rent implied a tenancy.

Finding that subsequent occupation was not a periodical tenancy but that it was either a tenancy on sufferance or a tenancy at will, his lordship held that such tenure did not fall within the provisions of the Act. In this regard his lordship thus said: ". . . All the tenancies referred to in subsection (2) of section 3 refer to tenancies which can be tenancies for a term certain . . . a tenancy on sufferance, or indeed, a tenancy at will, is neither a tenancy for a term certain or a periodical tenancy. It is a tenancy which can be terminated by the landlord at any moment. I find that the Act does not apply to a tenancy

at sufferance or to a tenancy at will". [1]

Having ascertained to which tenancies the Act applies, we can now look at what provisions there assure/of security of tenure. The most obvious protection accorded to the tenant of business premises is the requirement that termination of a tenancy at the instance of the landlord must be preced by the giving of notice "not less than six months and not more than twelve months before the date of termination specified therein". [2] In the Patel case already referred to the Court, finding that the Act was applicable, insisted that such notice was a statutory requirement. In the Morton Estates Ltd., case where the Act was found not to apply, a shorter notice (two months) was held to have been sufficient as being consistent with the tenancy in issue.

With the termination of the tenancy in sight, a tenant is given an opportunity to secure a new tenancy of the premises. In applying for such renewal, Doyle, C.J., in the Daka case has interpreted the combined effect of ss. 4 and 6 as creating two classes of tenancies for the purpose. In this respect his lordship said: ". . . the Act divides tenancies into two classes (a) those who can apply for a new tenancy from their landlords, and (b) those who must await a notice of termination before applying to the Court".

S.4(1) states that under a tenancy to which the Act applies a

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[1] At p. 5.

[2] See s.5(2). Cf., s.4(1).

tenant may apply to the court for a new tenancy:

(a) if the landlord has given notice under section five to terminate the tenancy; or

(b) if the tenant has made a request for a new tenancy in accordance with section 6.

Under s.6 the tenant's application of renwal is addressed to the landlord but the current tenancy which is to expire should be one "granted for a term of years certain and thereafter from year to year". On the effect of this, Doyle, C.J., has observed: ". . . The Act itself . . . does not permit all tenants covered by the Act to apply to their landlord. Only those tenants who have tenancies for a number of years and thereafter from year to year may apply. Those tenants who merely hold for 'a number of years certain' without the further provision cannot apply". [1] On the effect of s.4, his lordship has also made this observation: "The terms of section 4 prohibit a tenant who has not first made application to his landlord from applying to the court unless the landlord has given notice of termination . . .". [2]

The distinction in the procedure of renewal between the two classes of tenants, it may be added, does not appear to serve any useful purpose. Thus a case for the assimilation of the two classes would seem forceful. From the standpoint of any tenant, the anxiety of renewing a lease from the landlord must attach to any period of expiry if the lease is still needed. Such a tenant should not, it is

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[1] At p. 8.

[2] At p. 7.

suggested, be precluded from seeking renewal from the landlord simply because the expiring lease did not initially include the magic condition "and thereafter from year to year". The tenant in the second category is not however deprived of the facility to renew his tenancy through court proceedings. It might, for a while, be thought that by conditioning application of renewal on notice of termination, a loophole exists by which a landlord could withhold such notice in order to deprive the tenant of the judicial fiat. As we have already seen, a landlord is obliged under the Act to serve notice of termination on the tenant and this is not discretional. Hence the condition precedent to lodging application to the court is ever secured.

On the matter of renewal being referred to the court, the landlord can oppose the application on a number of specified grounds. [1] These grounds can be summarised thus -- that (a) the tenant is in substantial breach of the condition and terms of the subsisting tenancy; (b) the landlord has offered the tenant alternative accommodation of a comparable and suitable standing on just as favourable terms as the subsisting tenancy; and (c) the landlord requires the entire or substantial part of the holding for his beneficial use. Of these only (a) and (c) need further elaboration.

Under (a) fall such breaches as failure of maintenance in the repair and condition of the premises, default of rent, and misuse and mismanagement of the holding. Beneficial use under (c) relates to a

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[1] See s.11(1)(a) - (g).

number of instances when the landlord requires the entire holding. The landlord may require to/or rent dispose of the entire holding because it is more profitable than renting seperate lettings. The landlord may wish to demolish or reconstruct the premises in which event such works cannot be carried out without possession of the entire holding including that let. And the landlord may require repossession of the whole holding for his own needs such as for residence or business.

In the case of demolition or reconstruction of the premises, the court shall not order repossession of the holding if suitable arrangements and terms in a new tenancy can be made allowing the landlord to carry out his work without interfering substantially with the tenant's business. [1]

(b) Determination of rent

There are two instances when the court is empowered to make such a determination -- namely (a) when there are interlocutory proceedings to resolve the matter of renewal of tenancy during which intervening period the subsisting tenancy still runs; and (b) when the court has made an order for the grant of a new tenancy.

Under (a) the landlord may apply to the court to determine the rent during this intervening period. In making this determination the court shall have regard to the rent payable under the subsisting tenancy. [2]

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[1] See s.13(1).

[2] See s.7.

The court is, however, given further discretion to determine the rent alternatively as it would under (b).

In determining rent under (b), the court shall first rely on what the landlord and tenant have agreed on. In default of agreement the court shall determine rent being guided by the rent at which such holding "might reasonably be expected to be let in the open market by a willing lessor". In this determination the court will, inter alia, disregard the good will reputation attached to the business on the holding , and any effect on rent due to any improvements carried out in pursuance of obligations under the previous tenancy. [1]

In this situation, the court has the ancillary function of determining the terms of a tenancy where there is default of agreement between the parties. In this exercise the court "shall have regard to the terms of the current tenancy and to all relevant circumstances" other than the terms under the current tenancy relating to duration and rent. [2]

Although, as we have discussed, there is legal provision for regulation of dealings in both residential and business premises, the effectiveness of rent control is far from being satisfactory. In relation to rent control of residential premises the Rent Act is merely law on paper. By contrast regulation of business premises has been more successful. The reasons for this success are obvious. The Landlord and Tenant (Business Premises) Act, as we have seen, is not primarily

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[1] See s.16.

[2] See s.17.

concerned with rent control but with security of tenure. As we shall see, implementation of rent control depends very much on the administrative machinery of enforcement. Such a machinery has never been necessary in the regulation of business premises. But even in the assurance of security of tenure, a tenant of business premises has had the advantage of having money, hence the necessary financial standing to challenge violations of the law by a landlord. Efforts in improving the effectiveness of regulation should therefore be focused on rent control of residential premises.

Let us now review rent control, suggesting in what ways, if any, effectiveness of control can be improved on.

(iii) Evaluation of effectiveness of rent control

The failure of rent control can be attributed to the lack of an enforcement machinery. The Rent Act provides various means of enforcement. None of these however have been used. We have seen that under the Act a court is empowered to determine the standard rent of any letting either on its own volition or on application by an interested party. In addition to this provision the Act provides for the appointment of rent control officers by the Minister. [1] The functions of these officers are to ensure, amongst other things, that the standard rent is observed.

Since the anactment of rent control legislation in 1968 there

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[1] See s.30.

has never been a cause of action entertained by any court on its own motion. The High Court Registry in Lusaka confirms this. [1] The Librarian of the High Court Library who keeps records of High Court decisions in the country cannot trace any such cause of action either. [2] The Subordinate Court Registry in Lusaka does not equally reveal any such cause of action. [3] Reasons for the lack of action on the part of courts are not hard to seek. Courts do not have the administrative facilities to carry out the function of rent control. There is neither the means to know who are not observing provisions of the Act nor the administrative staff to keep records of rentable properties.

The lack of records of rentable properties is not only true of the courts but also of the more relevant institutions which should be well versed with such information. A search in the Ministry of Local Government and Housing revealed that there were no available statistics of rentable properties. Mr. R.W. Macdonald, a valuation officer in the Ministry, confirmed that although the Ministry had rating files of municipalities and townships in the country, there were no similar records regarding rentable properties. [4] Mr. A.O. Agyemang, the planning officer in the City Council of Lusaka, confirmed equally that there were no known owner-occupier houses within the boundaries of the Council. All he did in attempting to give a picture of housing units in

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[1] Interview with Mr. D. Chirwa, Acting Registrar of the High Court on 16/9/1977 at Lusaka.

[2] Interview with Librarian of the High Court Library on 24/1/1977 at Lusaka.

[3] Interview with the former and present senior clerks of court on 16/9/1977 at Lusaka. Also interviewed the senior Resident Magistrate on 19/1/1977 at Lusaka.

[4] Interview with Mr. R.W. Macdonald on 13/3/1977 at Lusaka.

the capital city of Zambia was estimate from the grants of planning permissions. [1] In his estimation, over a period of two years there have been three hundred housing units built in Lusaka. But it is not possible to ascertain from this estimate which houses have been let on tenancies.

As can be seen, without the knowledge of rentable residential premises, it is practically impossible to administer rent control. But even the provision for appointment of rent control officers has not been successfully pursued. In 1969, Messrs. D. Cox, D. Raggett and P. Harrington were appointed rent control officers in the Ministry of Local Government and Housing. [2] These officers have since left the country. There is nothing left on record to indicate what functions were carried out. In Macdonald's recollection there was nothing done with regard to rent control by these officers. Their duties were those of an ordinary civil servant, quite unrelated to rent control. [3] At the present time there are no rent control officers.

But even with the lack of an administrative machinery of enforcement, interested parties could still have recourse to judicial determination of the payable rent. Unfortunately however this redress is never resorted to. This, in part, according to the observation of Mr. J.W. Macdonald is due to the lack of knowledge by interested persons of the existing rent control provisions. This lack of knowledge could of

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[1] Interview with Mr. A.O. Ogyemang on 9/3/1977 at Lusaka.

[2] See S.I. No. 38 of 1969.

[3] Interview with Mr. R.W. Macdonald. See note 4 on p. 538, supra.

course quite adequately be cured by a mass education programme. Lack of knowledge however does not appear to be the overwhelming reason. Acute shortage of housing accommodation is the real reason which renders challenging of the payable rent a disadvantage even to knowlegeable parties. The renting of houses by the National Agricultural Marketing Board (hereinafter called NAMB) is illustrative of the dictating circumstances in a landlord tenant relationship.

NAMB is a parastatal organisation which rents from private landlords a vast number of residential properties for its employees both in Lusaka and elsewhere in the country. NAMB has a number of advantages in its dealings with landlords which an average individual tenant does not have. The organisation has the money and available legal advice in its Legal Department. In renting houses NAMB is governed by the existing government directive. This directive requires that before the Organisation rents property it should seek the advice of a professional consultant on the rentable value of the property. NAMB's Legal Officer however disclosed that the Organisation just resorts to direct dealings with landlords. The reason for this is that professional advice takes time to have and landlords are reluctant to wait for this advice when there are numerous tenants willing to pay rents one year in advance. The Legal Officer added that the pressure for accommodation in the current year is such that the Organisation has already entered into more than five hundred tenancies with still many more employees on the waiting list.

Revealing the disposition of landlords, the Legal Officer [1] said

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[1] Interview with NAMB's Legal Officer on 24/3/1977 at Lusaka.

they just dictate what rent they want. You take it or leave it. Pressed with such a situation NAMB takes up any offer that is available for convenience sake. Asked why they could not challenge such arbitrary determination of rent, the Legal Officer gave as the main reason harm to the public relation and reputation of the Organisation. It is feared that any legal challenge might prompt landlords to refrain from any future dealings with NAMB. The lucrative nature of the market from the landlord's point of view is borne out by lettings of houses to individuals by the University of Zambia. Until fairly recently the University had a surplus of housing units which it rented to individuals. When these houses were rented to individual tenants, the payable rent was arbitrarily determined by the University as the landlord. The rent so determined was not calculated on the basis of the Rent Act. Officially it has been said the payable rent was the best offer obtainable on the market. [1] The market value is however dictated by the demand and could not therefore correspond to the standard rent as determined under the Act. The Act primarily insists on "a monthly rate of one and one quarter per centum of the cost of construction". With such a test the standard rent under the Act would in any event be lower than the market value.

In such dictating circumstances the National Rent Payers Association of Zambia appears to have the description of an organisation which would have rescued the tenant by ensuring that the standard rent was observed. This Association has been in existence now for nearly ten

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[1] Interview with the University Housing Officer on 22/9/1977 at Lusaka. The author is also currently a member of the Senior Staff Housing Committee of the University.

years and purports to ensure in its objectives the interests of rent payers. Apart from a threatened call for a national boycott to pay rents in 1970, there is nothing discoverable from the activities of the Association which suggests that the Association has ever concerned itself with standard rent. [1] If anything the Association has spent a good deal of time nursing its internal squabbles. In any case its services, if there were to be any, are limited to paid up members.

In this type of situation if rent control were still the Government's theme the burden of regulation would have to be assumed more positively by the Government itself. One way of doing this would be compiling a record of rentable properties with the assessed rentable value. There would have to be a rent registry to keep the records up to date from time to time. If this were achieved, what would be left for negotiation between the parties are terms and conditions of the tenancy other than the rent. And in the event of rent being agreed on by private negotiation, this could be made subject to that kept in the registry. Insistence by the tenant on the registry stipulated rent could be guarded by legislative provision as not being a ground upon which a tenancy could be terminated or refused to be renewed.

The danger with such a legislative initiative is that if the registry rentable value does not correspond to the market value it would discourage the renting of houses. This could have a damaging effect on

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[1] A search in the Association's file no. 102/35/75, Office of the Registrar for Societies on 16/9/1977 at Lusaka.

the already acute shortage of accommodation. A close relationship being maintained between the market value and the rentable value, may, it is suggested, justify such legislative intervention.

As the position stands now, the only way of enforcing rent control is through the consent procedure. The Land (Conversion of Titles) Act requires consent of the President in any transaction affecting land. [1] The letting of premises is such a transaction which requires presidential consent. In this way both residential and business premises are affected. The current practice is that before the Commissioner of Lands sanctions the letting on behalf of the President the rentable value of the property is determined first by the valuation section of the Ministry of Local Government and Housing. According to Mr. Macdonald, one of the valuers in the Ministry, the rentable value for residential premises is based on the standard rent under the Rent Act. The rentable value for business premises on the other hand is based on the market value.

To avoid this disparity in the standard of determining rent, it is suggested, that the assessment of rent be on the same basis. There is in this regard need to formally incorporate rent control under the consent procedure. The instruction as to the formula of determining rent under the Rent Act, as we have seen, is addressed to a court and not to valuers. Strictly speaking, valuers should not be bound by the standard set under the Rent Act. It is obvious of course that

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[1] For a fuller account of consent under the Act, see pp. 385 et seq., supra.

Government would still wish to fix rent, so far as rent control can be enforced, as provided under the Rent Act. This being government intention, the instruction as to determination of rent should be addressed quite unequivocally to the valuers.

The only weakness with regulation of rent through the consent procedure is that only lettings that are brought to the attention of the Commissioner of Lands can be regulated. Thus unless the system of requiring consent can efficiently be enforced, there will still be cases of evasion. In the short term, notwithstanding these difficulties of evasion, the consent procedure can be used for rent regulation. Evading the procedure at any rate, renders the transaction null and void. The fear of having the transaction bad in law for want of consent may in itself operate as the incentive for submitting to the consent procedure.

CHAPTER 9

THE MACHINERY FOR ASSURING INTERESTS IN LAND

The two principal Acts -- the Lands and Deeds Registry Act [1] and the Housing (Statutory and Improvement Areas) Act provide exclusively the machinery of registration of land. The Reserves and Trust Land (Adjudication and Titles) Act, [2] which made provision for registration of interests under the customary domain by a mode of converting a customary law interest, has since been repealed. [3] The wisdom of this repeal will be commented on when assessing the absence of a registration machinery for interests held under customary law.

We may now first discuss the provisions of the two Acts in force.

A. The Lands and Deeds Registry Act

This Act provides for both registration of deeds affecting land and title to land. It is important to note the distinction between the two registration systems. Registration of deeds involves a recording of transactions that have taken place with regard to any particular parcel of land. The essence of this recording system is to provide a facility for determining the state of any land and indeed in ascertaining or deducing in whom proprietorship of title vests. It is essentially a register of transactions. In this the registry of a

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[1] Cap. 287, Revised Laws.

[2] Cap. 295, Revised Laws.

[3] See s.22(c), Act No. 20 of 1975.

transaction is not a guarantee as to the validity of the documents registered. This therefore is the flaw in the system in that accuracy in the contents of the documents so registered is not capable of ascertainment.

Registration of title on the other hand provides conclusive evidence behind which an intending purchaser need not go in satisfying himself as to the proprietorship of any given land. In this system registration is a guarantee as to the accuracy of the registered title.

This registration scheme when initially devised for the then territory of Northern Rhodesia was primarily intended to assure European settlers' interests in land. The scheme was supported by a cadastral survey system of South African origin. P.J. Dale, a senior research fellow at the North East London Polytechnic who investigated cadastral surveys within the Commonwealth, a project financed by the Ministry of Overseas Development, records how the registration scheme in Zambia has been confined to only 6% of the country. [1] This portion of the country is historically where European settlements were established. The Lands and Deeds Registry Act does not however confine the application of its provisions to any part of the country. In other words, these provisions could be extended to all the lands within Zambia. But since the administration of the registration scheme was concerned with land under European occupation, the practice over the years has ignored land under African

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[1] See P.F. Dale, Cadastral Surveys within the Commonwealth, HMSO, 1976, pp. 270-271.

occupation in Reserves and Trust land. With the shift in emphasis from European interests to African interests the administration of the registration scheme poses severe difficulties.

Before evaluating the difficulties of adapting the registration system to conditions of modern Zambia, we shall discuss the provisions of the Act as they regulate the two aspects of registration.

(i) Registration of Deeds

The Lands and Deeds Registry Act requiring the registration of documents as materially relevant provides: [1]

> Every document purporting to grant, convey or transfer land or any interest in land, or to be a lease or agreement for lease or permit of occupation of land for a longer term than one year, or to create any charge upon land, whether by way of mortgage or otherwise, or which evidences the satisfaction of any mortgage or charge . . . unless already registered . . .must be registered within the times hereinafter specified. [2]

The proviso to this section dispenses, however, with the requirement of registration with regard to "a document creating a floating charge upon land that has been registered under . . . the Companies Act or . . . the Co-operative Societies Act . . .". This is because it is required elsewhere.

Four points fundamental to this registration scheme can be observed. These are namely that:

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[1] See s.4(1).

[2] For the specified times within which registration should be effected, see s.5.

(a) the document conveying an interest need only "purport to grant, etc.";

(b) it is every kind of document (except those covered by the proviso) which is affected;

(c) the interest conveyed should be for a term not less than a year; but

(d) in the case of an encumbrance (such as a charge or mortgage) affecting land there is no limitation as to duration.

(a) above underscores the unreliability of such a registration system. The document purporting to convey an interest need not actually and validly convey such interest. In the Court of Appeal case of William Jacks & Co. (Zambia) Ltd. v. Registrar of Lands & Deeds and Construction & Investment Holdings Ltd., [1] the Full Court considered the meaning of the word "purporting" in s.4. Doyle, Ag. C.J., (as he then was) said: "It seems to me that the intention of the legislature in using the word "purporting" in s.4 . . . was to relieve the Registrar of the great burden of ascertaining what in fact was the true nature of any document presented to him. Provided on its face it appears to him more or less accurately to resemble a valid document which required registration, he does not have to go further". Put in other words, his lordship is saying that a document can be registered even if invalid so long as it is apparently valid.

The facts in this case were that the appellant, having apparently entered into an agreement for a lease exceeding one year,

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[1] S.J.Z. No. 5 of 1967 at p. 54.(C.A.).

applied to the Court to have it registered out of time. The said agreement, however, although complete in some particulars, lacked a commencement date. This deficiency was held by the Court as depriving the document of any purport to be an agreement for a lease. Ramsay, J., more aptly put it:[1] ". . . The Agreement . . . may have been thought by the parties to have been a concluded agreement, but it is to be registered, not by them, but the Registrar. He is a qualified barrister or solicitor, and a perusal by him of the agreement would satisfy him that, on the face of it, it does not purport to be an agreement for lease".

On this basis it was held that the agreement fell outside the provisions requiring registration. The effect this decision has is that not every invalid document can be admitted for registration. Only a latent invalidity would have the effect of making a document purport to convey an interest. In so far as a document apparently invalid does not qualify for registration it can be said that this registration system is not entirely unreliable.

Whatever the Registrar may rightly or wrongly admit for registration, it appears abundantly clear that the system of registering documents is not intended to cure any defects in the documents so registered. In this respect the Act plainly stipulates:[2]

> Registration shall not cure any defect in any instrument registered or confer upon it any effect or validity . . .

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[1] At pp. 57-58.

[2] See s.21.

As to (b) above, registration, with certain exceptions already mentioned, [1] is compulsory in respect of all documents which convey an interest exceeding one year. The Nyasaland case of In the Matter of the Estate of Osman Tayub [2] where the registration provisions of the 1916 Lands Registration Ordinance [3] were in issue provides useful contrast. In that case the issue before the bar was whether letters of administration were required to be registered under the said Registration Ordinance. S.6 of the Ordinance provided: ". . . all deeds, conveyances, wills and instruments in writing . . . whereby any land or interest in or affecting land may be affected . . . are subject to compulsory registration". This Ordinance replaced the 1910 Registration of Documents Ordinance [4] which like the corresponding Zambian Act required registration of "all documents purporting to grant or transfer land or any interest in land, or to lease land . . .".

Thomas, J., finding letters of administration not included in the definition clause of the 1916 Ordinance, where letters of administration with will annexed were mentioned, did not hesitate to hold that they were not intended to be subject to registration. The Zambian Act is in this regard quite express that letters of administration are subject to registration. S.5(3) of the Act specifies that "Probate of

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[1] Floating charges on the assets of companies or co-operative societies.

[2] 5 Ny.P.L.R.9.

[3] No. 8 of 1916.

[4] No. 12 of 1910 (see s.4).

a will affecting land or any interest in land shall be registered within twelve months of the grant thereof or the sealing thereof . . .". The definition clause makes it clear that "probate of a will""includes letters of administration with or without will annexed". [1]

On registration of every such document, the document shall describe the land in question by reference to a diagram or detailed plan approved by the Surveyor General, unless the land so described has already been similarly described by previous registered documents. In this event the document registered must refer to the document already registered with the diagram or plan describing the land. [2] This, needless to say, assures the accuracy of registration as it relates to a particular parcel of land.

The consequence of failure to register any document as specified is to render such document "null and void". [3] The effect of these words -- "null and void" has been the subject of conflicting decisions. In the High Court case of Ward v. Casale & Burney [4] the expression "null and void" under the Lands and Deeds Registry Ordinance (as it then was) was equated to the expression "void at law" as used in the 1845 English Real Property Act. [5] On this basis

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[1] See s.2(f).

[2] See s.12.

[3] See s.6.

[4] 5 N.R.L.R. 759.

[5] 8 & 9 Vict. c. 106. S.3 provided: "A lease, required by law to be in writing . . . made after the first day of October, 1845, shall be void at law unless also made by deed".

it was held that although the agreement in issue was void at law for want of registration, it was enforceable in equity. The subsequent High Court case of Sundi v. Ravalia [1] took a contrary view, holding that the meaning of "null and void" is "of no effect whatever" whether at law or in equity.

Of the two conflicting judicial views, it is submitted with respect that the Sundi case is more in accord with the provisions of the local Act because the Ward case wrongly equated "null and void" to "void at law". The former expression on the face of it invites no restrictions in meaning while the latter by not being exclusive appears to invite the equity jurisdiction of the Court.

The Uganda case of Souza Figueiredo & Co. Ltd. v. Moorings Hotel Co. Ltd., [2] (followed in the Kenyan case of Clarke v. Sondhi, [3] bringing into issue the relevant provisions of the Registration of Titles Ordinance [4] appears distinguishable from the Sundi case. The issue in this case was what was the effect of want of registration of a document which under the Ordinance was required to be registered. The relevant provision of the Ordinance which was the subject of interpretation provided: [5]

> No instrument until registered in manner herein provided shall be effectual to pass any estate or interest in any land under the operation of

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[1] 5 N.R.L.R. 345.

[2] [1960] E.A.926.

[3] [1963] E.A.107.

[4] Cap. 123, Laws of Uganda.

[5] See s.51.

> this Ordinance or to render such land liable to any mortgage; but upon such registration the estate or interest comprised in the instrument shall pass or (as the case may be) the land shall become liable to the covenants and conditions set forth and specified in the instrument or by this Ordinance declared to be implied in instruments of a like nature.

The appellant in this case took occasion to argue, that since the agreement in issue (a sublease exceeding three years) was not registered, it was ineffectual to create any estate or interest in land -- hence the covenant to pay the rent was unenforceable. Interpreting the provision of the Ordinance, Sir Kennth O'Connor, P., denied the appellant's argument when he held: ". . . no estate or interest in land can be created or transferred by an unregistered instrument; but s.51 does not say that an unregistered instrument cannot operate as a contract inter partes".

To the argument that doctrines of equity cannot override the terms of the Ordinance, his lordship replied: [1] ". . . there is no question here of an equity overriding . . . the Ordinance . . . there is nothing in the Ordinance to say that an unregistered document purporting to be a lease of, or an agreement to lease, land which is subject to the operation of the Ordinance for more than three years is void". On this reasoning the distinguishing factor is provided. If the provision had gone further to state that an unregistered document was void, like under the Zambian Act, his lordship, it would appear, would have accepted that want of registration rendered the transaction an absolute nullity.

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[1] At p. 931.

Although such would seem to be the effect of non-registration under the Zambian Act, the proviso to s.6 which declares unregistered documents "null and void" is equally important. The proviso stipulates that registration out of time can, on application to the court, be granted under certain conditions. These conditions are namely that:

(a) the failure to register was unavoidable;

(b) there are special circumstances which afford ground for giving relief; and

(c) no injustice would be caused by allowing registration.

In the Matter of Delkins Ltd. & Airflex Ltd., [1] a decision of the High Court is illustrative of conditions (a) and (c). In this case Delkins Ltd., (the applicant) sought the indulgence of the Court, by moving that it be granted an extension of time within which to register two documents in respect of certain properties assigned to it by Airflex Ltd. The latter had made the assignment in consideration that the applicant would refrain from seeking judgment against it in respect of debts owing. The applicant employed the services of a solicitor, who had since left the country. The solicitor had been instructed to attend to all the legal requirements relating to the assignment. The solicitor, however, neglected to effect registration of the documents within the specified time. The application for the extension of time was opposed by one of the proprietors of the said properties and the liquidator of Airflex Ltd.

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[1] 1971/HK/237 (unreported).

The proprietor had entered into a Deed of Surrender with Airflex Ltd. The liquidator argued that registration would have the effect of divesting him of virtually the only asset distributable to the ordinary creditors.

Chomba, J., (as he then was), while holding that the negligence of the solicitor made the failure to register unavoidable from the applicant's viewpoint for which the absent solicitor could not be sued by reason of his absence, a grant of extension of time would do injustice to other interested parties. The application was accordingly refused.

Patel & Another v. Ismail [1] is another case illustrating, inter alia, condition (b) -- that special circumstances do exist. In this case the appellant applicants entered into a written agreement with the respondent for the purchase of the good will of the latter's business. As part of the agreement the respondent was to grant the applicants a three year lease of the premises with an option to renew for two years after which latter period the condition as to renewal would not attach. The applicants undertook to pay all moneys, including rent and fees for registration of the lease. Subsequent to taking possession one of the applicants approached respondent to have a formal lease drawn but the latter said that it was not necessary. The applicant dissatisfied with this arrangement sought legal advice from a barrister who equally gave his opinion that a formal lease was unnecessary as an agreement for a lease was as good as a lease. On the

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[1] 5 N.R.L.R. 563.

expiration of the three year period, the applicants sought renewal, which the respondent rejected. The respondent instead commenced proceedings soon after for recovery of possession, adopting the attitude that the unregistered document was null and void.

The Court granted extension of time for registration on a finding that special circumstances did exist in that:

1(a) the applicants had taken reasonable steps to ensure that their rights under the agreement were preserved;

(b) the respondent had been asked to execute a formal lease and had refused;

(c) it would be inequitable not to grant the application; and

2 no injustice could be caused as the respondent had acted in an inequitable manner.

The existence of conditions to warrant a grant of extension of time must necessarily be a question of fact.

(ii) Registration of title

The Act stipulates under what circumstances the issue and holding of a certificate of title is compulsory. It is thus provided:[1]

> As from the 1st May, 1944, no document purporting to grant, convey or transfer land or any interest in land, or to be a State Lease or agreement for a State Lease, or to be a lease or agreement for a lease for a term of not less than fourteen years, or to create any charge upon land, whether by way of mortgage or otherwise, shall be registered . . . unless, prior to such registration, a Certificate of Title or Provisional Certificate in respect of the land comprised in such document has been issued to the person or persons entitled thereto.

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[1] See s.29.

This provision started a system of certification of title effective from 1944; for a document conveying an interest in excess of fourteen years to be registered, the condition precedent is the obtaining of a title certificate to the land in question. In the case of encumbrances, such as mortgages, no restriction in time is imposed. What this means is that every time a mortgage is created there must be a certificate of title relating to the land affected. From the point of view of money lending institutions, no money would be lent where the security attached to the land is not supported by a title certificate.

The procedure for obtaining a title certificate is first to apply for a provisional certificate. After the expiry of six years from the issue of a provisional certificate, the registered proprietor may then proceed to apply to the registrar for a certificate of title. [1] In the case of an original State grant of land, however, the President "shall instruct the Registrar to issue a Certificate of Title without any Provisional Certificate, and the Registrar shall in such event issue a Certificate of Title accordingly . . .". [2]

In applying for a provisional certificate "Every applicant . . . shall produce to the Registrar all instruments in his possession or under his control or in any way affecting his title and shall furnish a schedule of such instruments and also, if required, an abstract of his title, and shall make and subscribe a declaration of the truth of the statements in such application". [3] On receipt of the application, the

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[1] See s.43.

[2] See s.42.

[3] See s.37.

registrar shall cause investigations and inquiries to be made into the title to the land specified therein. [1] In this task the registrar shall order the applicant to serve notices on any interested persons not made party to the application and every such notice shall invite objections from such persons. [2] If at the expiration of the time or times specified in such notices and after receipt of all documents no objection is lodged, the registrar shall then issue a provisional certificate. [3] If there is any objection to the application, the registrar shall refer the matter to the Court, which after determination may order the issue of the certificate, or vary it to take into account the rights of other parties or refuse the issue altogether, and the registrar shall act accordingly. [4]

In the case of applying for a certificate of title, a similar procedure is followed with only this requirement that the registrar advertises the application by notice in the gazette and at least one newspaper published in Zambia or approved by the Minister. [5] If at the expiration of the time specified in the advertisement no objection is lodged, "the Registrar shall proceed to file and cancel all the documents of title delivered to him with such application, including the Provisional Certificate, and shall issue to the applicant a Certificate of Title . . .". [6] If there are any objections, these,

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[1] See s.38(1).

[2] See s.38(2).

[3] See s.39.

[4] See s.41.

[5] See s.44.

[6] See s.45.

like in the case of a provisional certificate, shall be referred to the Court which has similar powers of ordering the issuing, varying or refusing the grant of the certificate. [1] On the issue of either certificate, the registrar shall cause to be noted on the certificate existing encumbrances. [2]

Registration, as thus discussed under the two schemes of deeds and title, entails special legal consequences to which we may now address ourselves.

(iii) Legal consequences of registration

In the case of registration of documents, the important consequence to note is with regard to priority of documents. It is thus provided: [3]

> All documents required to be registered . . . shall have priority according to date of registration; notice of a prior unregistered document required to be registered . . . shall be disregarded in the absence of actual fraud.

The date of registration for this purpose shall be the date upon which the document shall first be lodged for registration in the registry. [4]

It is important to note about this provision, that as between two competing claims, the first registered document has priority notwithstanding the presence of notice of the other document which might be earlier in time of execution. Thus the doctrine of notice is

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[1] See s.46.

[2] See s.48.

[3] See s.7(1).

[4] See s.7(2).

expressly ousted from being a relevant consideration. In this the Zambian provision escapes the criticism and interpretation placed on the Gold Coast Land Registry Ordinance [1] in the West African Court of Appeal case of Crayem v. Consolidated Trust Ltd. [2]

In this case the owner of premises first leased his property to the respondents for a series of five year periods with an option to renew. Under a deed which was the subject of this case, the respondents sought to exercise their right of renewal at the end of a five year period. But before the option was exercised, the owner had leased the same premises to the appellants on better terms and conditions. The deed under which the respondents sought renewal was not, however, registered. On failing to obtain possession from the respondents who refused to quit on account of their option to renew, the appellants commenced proceedings to recover possession. The issue was solely whether registration conferred absolute priority as between competing claims notwithstanding notice of an earlier but unregistered deed.

The relevant provisions under the Ordinance governing the effect of registration with regard to priority merely stated: [3] "Every instrument executed on or after the 24th day of March, 1883 . . . shall, so far as regards any land affected thereby, take effect as against other instruments affecting the same land from the date of its registration . . .". The absence of the inclusion in this provision

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[1] Cap. 112 Laws of the Gold Coast.

[2] (1949), 12 W.A.C.A.443.

[3] See s.20.

that this was to be the effect notwithstanding notice inclined the Full Court to hold that priority of registration was not protected from being adversely affected by notice. Delivering the judgment of the Court, Lewey, J.A., held: [1] ". . . a later instrument can by registration obtain priority over an earlier one only if it was obtained without fraud and without notice of the earlier unregistered instrument". Finding that the appellants had notice of the respondents' lease, the Court took the view that they should have been put on enquiry by reason thereof and hence would have been able to discover that the respondents had an option to renew.

The specific reference to notice in the Zambian provision renders notice not a material consideration affecting the priority of a registered document. This priority is only subject to actual fraud.

The next important consequence of registration relates to registration of title. On the issue of a certificate or provisional certificate of title (which in itself is evidence of the register), the certificate shall be treated by all courts as conclusive evidence that the holder thereof is the proprietor unless this can be rebutted by production of the register wherein such particulars of the certificate are entered. [2] Amplifying further on the conclusiveness of such certificates, s.58 of the Act exempts the transferee of an

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[1] At p. 447.

[2] See s.54.

interest from the registered proprietor to inquire into the propriety of title of the registered owner except in instances of fraud. In this exemption the transferee shall not be affected by notice, direct or constructive, of any trust or unregistered interest and "the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud".

On the conclusiveness of the register or certificate of title as evidence of proprietorship, the Kenyan case of Dinshaw Byramjee & Sons Ltd. v. The Attorney General [1] is illustrative. It was held in this case that the title of a person appearing on the register as proprietor, secured in accordance with the provisions of the Registration of Titles Ordinance, is, as against third parties acting innocently, conclusive of that fact. The underlying rationale of this acceptance is the sanctity of the register which, in the words of Sir Clement De Lestang, Ag. P., ". . . were it otherwise the principal object of the Ordinance . . . founded on the Torrens system of land registration, would be defeated. . .". [2] An earlier Kenyan case of Govindji Popatlal v. Nathoo Visandji, [3] which came before the Privy Council, was even more emphatic in interpreting the provision on which the Dinshaw Byramjee's case relied. The provision of the Registration of Titles Ordinance in issue provides: [4]

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[1] [1966] E.A.198.

[2] At p. 201.

[3] [1962] E.A.372.

[4] See s.23, cap. 160, Laws of Kenya.

> The duplicate certificate of title issued by the registrar to any purchaser of land upon transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof . . . except on ground of fraud or misrepresentation to which he is proved to be a party . . .

On the basis of this section, the Privy Council held that the certificate of title issued pursuant to this provision was conclusive evidence of the title of the mortgagee to the property. Delivering the opinion of the Board, Lord Guest adopted [1] without reservation the observation of Windham, J.A., (in the Court of Appeal):

> "Any other conclusions would violate the general principle of the sanctity of the register, which is the foundation of all legislation based, as the Registration of Titles Ordinance is, upon the Torrens system of registration".

The issuing of a certificate of title by the registrar on transferring land to a purchaser by the registered proprietor is under the Zambian Act governed by s.61.

There is a great deal of similarity between the Zambian and the Kenyan system as set out in the Registration of Titles Ordinance. This warrants looking at judicial conclusions on the Kenyan provisions as persuasive in regard to the provisions of the Zambian legislation. Quite besides the similarity in the mode of deducing the root of title under the two schemes,[2] both provisions have a

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[1] At p. 376.

[2] Compare in this regard the Zambian Act and part III of the Kenya Ordinance. Note that the latter initially applied only to the Coast District of Kenya.

similar purport on the vitiating effect of fraud on the conclusiveness of proprietorship.

Other incidents also flow from the acceptance that a certificate of title entails ownership of the land to which it relates. Except in specified instances, no action for recovery of any land can lie against a registered proprietor of that land. [1] These exceptions relate to:

(a) rights of a mortgagee over a defaulting mortgagor;

(b) rights of the President with regard to a defaulting holder of a state lease;

(c) a person deprived of land through fraud as when a certificate of title is issued in these circumstances;

(d) a person deprived of land or any interest therein by reason of the fact that such land is inadvertently included under a certificate of title issued in respect of another proprietor; and

(e) a registered proprietor claiming under a certificate issued earlier in time than a subsequent one issued to another proprietor in respect of the same land.

But more important in the indefeasibility of a registered proprietor's rights, is the statutory bar against adverse acquisition of interests byprescription in regard to land the subject of a certificate of title. [2] This confirms the helpless legal status of a "squatter" who, as we have seen, cannot, particularly in urban

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[1] See s.34(1).

[2] See s.35.

areas, assert any interest over any land without specific grant from the proprietor. [1]

The benefits of the certificate of title also extend to a provisional certificate "except that the Court may, at any time upon good cause shown at the suit of any person who claims that he has a better title, cancel or amend a Provisional Certificate and in that event may order the rectification of the Register accordingly". [2]

In assuring further the various interests in land to which the Act applies, there is the facility of a caveat.

(iv) The caveat facility

In this regard the Act stipulates: [3]

> Any person --
> (a) claiming to be entitled to or to be beneficially interested in any land or any estate or interest therein by virtue of any unregistered agreement or instrument or transmission, or of any trust expressed or implied, or otherwise however, or
> (b) transferring an estate or interest in land to any other person to be held in trust, or
> (c) being an intending purchaser or mortgagee of any land;
> may at any time lodge with the Registrar a caveat . . .

Grounds (a) and (c) were the subject of comment in the High Court case of Concrete Construction (Holdings) Ltd. v. Mubanga. [4]

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[1] See chapter 6, pp. 352-353, supra.

[2] See s.32.

[3] See s.76.

[4] 1970/HK/298 (unreported).

The facts in this case were that the applicant company entered into a written agreement with respondent for the sale by the former to the latter of a piece of land. The respondent paid part of the purchase price but failed to satisfy the balance. On being requested to pay the balance, a cheque was drawn by him on the strength of which the applicant company executed the written agreement. The cheque was, however, subsequently dishonoured upon which the applicant sought to alienate the land to another purchaser. On discovering this move, the respondent filed a caveat on the basis of the executed agreement, alleging that he had acquired beneficial ownership of the property. The applicant opposed the caveat. Chomba, J., rejected this ground ruling that by failure of the respondent to perform the contract he also failed to acquire beneficial ownership. Hence a caveat could not be filed on that ground. Probing into the caveat provisions to find whether a caveat could be supported by reason of the respondent being an intending purchaser, his lordship placed this interpretation on the meaning of the provision -- "--The term 'intending purchaser' is, regrettably, not defined . . . In my view however that term should be construed to mean a party who is not only intending to purchase but who has the ability to purchase . . .". [1]

In Morgan v. Clark [2] a caveat was successfully lodged on the basis of beneficial ownership. This was an application by the

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[1] At p. 4.

[2] 4 N.R.L.R.157.

applicant to have the caveat filed by the respondent removed. The facts of the case were that the respondent accepted applicant's offer for the sale of the farm. Acceptance of the offer was effected but soon after receipt of the same, the applicant purportedly withdrew the offer having sold the farm to another purchaser. Finding that there was a valid contract, Palmer, Ag. J.,/held the caveat which remained effective.

Parties relying on the caveat facility must clearly show the existence of an interest they claim they are entitled to. An arguable point should be left for determination at the trial of the action. Thus In the Matter of the Agricultural Finance Company Ltd. and Mweemba & Othrs., [1] Cullinan, J., refused to interfere with the defendants' caveat when the interest for which the plaintiff company sought to remove the caveat as mortgagee of the property was not founded on any documentary proof of title or interest other than an affidavit merely deposing the existence of a mortgage. His lordship thus observed: "All . . . questions are a matter of evidence which in the particular circumstances of this case can only be settled at a trial . . .". [2]

The effect of a caveat once properly lodged [3] is to bar any further dealings in the land to which it relates. It is thus provided that so long as a caveat remains in force no entry can

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[1] 1973/HP/923 (unreported).

[2] At p. 8.

[3] As to the procedure and requirements of lodging a caveat, see ss.77-78 & 80.

be made on the register "having the effect of charging or transferring or otherwise affecting the estate or interest protected by such caveat . . .". [1] In Re a special case submitted by the Registrar of Lands and Deeds [2] the issue was whether a second caveat could be registered in respect of the same land while the first caveat still subsisted. Woodman, A.C.J., held that although the second caveat did not have the "effect of charging or transferring" the land protected by the first caveat, nevertheless it would"otherwise affect"the same. [3] Accordingly registration of the second caveat was prohibited.

The facility of the caveat may not however be abused by the caveator. Any improper use of a caveat will render the person at whose instance it is instituted liable for damage at the suit of the person who sustains damage by reason thereof. Thus it is provided: "Any person lodging any caveat without reasonable cause shall be liable to make to any person who may have sustained damage thereby such compensation as may be just". [4]

This provision was successfully employed in the High Court case of Construction and Investment Holdings Ltd. v. William Jacks

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[1] See s.79.

[2] 5 N.R.L.R.475.

[3] For a contrary view as to the effect of the words "or otherwise" if the ejusdem generis rule were to apply, see editorial note at p. 475.

[4] See s.82.

& Co. (Z) Ltd. [1] The facts of this case are that Zambia Airways Corporation gave by letter a firm commitment to purchase the plaintiff's property. Subsequently however, the intending purchaser informed the plaintiff that it would be pointless to enter into further negotiations while plaintiff's title remained encumbered by a caveat lodged at the instance of the defendant, who had claimed an agreement for a lease of five years with the plaintiff. After the plaintiff's property was freed from any caveat, the plaintiff approached Zambia Airways Corporation, which by letter expressed no further interest in the property. That the sale fell through because of the defendant's caveat was beyond dispute. The plaintiff now brought suit against the defendant for loss due to the intending purchaser's change of mind.

In determining the cause of action, the main issue before the Court was what was meant by the words in the provision -- "without reasonable cause"? In answering the question, Scott, J., addressed himself to the circumstances in which another person would have the right to prevent the registered proprietor dealing freely with the property registered in his name. His lordship found the circumstances to be "if that other person has, or purports to have, an enforceable interest in the property in question. . .". If this were not the case, his lordship concluded: ". . . then he should not . . . be justified in interfering with the rights of the registered proprietor". On this premise his lordship equated "reasonable" with "justifiable" and hence "without reasonable cause" was interpreted

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[1] 1972 Z.R.66(H.C.).

to mean a claim which was not justifiable. His lordship rejected the defendant's contention that the test should simply be whether the defendant believed it was entitled to an interest in land. Stating the principle the learned judge said: ". . . The right given . . . should be used with care, as it would not . . . be justifiable to say that a person had a claim to an interest in land unless it was supported by a valid document, or documents, evidencing the interest, or document or documents purporting to do so, and capable of sustaining an action thereon, or apparently so . . .".

Finding that the agreement in issue between the plaintiff and defendant was held to have been patently invalid and did not even purport to be an agreement for a lease, [1] the learned judge held that the defendant failed to justify his claim. Compensation was therefore awarded to the plaintiff in a sum assessed on the difference between the contract price, which the intending purchaser would have paid, and the current market price.

B. The Housing (Statutory and Improvement Areas) Act

The land interests created by this Act have already been discussed. [2] In addition to creating these interests however, machinery for registering them as an assurance of their existence has also been provided. Providing for various title registries the Act constitutes respective councils [3] as registries of the

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[1] For this holding, see judgment of the Court of Appeal (as it then was) in William Jacks & Co.(Zambia)Ltd., case, at pp. 548-549 supra.

[2] See chapter 6, pp.358-360, supra.

[3] "Council" means "a municipal council, township council, rural council or any other council established under the Local Government Act". See s.3.

statutory housing and improvement areas within their boundaries. Avoiding provisions of the Lands and Deeds Registry Act and related Acts, [1] which require an accurate description of any parcel of land, the subject of registration, the new Act provides for a general plan relating to either type of area. [2] It is in this very regard that this new registration scheme has much to commend itself. The surveying and diagram requirements under the then only registration system in the country were prohibitive for any area where surveying was impracticable.

The general plan under the new scheme, which must be approved by the Surveyor General, should contain the name and description by which the area is known or is to be known with an indication of existing or intended public facilities for common user. There is only one significant difference in the requirement relating to the description of a building in the two areas. In the case of a statutory housing area, the plan should indicate the dimensions of each piece or parcel of land with a serial number identifying the building. In the case of an improvement area, on the other hand, it suffices to identify the location of each building by a serial number.

The significance of the difference can only be appreciated against the background of the respective areas. Improvement areas,

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[1] The Lands and Deeds Registry Act, The Land Survey Act and the Town and Country Planning Act are expressly excluded from applying to land governed by the Act. See s.48 and schedule thereunder.

[2] See ss.4(2) & 37(2).

it must be noted, are what hitherto have been "shanty compounds". The initial inception of these areas was unplanned and unregulated. In such areas insistence on dimensions is not a practical proposition. Statutory housing areas, on the other hand, have all along been estates of local authorities and as such have had the relative benefit of planned and orderly growth. In these areas determination of dimensions of any particular parcel of land is not entirely impossible. Coupled with a serial number identification, determination of a particular piece of land must be certain.

The general plan thus facilitates the grant of a registrable interest. Whenever a council grants any interest in respect of any parcel or plot of land in these areas, such grant need not be accompanied by an exclusive diagram describing the particular parcel or plot of land. In respect of a statutory improvement area, the Act merely requires the particulars identifying the house, building or plot in question by reference to its appropriate number on the plan. [1] This procedure is not, however, available to land within an improvement area. In this area, the provision laid down is the issuing of an occupancy licence, which interest is registrable without any reference to the general plan. [2] It has been said in this regard that the general plan has been excluded from the registration procedure due to the practical difficulties of surveying plots in a compound where existing habitations follow no regular pattern. [3] The

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[1] See s.13(2).

[2] See s.39(4).

[3] See Lusaka Sites & Services Project, Vol. 3, op. cit., par. 3.3.

general plan which in any event is prepared in respect of this area as required by the Act is thus only of use to councils in the administrative management of registered occupancy licences.

It is however hard to conceive what differences this procedure makes with regard to improvement areas as the same end could be achieved by merely referring to any particular plot by a serial number with which to identify it on the general plan.

There are a number of useful comparisons that can be made relating to the registration of documents and title under this Act with the corresponding provisions of the Lands and Deeds Registry Act. There is a requirement to register "any . . . document relating to any dealing with land". [1] Thus under this registration scheme no document, whatever length of time might be involved, affecting land can pass without registration. The consequences of want of registration, just as under the Lands and Deeds Registry Act, is to render an unregistered document "null and void". [2] The interpretation placed on these words in Sundi's case, [3] as we have already seen, would appear pertinent. There is, however, a qualifying proviso under this Act which distinguishes it from the similar provision under the Lands and Deeds Registry Act. The proviso states:

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[1] See s.39(4).

[2] See s.16.

[3] See p. 552, supra.

> Provided that nothing herein contained shall apply to the case of any person who has notice of any such document.

Under this proviso notice has a vitiating effect. Thus he who has notice of an unregistered document cannot be heard to say that the document is null and void. There is however no similar provision under this Act as to the extension of time within which to register a document. This it must be added is regrettable and may cause hardship where failure to register was inadvertent.

As for priority of documents, under this Act too, priority is apparently to be determined by the time of registration and not execution of the document. The provision under the Act is not, however, absolutely clear. The relevant provision merely states: ". . . any document required or permitted to be registered under this Act . . . shall be registered in the order of time in which it is presented for that purpose". [1] Apart from the marginal note which says, "Priority determined by registration and not by execution", there is nothing expressly stated suggesting that priority is to be determined by registration and not execution of a document. The Act is equally silent on the effect notice and fraud may have on priority of documents. This, it is submitted, can only lend itself to the conclusion that notice and fraud have a superseding effect on priority. Unless expressly excluded, no other conclusion would appear available.

The effect of a certificate of title is the same under this Act as under the Lands and Deeds Registry Act. Except on the grounds

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[1] See s.14(1).

of fraud, misrepresentation or mistake, the certificate is conclusive evidence of the interest specified and granted therein. [1]

With regard to the caveat facility, there is substantial similarity between the provisions of the two Acts. Thus the grounds and procedure for lodging a caveat under this Act are the same and so is the remedy for compensation where a caveat is lodged "without reasonable cause". [2] In this regard the decision in Construction and Investment Holdings Ltd.,[3] is equally pertinent.

To the extent of any similarities between provisions of the two Acts the new Act should be viewed in light of decisions interpreting the earlier Act. Needless to say, it is now a well settled rule of construction that a court construing a later Act is entitled to rely on the construction put on the same or similar words or phrases in an earlier Act in pari materia. [4]

C. The absence of registration machinery for interests held under customary law

Previously the Reserves and Trust Land (Adjudication and Titles) Act, which followed the Kenya model [5] of registration, provided

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[1] See s.8.

[2] See Part IV of the Act -- ss.26-32.

[3] See pp. 568 et seq, supra.

[4] See Maxwell, The Interpretation of Statutes, 10th ed., London, pp. 33 et seq.

[5] For the import of the Kenya model, see North & Othrs., "African Land Tenure Developments in Kenya and Uganda and their application to Northern Rhodesia", J.A.A. Vol. 13, 1961, pp. 211-219. For the Kenya model of registration of land interests initially existing under customary law, see M. Rogers, "The Kenya Land Reform Programme - a model for modern Africa" in Vergassung Und Recht in Ubersee, H. Kriiger (ed.), Hamburg, 1973, pp. 54-57.

machinery for registration of interests under customary law through the adjudication process. Adjudication determined who had the sole and exclusive right of occupation to the land in question. If determined that the claimant, who invoked the process, had such right of occupation and there were no other contestants, the interests in the land in question were converted into some other kind of individual interest outside the domain of customary law. The interests so converted became registrable in the name of the unopposed claimant. Registration would have been effected in the Registry of Deeds established under the Lands and Deeds Registry Act and a certificate of title issued notwithstanding the provisions of this Act. [1]

The registrable interest, apart from designating the land as the claimant's, was not expressly defined. All that the Act did was to exclude customary law from governing rights conferred and recognised after adjudication. It was provided: "Save for the purposes of section 12, African customary law relating to the acquisition or creations of rights in land shall not apply to land the subject of the grant". [2] S.12 to which this provision was subject merely allowed devolution on a customary law heir on the death intestate of the registered proprietor of the land thereof. To retain the character of the land, any other claimant of an interest under customary law who was not an heir was entitled to compensation from the heir for the value of the interest. Upon such compensation the heir became the

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[1] See in particular s.11(1).

[2] See s.17.

registered proprietor. [1]

Thus although this interest was not expressed to be an English freehold estate, it certainly had every resemblance in incidents with this estate. Indeed there is every reason to suggest that it was a freehold estate or the equivalent of it.

This Act as stated has since been repealed. It is, however, difficult to ascertain what was intended to be achieved by the repeal. Since under the Land (Conversion of Titles) Act it is the freehold estate which was desired to be extinguished, the reason can be inferred that the Act was repealed because it had the effect of creating such an interest. But in so doing it appears that consideration was never given to the benefits of registration of land under customary law. The conversion of titles should only have affected the registrable interest created under the Act and not extinguished the registration scheme. It might be argued that the repeal of the Reserves and Trust Land (Adjudication and Titles) Act is justified since provisions of the Act were rarely used except for one area in the whole country. [2] The position is similar in Malawi where the corresponding Act, which is still in force, has not been extensively used. [3] But time may soon prove that a registration scheme under customary law to monitor the state of land is essential.

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[1] See ss.12(4)(c), 13 and 14.

[2] See Schedule to the Act.

[3] Cap. 59:01 Laws of Malawi has just been applied to an area in Lilongwe District. See schedule to the Act.

Any sustained effort to regulate transactions of interests under customary law, such as vetting of sales, would need the support of a registration scheme for effective implementation. But even beyond this the effective utilisation of land under the customary domain needs constant supervision. No surveilance, however, can be achieved systematically without any system of registration. To detect whether landholders are putting their land to beneficial use it will be necessary in each and every case to conduct a thorough investigation who these are. Once on record the assignment is merely one of supervision. And in this is the added benefit of certainty as to who the registered owner is.

Difficulties in the modes of registration there will ever be. Allott has very appropriately underscored this when he made this observation: [1]

> Registration demands a defined parcel over which registered rights may be exercised. Many customary laws do not proceed by way of fixed, determined boundaries. It is not only in respect of so called shifting cultivation that this point applies, although clearly there the contrast is most pronounced; even well-defined agricultural rights, e.g. to make a cocoa farm out of a virgin forest, in respect of a defined area, may carry the legal implication of a priority claim to take up a certain amount of the unoccupied land lying in the path of advance of the cultivator.

And to this may be added the difficulty of registering family or lineage property. Where the family is ascertainable, the problem may well be resolved by registering the land in the names of family members as joint property. Where, however, lineage members cannot

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[1] See A.N. Allott, "Theoretical and Practical Limitations to Registration of Title in Tropical Africa", op. cit., p. 5.

all be ascertained then the difficulty arises.

The repealed Act itself seems to have offered some answers to these problems which are related to the registration of customary interests. The extent of the land adjudicated on as being in the sole and exclusive occupation of one is the registrable parcel. Other family interests can be redeemed by the registered proprietor. In the alternative the registered parcel can be subjected to these other interests but for purposes of management the registered proprietor is the one who matters.

The need for a registration scheme is quite evident. In appraising which registration system is suitable for Zambia, we are limited in the alternatives available. The Registration scheme under the Housing (Statutory and Improvement Areas)/Act is fairly recent and is just beginning to be used. [1] Besides its novelty, the scheme, as we have seen, is primarily designed for urban settlements. Thus by its nature it cannot be successfully employed to rural areas which constitute about 94% of the land in Zambia. The Reserves and Trust Land (Adjudication and Titles) Act which had been used in respect of one area (Chipangali in the Chipata District) in the rural sector has been repealed. [2]

This only leaves the registration system under the Lands and Deeds Registry Act as the only scheme of long standing. It is only

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[1] The Act came into force on 1st June 1975. The municipalities of Lusaka, Kitwe, Ndola and Livingstone have just had their general plans for the respective areas within their jurisdictions submitted for approval to the Surveyor-General this year (1977).

[2] See p. 545, supra.

this system, which from its practical failures and successes over the years, provides the basis for any meaningful assessment. With primarily only this registration system in the country we may proceed evaluating its suitability by posing the question whether the scheme is serving its purpose. It is necessary in answering this question to highlight the practical difficulties encountered in administering this registration system. In so doing it is hoped that we can appraise whether the system can be extended to all categories of land in Zambia.

D. Suitability of the land registration system under the Lands and Deeds Registry Act

As pointed out earlier this system of land registration in its initial inception was intended to assure the interests in land of European settlers. Its success in this regard has been attributed to the South African model of cadastral survey based on fixed boundaries. In principle, this system could apply to the whole country. Mr. C. Aryee, Registrar of Lands and Deeds, agrees that the Lands and Deeds Registry Act does not discriminate in its provisions between land in the rural sector and any other land in the country. He added in the interview that land under customary tenure (in the rural sector) can only be registered "subject to a diagram approved by the surveyor-general". [1]

Registration under the Lands and Deeds Registry Act requires a diagram relating to the land in question. It is because of the

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[1] Interview with Mr. C. Aryee, Registrar of Lands and Deeds on 26/4/1977 at Lusaka.

difficulties in surveying that land under customary tenure does not qualify for registration. The fixed boundaries cadastral survey, although reputed for its accuracy, is impracticable in a vast area like Zambia. Fixing boundaries entails marking beacons in positions which should be surveyed and tied to the "national trigonometrical framework where possible". [1] This in turn requires an adequate number of surveyors to undertake the necessary field work.

The number of trained surveyors in the country is, however, very small and there are no immediate prospects that the situation will improve. The Surveyors' Institute of Zambia puts the present number of licensed surveyors in private practice at four with a large number of unfilled vacancies in the public sector. [2] As to education facilities for training, the Institute observes: ". . . currently there is no local course for training professional land surveyors and to the Institute's knowledge no Zambian is being trained abroad at present". Mr. R.A. Minchell,[3] the Director of Surveys, puts the ratio of professional land surveyors in either East or Central Africa at "one land surveyor per 100,000 people or one land surveyor per 25,000 square kilometres of land . . .". He adds however that this ratio is not relevant to countries like Zambia "where educational facilities are such that candidates with the basic educational qualifications for training at professional level are not being produced in

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[1] See E.A. Oke, "Land Tenure Systems in Zambia", a paper presented on behalf of the Surveyors' Institute of Zambia at the permanent committee meeting of the International Federation of Surveyors, Ibadan, 1976, at p. 10.

[2] See "Situation Report: Zambia", in The Development of Land Resources in East, Central and Southern Africa: The Role of Surveying and Land Economy, London, 1976 at p. 85.

[3] See R.A. Minchell, "Surveying and Mapping for Development", ibid., at p. 50.

anywhere near sufficient numbers to satisfy demands, irrespective of the manpower needs". Mr. Tompkins, the chief examination officer in the Survey Department of the Ministry of Lands and Agriculture, reveals even a more disappointing picture as to the attitudes of young Zambians towards the surveying profession. He observes that their disposition is one of disinterest and in his view there is very little that can be done to generate interest. [1]

With such a bleak manpower position, the present cadrastral surveying system can no longer be relied on, let alone facilitate the extension of registration of land to all parts of the country. But even besides the manpower difficulties the current practice of fixed boundaries is time consuming and costly. Mr. Minchell has expressed disatisfaction with this system because "there is no real quick method of survey . . .". On the cost the system entails "in high density, low cost housing areas or in low value rural areas", he concludes that it is prohibitive. [2] On the time that it can take between surveying and processing the required diagram, Mr. Dale observes from his investigations that the Zambian system has given rise to considerable delays. [3] The preparation of such diagrams has at times taken two years while the checking can take as long as a year. This is of course mainly due to the shortage of manpower.

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[1] Interview with Mr. Tompkins, chief examination officer, on 21/9/1977 at Lusaka.

[2] See R.A. Minchell, "Surveying and Mapping for Development", op. cit., at p. 49.

[3] P.F. Dale, Cadastral Surveys within the Commonwealth, op. cit., pp. 269-270. Dale carried out this project on the recommendation of the Conference of Commonwealth Survey Officers in 1971. The project was financed by the Ministry of Overseas Development. Cf., p. 546 supra.

The stringency of the checks is, however, another contributing factor. Mr. Tompkins disclosed that as the chief examination officer over the years he has had to refer back to the field several surveys because "of errors due to incompetence".

It is quite evident that these difficulties cannot be overcome in the normal course of time. Hence a search for the alternative is imperative. The Survey Department appears to have offered a provisional solution to this problem. The Department is increasingly relying on the provisions of section 12(1)(b) of the Lands and Deeds Registry Act. This allows the substitution of a diagram by preparation of a "sufficiently detailed plan" in circumstances "where the Surveyor-General is satisfied that an actual survey or the approval of a diagram is, for the time being, impracticable". The practice has been to prepare a "sketch plan" on the strength of which the State grants a 14 years lease. [1] A "sketch plan" has been described as a detailed plan which is prepared from other, but adequate, sources of information by which a parcel of land is identified in relation to some natural feature. Such a plan is done in the office without the need of going to the field. Subsequently when a diagram has been prepared the lease may then be extended for a period not exceeding 100 years from the date of the original grant. With a "sketch plan" 14 years is the maximum interest allowed in law. This is so because with effect from the 1st May, 1944 any document which conveys an interest in land exceeding 14 years can only be registered if accompanied by a

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[1] For the practice of such grants in Reserves and Trust land, see pp. 346 et seq., supra.

certificate or provisional certificate of title.[1] But such a certificate of title can only be obtained on the strength of a diagram describing the land to which the certificate relates.

Officially it is said that the "sketch plan" is just a provisional measure. Mr. Dale notes, however, that the tendency of the Department of Lands has been to grant 14 years leases due to delays in the preparation of diagrams. This has been done "to avoid the necessity of having a surveyed diagram prepared . . .".[2] A suggestion has been put to the Department of Survey that if the "sketch plan" is serving a useful purpose, the solution then lies in extending the period of the lease. The official reaction is, however, opposed to this suggestion because it is felt that this would be abandoning accuracy for which the diagram, based on the present survey methods, has been reputed.[3]

The Department of Survey does, neverthless, appreciate the limitations on the current cadastral survey system. The official feeling within the Department is that the solution lies in the shift

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[1] Cf., pp. 556-557, supra.

[2] See P.F. Dale, Cadastral Surveys within the Commonwealth, op. cit., at p. 270.

[3] Joint interview with Mr. Tompkins and the Assistant Surveyor-General, (Cadastral) on 21/9/1977 at Lusaka.

from the present fixed boundaries system to the general boundaries [1] system. The Assistant Surveyor-General (Cadastral) argues that the success of a general boundaries system depends on good large scale maps. As the situation stands now, generally the details on available maps in Zambia are out dated. Unless there is provision of money to develop a good mapping system the present system will have to be retained. Where there are sufficient details on a map, the Assistant Surveyor-General pointed out that they have in fact prepared diagrams just as accurate as those based on cadastral survey without the need to go to the field. This for instance was done in respect of 6,000 hectares in the North Western Province and a development project in the Mungule area of the Central Province. It was possible to locate with accuracy the positions of the respective parcels of land from the details and natural features disclosed by the maps.

Certainly there is merit in the proposal to move to the general boundaries system where the marking of a parcel of land is related to its position vis-a-vis the natural features such as roads, mountains, streams and other erections on the ground. In this way the costly and time consuming field survey is avoided. Indeed as between the fixed

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[1] Dale defines "fixed boundary" as "a boundary the precise line of which has been determined and recorded". He defines "general boundary" as "a boundary the precise line of which has not been determined". See P.F. Dale, Cadastral Surveys within the Commonwealth, op. cit., (glossary) at p. xxi. Simpson defines fixed boundary in relation to the English Registration Rules; but his definition of general boundary appears more illuminating - "a boundary of which the precise line is undetermined in relation to the physical feature which demarcates it . . .". See S.R. Simpson, Land Law and Registration, Cambridge University Press, 1976 (glossary) at p. xli.

boundaries system, on one hand, and the general boundaries system, on the other, none can claim superiority or any particular advantage over the other. In England for example the general boundaries system supported by the ordnance map has worked with remarkable success as a facility in land registration. [1] So has the fixed boundaries system worked successfully in South Africa where it has been reputed for accuracy in the description of the registered land. [2]

Despite this competition between the two systems, Mr. Dale has quite appropriately observed that for the land surveyors, "the problem is to determine within either a fixed or general boundary system, whether one standard of survey will in the long term produce significantly greater benefits and lead to better overall land administration than another . . .". [3] In this regard Mr. Dale appears to agree with the official view in the Department of Survey that Zambia will obtain greater benefits from the general boundaries system based on detailed large scale maps. He has indicted the South African modelled cadastral survey now in use in Zambia for having been successful in 6 per cent of the country "at the expense of the overall mapping requirements of the country". [4]

Although there is this official enthusiasm for the general

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[1] See S.R. Simpson, Land Law and Registration, op. cit., pp. 133-137.

[2] Ibid., pp. 104 et seq.

[3] See P.F. Dale, Cadastral Surveys within the Commonwealth, op. cit., at p. 35.

[4] Ibid., at p. 271.

boundaries system, the Assistant Surveyor-General readily admits some unavoidable limitations in relying on this system. Large scale maps can only support the general boundaries system if the topography in the country consists of a sufficient number of natural features. In places like the Western Province of the country where the terrain is flat and sandy large scale mapping will be a fruitless exercise. In these circumstances it can only be suggested that along side the general boundaries system, the present cadastral survey be retained for such areas of the country which lack sufficient natural features. Indeed in evaluating the importation of the English principle of the general boundaries in Tanganyika, Dowson and Sheppard scorned: "the value of this provision in Tanganyika, a country practically devoid of physical boundaries, is somewhat obscure". [1]

But even accepting the general boundaries system in principle, there is the limitation of financial provision for preparation and constant revision of large scale maps. The Department of Survey expressed apprehension as to whether the Government would readily provide the necessary money. If the mapping scheme proves too expensive, this in itself may be prohibitive in the moves to implement a new system. This may well be the case if there is no overall demand for land registration in the rural sector. In this situation, extensive mapping of the country could be a burden on government revenue

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[1] Quoted by S.R. Simpson in Land Law and Registration, op. cit., at p. 140.

without the justification that respective landowners in the countryside are making full use of the registration scheme. If this is likely to be the case, and there is no reason to be too optimistic judging from the minimal use of the now repealed Reserves and Trust Land (Adjudication and Titles) Act, which provided for registration of title in reserves and trust land, then the solution for Zambia may lie in land registration based on systematic adjudication such as in Kenya and Malawi. [1] In this regard the repealed Reserves and Trust Land (Adjudication and Titles) Act will have to be reenacted. To supplement the effectiveness of the Act, there will be need for a programme of mass education, highlighting the benefits that can accrue from individualisation of title under the reenacted Act.

There are many advantages with a land registration scheme based on adjudication. The process of adjudication and dermacation of boundaries can be administered by staff not necessarily skilled, thereby reserving skills of surveyors to actual survey work. The limited financial resources can only be used in specially selected areas where immediate development is contemplated and justified on economic grounds.

We may conclude our discussion on the suitability of the current registration system in Zambia by restating what alternatives are available. The present registration scheme can be retained but as a

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[1] See S.R. Simpson, Land Law and Registration, op. cit., pp. 197 et seq., and chapter 23.

general principle the scheme should be based on the general boundaries system. The adoption of the latter system, however, needs sufficient financial provision for a detailed up to date mapping of the country. Where, however, mapping is not a practical exercise due to the lack of sufficient natural features in some parts of the country, the present cadastral survey of fixed boundaries can be retained for such areas. If on adoption of the general boundaries system the mapping cost to support the system is prohibitive and uneconomic, then the repealed adjudication process should be re-introduced as a provisional measure for registration of land in the rural sector.

PART V

CONCLUSIONS

CHAPTER 10

CONCLUSIONS AND SOME PROPOSALS FOR REFORM

This thesis shows the need for overall reform in the law. I have tried to indicate the factors which still inhibit the implementation of an effective policy of land development. For forty years of direct Colonial Office British administration a land tenure had been evolved which primarily provided seperate categories of landholding for two racial groups. The policies that influenced this evolution have been explored in Part II of this work. Economic interests, objective of attraction of European settlers and the protection of African interests engineered a tenurial system based essentially on race segregation. Africans were by and large confined in occupation of the land reserved for them with all the facilities and legal provisions governed by customary law. Land under European occupation attracted all the attention with the provision of a law and facilities compatible with a land tenure favourable to European landholders. With the attainment of independence there has been a shift in emphasis from European interests to African interests. Regrettably, this change in emphasis has not been adequately reflected in all the land policies, let alone the legal provisions and facilities that purport to advance African interests.

Reserves and Trust land, a colonial creation of a category of land reserved for Africans is still retained although the historical and legal distinctions between the two types of land

are no longer recognised in practice. With the existence of State land on the other hand, the various categories of land create a variety of interests. The anomaly existing in respect of these interests is that there is a discrimination without justification in the duration of a grant to different tenants. Besides this, the state of the law regulating dealings in land still remains outdated considering that there is no longer restriction in alienation of land on account of the landholder's race. Chapter 7 in Part III of this thesis showed the unsatisfactory state of the law in this regard. Provisions of law which were adequate at a time when landholding was based on race are still retained even when conditions have clearly changed. But what has even a more impeding effect on land utilisation is the retention of the various legal processes and facilities. The use of land is regulated by legal means and facilities which are more difficult to administer now than ever before. The effect is to inhibit the implementation of the declared objectives of government land policies.

This Chapter proposes to summarise the proposed remedies by suggesting a grant of uniform interests; consolidating and rationalising the land law; and simplifying the machinery for regulating and assuring a landholder's interests.

A. The grant of a uniform interest

A uniform system of interests in land tenure should be achieved wherever possible. Where the State has statutory powers of grant whether by itself or through its agents the interest granted as a statutory lease should be for an even duration.i.e. not exceeding 100 years. Thus whether the land is in Reserves, Trust land or State land, the practice of grants should be the same. As the position is now the duration of leases granted by the State, is not the same depending on where the land is situated. In Reserves and Trust land, as we have seen in Chapter 6, individual grants of leases are made for 14 years due to the lack of surveying facilities with which a longer term could be granted. But where a tenant is an expatriate individual or enterprise using the land for a commercial purpose without any Zambian participation, the interest that can be granted is even less than 14 years. In improvement areas, the interest that a local authority can grant to a tenant cannot exceed thirty years. Only in State land outside these areas (Reserves, Trust land and improvement areas) does the State invariably grant a full term of years not exceeding one hundred years.

With leasehold tenure adopted now as Government policy, there appears no justification why the full term of a lease allowed by law cannot be granted irrespective of the type of land. This disparity in the grantable interest will inevitably

have the effect of attracting land developers to those areas of State land where the maximum term of a lease can be obtained. This in turn is bound to result in an uneven development of land.

In Reserves and Trust land we have of course seen, particularly in Chapter 9, the difficulties encountered in surveying the land as required by law to facilitate the grant of a term longer than 14 years. But as suggested in that chapter the surveying facilities which have been available for a long time in urban areas should be extended to such land. With this being possible, the State should be able to grant leases for a maximum term as it does elsewhere in State land. In this respect it can only be suggested that Reserves and Trust land be assimilated into one category. Colonial considerations which resulted in the creation of these categories of land for the assurance of African interests are no longer relevant. In the call for assimilation we can only but endorse the 1973 Ad Hoc Committee on Legal Reforms Report:[1] ". . . In the area of Trust Land and Reserve Land the cause of difference is historical and not due to

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[1] See Report of the Ad Hoc Committee on Legal Reforms, Lusaka, 29th June, 1973 at p. 34. This Committee amongst many others was appointed by President Kaunda in 1973 to review Government policies in the field of law for the past ten years and recommend how the same policies could be best implemented in the next decade. The membership of the Committee consisted of a judge of the High Court (Chairman), a judge of the Supreme Court, a number of lawyers from Government, private practice and the University. (The author was privileged to be a member of this Committee).

any inherent difference in the economic and social use of land. These two categories of land . . . are not in keeping with the aim to create an integrated society".

Indeed as was revealed in Chapter 6, the practice of State grants in Reserves and Trust land does not recognise the legal distinctions between the two categories of land. Subject to survey requirements, the State has been granting 99 year leases in either category since 1964. There is need, however, to regularise this practice by amending the Reserves and Trust land Orders. These Orders in their present form only allow a grant of a five years lease in Reserves to a non-native tenant, except for missionary or charitable organizations who are allowed a lease for a maximum term of 33 years. It is only in Trust land where a non-native tenant is allowed a grant of a right of occupancy for a term of 99 years. The variance between the law and practice is unsatisfactory. Strictly, as already indicated, grants of leases in Reserves which exceed the permissable statutory term cannot confer good title on a non-native tenant.

But beyond this, there is urgent need for land in Reserves and Trust land to be more marketable than hitherto has been the case. It will be recalled that land in Reserves and Trust land accounts for about 94% of the area of Zambia. This constitutes

the rural sector which in relation to urban land has yet to be developed. The current practice by the State of requiring the consent of the chief and the rural council before granting a 99 years interest is not conducive to development. This requirement is more favourable, as already pointed out, to a tenant with local ethnic ties. We have seen in Chapter 2 the role of residence in the tenure of land under Customary law. Customary law is quite emphatic on residence as being a requirement for any landholder. With such a requirement it is most unlikely that a local chief or rural council can disregard the local customary law in their grant of consent. What this means in practice is prejudice against prospective land developers from acquiring land within an ethnic community different from their own. But if one has the capital to invest in any rural land, why should ethnic considerations retard development consequent on such investment?

It is suggested that the State should intervene in this regard by providing land anywhere in Reserves and Trust land on the condition that a land developer has the necessary capital to invest in the land. This should be the qualifying condition even in cases where land is required for commercial purposes by a non-Zambian individual or enterprise. It is here pertinent

to acknowledge the role of the European farming sector in Zambia. The country has had to rely almost solely on this sector for food production. European commercial farming has so far been confined to land outside Reserves and Trust land. But with the obvious contribution of the European farming sector, there is no reason why European expertise cannot be invited and encouraged in Reserves and Trust land as well. The current practice of insisting on Zambian participation in the commercial enterprise in rural land while this is not insisted on elsewhere in State land is to attract investment and development in the latter at the expense of the former. Admittedly, the rationale for this insistence might be deduced from the initial motive of creating these lands - for the exclusive use and benefit of the indigenous people. It might be thought therefore that Zambian participation assures indigenous interests. It is submitted, however, that European capital and investment in rural land is equally an assurance of indigenous interests in so far as it generates rural development. It is suggested in this regard that Zambian participation, no doubt, should be encouraged, but should not be a condition of tenure.

Making rural land more marketable and available to development through State grants does of course pose the risk of land speculation and particularly the creation of a landless class. It is necessary to check on land speculation for which provision already exists, as we have seen, under the Lands Acquisition Act in Chapter 8. To avoid creating a landless class, State grants

should never be made in instances which involve dispossessing the rural peasantry of its land. State grants should be made over land earmarked for commercial use, which at the present time remains vacant and unoccupied. Village settlements can be discouraged in advance in areas which have been so earmarked.

To conclude this part on provision for a uniform statutory interest, it is proposed that in improvement areas (which are declared under the Housing (Statutory and Improvement Areas Act) interests that can be granted should be enlarged too. In the long term there is very little justification for limiting in these areas the maximum grantable interest to thirty years. Housing estates in State land abutting these areas provide a tenant with a statutory lease not exceeding one hundred years. This kind of discrimination is certainly hard to justify in the eyes of the tenants in improvement areas who should also be entitled to security of tenure in their housing estates. At the moment improvement areas are still being experimented, hence probably the justification for a shorter term of interest. It was conceded in Chapter 6 that the shorter term of grant might be justified on the ground that Government should not be bound to this urban settlement scheme in improvement areas until the scheme has been satisfactorily established. This provides the Government the chance of withdrawing the scheme without entrenching tenants' interests in case the scheme proves unworkable.

But once this housing scheme proves viable, it is suggested that tenants should be able to obtain an interest just as durable and on the same terms and conditions as elsewhere in State land.

With the parity of interests in all categories of land, control and regulation can be left to legislation.[1]

B. Consolidation and rationalisation of the law

While uniformity of land interests cannot be entirely achieved, there is still urgent need to rationally consolidate the law to facilitate with some degree of certainty land alienation. This is necessary as we have seen because artificial barriers in alienation between interest holders have disappeared. Persons (generally Africans) who previously may have been confined to customary land, are, as we have seen, now able to acquire land outside the customary domain. This situation in particular has introduced doubts as to what extent customary law should affect interests outside its sphere. This calls for a consolidated source of law reconciling some inevitable contradictions of a plural legal system.

Chapter 7 of this work should have underlined how the present state of legal provisions are lagging behind time. Provisions initially suited to a segregated pattern of land tenure are still retained in regulating current land transactions. That conditions

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[1] There is already an expressed legislative intent that Reserves and Trust land are subject to certain statutory regulation in the interest of controlled use of land, planned development and conservation. See Reserves and Trust Land (Application Legislation) Regulations, Appendix 4, Revised Laws.

have changed can hardly be doubted. Part II of this work has revealed the thinking and reasoning behind the moulding of the colonial land tenure system. Most of that reasoning cannot now stand the test of justification. Legal provisions along the lines suggested in Chapter 7 must be sought to cater for current trends in the conveyancing practices of the country. To fail to attend to this assignment is perpetuating the anomalies between the law and contemporary conditions.

But even within the various regimes of the law as they exclusively govern the respective land interests, consolidation can still be urged. In the general branch of the law (local enactments and the received English law), consolidation is certainly imperative. One consolidated source of law will assure certainty. In the absence of prolonged litigation, it becomes difficult to predict with any amount of certainty to what extent a landholder's rights are affected and governed by the various sources of law. It would help a great deal to assemble in one piece all the relevant land legislation. This would also need an indication of which pre 1911 English Real Property law including the common law incidents attach to Zambia. That English law, as we have seen, has been substantially whittled away must alleviate the drafting exercise. This is a more commendable approach than having scattered laws.

Consolidation in customary law, on the other hand if at all necessary, must be tackled with caution. Generally consolidation of customary law, beyond a restatement may not only be impossible but also undesirable. Customary law by its very nature is not static -- hence to consolidate it by a written code might deprive it of its potency to adaptability for which it has often been commended.[1] In the process of adaptation it may consolidate itself but this might better be left to the evolutionary process. The merit in this approach is obvious in that the diversity in the nature of the social pressures maintaining customary law cannot be ignored. Granted this however, when there is a sufficient indication in the direction of change, statutory intervention may be more than welcome.

It appears that in those areas of this law where the evolutionary process does not provide an immediate solution even when this is due, consolidation may well be recommended. We have seen how persistently the problem recurred in the testate and intestate devolution of property interests as to what extent customary law was to determine the issue. It is suggested that in places where change is evidently invited the law be consolidated to minimise the choice of law problems. Thus we have seen in chapter 2 that in the law of inheritance in the areas under investigation there is a shift in the devolution of an

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[1] As for the danger of codifying customary law which might result in premature crystallization, see Conference on the Future of Law in Africa, London, 28th Dec. to Jan. 8th, 1960, at p.15. Cf., Lewis v. Bankole (1908), 1 N.L.R. at p. 101 per Osborn, C.J., "indeed one of the most striking features of interest in African native custom to my mind, is its flexibility, it appears to have been always subject to motives of expediency, and it shows unquestionable adaptability to altered circumstances without entirely losing its individual characteristics".

estate with emphasis on the immediate family. The law will do well to aid this shift for those who welcome it. This is one area of the law where certainty is bound to facilitate land transactions.

This would not necessarily deny those opposed to radical change in the provisions of the traditional law. While by consolidation changes can be recorded legislatively, a certain class of people can be granted the provision of opting out from the consolidated form of law.

The overall purpose of all these suggestions is an attempt to achieve a sound land law and land tenure system. The suggestions, however, would be ineffective if there were no adequate means to realise the interests provided by the law and the legal system. It is in this regard that a simpler machinery is being urged as a facility in this realisation. Current methods of realising various land interests have proved cumbersome and unsuitable and thus require modifications.

C. Simplification of the legal machinery and facilities.

The concentration in the creation of the various legal processes and facilities to serve interests under the English freehold tenure, which was more favourable and acceptable to European settlers, in large part accounts for the unsuitability of the colonial legal heritage. The current national needs dependent on land utilisation have broadened in scope. There is

now more than one class of landholder. Even where there might have been no need for a special facility, the need now exists. Reform in an area where there are no numerous experiments must be difficult and hence the task must be tackled with caution.

Chapter 8 disclosed the range of difficulties from the shortage of skilled manpower to technical problems in the law. The implementation of land acquisition, town and country planning, and regulation in the letting of premises highlighted the difficulties encountered. This should also serve as a reminder that formulation of policy should not be left unrelated to the means of implementation. Policy, it is suggested, should be preceded by examination of the machinery of implementation. This might in certain instances reveal that there is no need for new policies when the fault lies in the existing machinery which needs streamlining. This point is particularly borne out in the area of rent regulation. Government concerned at the exploitation of tenants, as we have seen in Chapter 6, proceeded to declare the phasing out of renting properties by private landlords. This policy would have been unnecessary, it is submitted, if the problem were identified as the lack of a rent regulating machinery. At a time of acute housing shortage, the solution would appear not to be phasing out private landlords but improving on the means to regulate rent. But even with the declared policy on

phasing out, it does not appear that Government adequately addressed itself on the problems of surrendering private housing estates by individual proprietors to local authorities or the Central Government. It would have been discovered that the anticipated surrender could not be possible in all instances without invoking provisions of the Lands Acquisition Act. But we have seen under this Act, that compulsory acquisition for developed and utilised land such as rented properties needs compensation without which no acquisition can be effected. A review in the administration of the Lands Acquisition Act has revealed a lack of provision of funds for compensation. If there are no funds then the policy of phasing out was not worthy declaring till financial provision was made.

But even in instances where provision has been made for acquisition without compensation as in respect of vacant and idle land, the machinery of acquisition as we have seen needs to be improved. There is the shortage of manpower and technicalities in the law relating to definition of unutilised and undeveloped land and the delay in taking of possession procedure. These difficulties ought to have been cured, as suggested, if the policy of taking over vacant and idle land were to be successfully implemented.

Technical difficulties were further particularly singled out in the administration of the Town and Country Planning Act. This Act modelled on the 1947 English planning legislation has

proved cumbersome both to the administrators (planning authorities) and the land developer. This in turn has proved a restraint on land development. It is clearly essential that regulation of development in this area be urgently reviewed with an aim to simplify the planning machinery . The suggestion has already been advanced that regulation be along the lines of attaching development clauses in leases granted by the State. This should be possible that now Government has decided on leasehold tenure.

Related to these difficulties of administration Chapter 9 appraised the efficacy of the current system of land registration. Without improvement in this process it cannot be hoped that dealings in land can be facilitated. The suggestion earlier made in this Chapter that rural land should be more marketable depends very much on the registration facility. In the absence of a registration machinery it is impossible to ascertain which land in Reserves and Trust land is unoccupied or indeed abandoned and unutilised. An intending land developer would wish to make a selection from known records of the available land before proceeding to seek a lease. With a recording system this should be possible. There is more certainty in such a system because it is practicable to ascertain the nature of the interest and in whom it vests.

It is not being suggested, however, that all land in the rural sector should be registered but that some amount of land earmarked for commercial purposes should have available registration.

In this regard the recording system could be extended to incumbent holders of customary interests who appreciating and attracted to commercial use of land might wish to opt out of the customary domain. This would again contribute to dealings in land cutting across ethnic lines. It is in this regard that the repeal of the Reserves and Trust land (Adjudication and Titles) Act is deprecated. But even with this repeal, it should still be possible for a landholder in the customary domain to obtain a State grant of a lease on the strength of his existing customary interests, which as we have seen in Chapter 2 are capable of being ascertained.

As to the existing registration machinery it has already been suggested that its provisions be extended to rural land. This it has been suggested in Chapter 9 could be achieved by shifting from the current practice of fixed boundaries survey (based on the South African model) to the general boundaries system supported by large scale up dated maps. The former has been the practice for many years in the country, confined in its administration to parcels of land under European occupation which primarily has been on the line of rail. This, however, can no longer be justified with a shift in policy which is equally concerned with land in rural areas under African occupation.

The need is that the policy and the law should be so related as to create clearly defined interests which should as far as possible be freely and easily utilised without impeding

development of the land. At this time when it is unquestionably recognised that Zambia's survival depends on the diversification of her economy, rural development must inevitably be pursued more vigorously. The diversification of the economy from copper production has to be in the direction of commercial agriculture. The rural sector provides the land for this move. Government will have failed if the law and policy are not addressed to the challenging problems of rural development.

APPENDICES

APPENDIX 1

Land (Conversion of Titles)

GOVERNMENT OF ZAMBIA

ACT

No. 20 of 1975

Date of Assent: 18th August 1976

An Act to provide for the vesting of all land in Zambia in the President, for the conversion of titles to land, for the imposition of restrictions on the extent of agricultural land holdings, for the abolition of sale, transfer and other alienation of land for value, and for matters connected with or incidental to the foregoing.

19th August 1975

ENACTED by the Parliament of Zambia.

1. This Act may be cited as the Land (Conversion of Titles) Act, 1975.

2. This Act shall be deemed to have come into operation on the first day of July 1975.

3. In this Act, unless the context otherwise requires --

"Certificate of Title" means a certificate of title to land issued in accordance with the provisions of Parts III to VII of the Lands and Deeds Registry Act;

"land", unless a contrary intention appears, includes land of any tenure, and tenements and hereditaments, corporeal or incorporeal, and houses and other buildings, also an undivided share in land, but does not include any mining right as defined in the Mines and Minerals Act in or in respect of any land;

"Provisional Certificate" means a provisional certificate of title to land issued in accordance with the provisions of Parts III to VII of the Lands and Deeds Registry Act;

"registered" means registered in accordance with the provisionsof the Lands and Deeds Registry Act;

"Registrar" has the meaning assigned thereto in the Lands and Deeds Registry Act;

"statutory leasehold" means a leasehold created by operation of section five and "statutory lease" and "statutory leaseholder" shall be construed accordingly;

"unexhausted improvements" means anything resulting from the expenditure of capital or labour and includes carrying out of any building, engineering or other operations in, on, over or under land, or the making of any material change in the use of any building or land.

4. Notwithstanding anything to the contrary contained in any other law, deed, certificate, agreement or other instrument or document, but subject to the provisions of this Act, all land in Zambia shall vest absolutely in the President and shall be held by him in perpetuity for and on behalf of the people of Zambia.

5. Every piece or parcel of land which immediately before the commencement of this Act was vested in or held by any person --

(a) absolutely, or as a freehold or in fee simple or in any other manner implying absolute rights in perpetuity; or

(b) as a leasehold under any lease granted or deemed to have been granted by or held of the President for a term of years extending beyond the expiration of one hundred years from the date of the commencement of this Act;

is hereby converted to a statutory leasehold and shall be deemed to have been so converted with effect from the first day of July 1975.

6. A person whose rights over and interests in any land have become converted to a statutory leasehold under section five shall, as from the date of the commencement of this Act, hold such land, as if he has been granted a lease thereof by the President for a term of one hundred years commencing the first day of July 1975, at such rent and on such terms and conditions and with such covenants as may be prescribed.

7. (1) On the determination of a statutory lease by effluxion of time, the statutory leaseholder shall be entitled to a renewal of the lease for a further term of one hundred years, unless he had failed to comply with or observe any term, condition or covenant of the lease, where the non-compliance or non-observance is such as renders the lease liable to forfeiture.

(2) Where a statutory lease is not renewed, the statutory leaseholder shall be entitled to compensation for unexhausted improvements as provided in section sixteen.

8. (1) Every lease of land, not being a lease granted or deemed to have been granted by or held of the President, subsisting immediately before the commencement of this Act, shall, on such commencement, become converted into a sublease held of and from the statutory leaseholder of the land, and the tenure terms, conditions and covenants of the original lease shall be deemed to be the tenure, terms, conditions and covenants of such sublease and the same shall continue to be valid and binding between the sublessee and the statutory leaseholder, in so far as they are not inconsistent with the prescribed terms, conditions and covenants applicable to the statutory lease:

Provided that the term of any such sublease, unless it expires earlier, shall expire one day before the expiry of one hundred years from the first day of July 1975.

(2) Every sublease and underlease subsisting immediately before the commencement of this Act shall, on such commencement, become converted into an underlease of the next derivative class and the tenure, terms, conditions and covenants of the original sublease or underlease, as the case may be, shall be deemed to be the tenure, terms, conditions and covenants of the converted underlease and the same shall continue to be valid and binding between the parties thereto, in so far as they are not inconsistent with the prescribed terms, conditions and covenants of the related statutory lease:

Provided that the term of any such underlease, unless it expires earlier, shall expire one day before the expiry of one hundred years from the first day of July 1975.

9. Subject to the provisions of section ten every mortgage, charge, trust and other encumbrance over any land and every easement or other right over, or appurtenant to any land which subsisted immediately before the commencement of this Act shall, after such commencement, continue to be enforceable or enjoyable, as the case may be, according to the terms, tenor and nature thereof, except in so far as such enforcement or enjoyment is inconsistent with the provisions of this Act:

Provided that the right of any mortgagee, trustee, beneficiary or holder of a charge or encumbrance to recover any amount of money to which he is entitled as such shall not be deemed to be inconsistent with the provisions of this Act merely on the ground that the rights and interests of the mortgagor, creator of trust or other holder of land have been converted or abridged by this Act.

10. (1) Any mortgage, charge, or trust subsisting over land immediately before the commencement of this Act shall, on such commencement, operate only on and against the unexhausted improvements on the land and, so far as regards land apart from the unexhausted improvements, shall be deemed to be extinguished.

(2) Nothing in subsection (1) shall be construed as debarring the sale or transfer of any land together with the unexhausted improvements thereon in the exercise of any right or power derived from or arising out of any mortgage, charge or trust or in execution of any legal process, provided previous consent of the President required under section thirteen has been obtained.

11. (1) For the avoidance of any doubt, it is hereby declared that it shall not be necessary for the Registrar to issue or for any person to obtain a Provisional Certificate or a Certificate of Title to evidence any rights and interests in land having been converted into rights and interests under a statutory lease, or a sublease or underlease derived from a statutory lease, but the Registrar shall, whenever any deed, instrument, Provisional Certificate or Certificate of Title relating to any land in respect of which the rights and interests have been so converted is next presented to him or produced before him in connection with any transaction or registration, stamp such deed, instrument or certificate with such stamp as may be prescribed indicating the fact of such conversion, and a reference to the terms, conditions and covenants applicable.

(2) On the publication of this Act, the Registrar shall endorse on the relevant folium of the register a memorandum to the effect that the piece or parcel of land has become subject to the provisions of section five.

12. No person shall be granted any land except for a specified term not exceeding one hundred years:

Provided that —

(i) any lease for a specified term of years may, on the expiry of such term (unless the lease provides otherwise and subject to the conditions and covenants thereof), be renewed for a like term or such longer term not exceeding one hundred years as the President may think fit;

(ii) notwithstanding anything contained in this Act, the President may, in the interests of international relations or in fulfilment of any international obligations of the Republic, grant land for a term exceeding one hundred years on such terms and conditions as he thinks fit, but any land so granted shall not be sold, mortgaged, encumbered or otherwise disposed of, except with the prior consent in writing of the President.

13. (1) Notwithstanding anything contained in any other law or in any deed, instrument or document, but subject to the other provisions of this Act, no person shall subdivide, sell, transfer, assign, sub-let, mortgage, charge, or in any manner whatsoever encumber, or part with the possession of, his land or any part thereof or interest therein without the prior consent in writing of the President.

(2) The President may in granting his consent under subsection (1) impose such terms and conditions as he may think fit, and such terms and conditions shall be binding on all persons and shall not be questioned in any court or tribunal.

(3) Without prejudice to the generality of subsection (2), the President may, in granting the consent under subsection (2), fix the maximum amount that may be received, recovered or secured --

(a) in the case of a disposition by sale, transfer or assignment, as the price, premium or consideration;

(b) in the case of a disposition by way of a sublease, as premium, consideration or rent;

(c) in the case of a licence to occupy, by way of premium, consideration or rent or, as the case may be, by way of periodical payments for use and occupation;

(d) in the case of a mortgage or charge, as a debt or advance:

Provided that in fixing any amount under this subsection no regard shall be had to the value of the land apart from the unexhausted improvements thereon.

14. (1) A leaseholder (whether a statutory leaseholder or not), unless the lease has become liable to forfeiture for reason of non-compliance with or non-observance of the terms, conditions and covenants thereof or it is otherwise provided in the lease, may at any time by giving not less than six months' notice in writing to the President, surrender the land to the President.

(2) On the expiry of such notice, the lease shall be deemed to have been determined and compensation shall be payable for unexhausted improvements as provided in section sixteen, as if the lease has been determined by effluxion of time.

15. The provisions of all agreements, deeds, instruments and other documents made before the publication of this Act but not registered before the first day of July 1975, shall, in so far as they relate to the subdivision, sale, transfer, letting, subletting, occupancy, mortgage or other disposition of land, such as is inconsistent with the provision of this Act, be null and void ab initio:

Provided that --

(i) this section shall not apply to any agreement, deed, instrument or document which is not required to be registered under any written law; and

(ii) the provisions of the Law Reform (Frustrated Contracts) Act shall apply to all agreements, deeds, instruments and other documents nullified by this section.

16. On the determination of a lease by effluxion of time, whether such lease is a statutory lease or not, just and fair compensation shall be payable to the person beneficially entitled to the land at the time of such determination, in respect of all unexhausted improvements on the land:

Provided that there shall be deducted from such compensation —

(a) the amount of any rent due in respect of the land;

(b) any amount due in respect of the land to the Government or any body or organisation financed by the Government.

17. (1) The Minister may, by regulations prescribe the maximum area of agricultural land (whether or not it has unexhausted improvements)which may be held by any person at any one time for any specified purpose; and different maxima may be so prescribed for different areas, districts or provinces.

(2) Such regulations may also provide that the contravention of any specified provision thereof shall constitute an offence and prescribe the penalties therefor.

(3) In this section "agricultural land" means land used or intended to be used exclusively or mainly for the purposes of agriculture as defined in the Town and Country Planning Act.

18. Save as provided in this Act, no compensation shall be payable by the President or by any other person in respect of the conversion of the nature of title in land or in respect of the extinguishment, restriction or abridgement of any rights or interests in or over land resulting from the operation of the provisions of this Act.

19. Any reference to the ownership of land in fee simple, absolute ownership of land, freehold land, freehold tenure or to a like estate in land or to a leasehold the term whereof extends beyond one hundred years from the commencement of this Act, in any written law in force in the Republic, or in any deed, title, certificate, agreement, instrument or document subsisting on the commencement of this Act, shall, after such commencement and in relation to any period subsequent to such commencement, be construed as a reference to a statutory lease.

20. (1) No person shall without lawful authority occupy or continue to occupy any vacant land to which section five applies.

(2) Any person occupying any land in contravention of subsection (1) shall be liable to be evicted without any notice, and, if necessary, by the use of reasonable force.

21. (1) The Minister may, by statutory instrument, make regulations for the proper carrying into effect of the provisions of this Act.

(2) In particular and without prejudice to the generality of the foregoing, such regulations may make provision for —

(a) the terms, conditions and covenants of statutory leases;

(b) the manner of determining whether any land has or has not unexhausted improvements, and the settlement of disputes relating thereto;

(c) procedure for making applications for the payment of compensation, where such compensation is payable, the determination of such compensation and the settlement of disputes relating thereto;

(d) the procedure for applying for the President's consent to any transaction relating to or affecting land;

(e) the procedure for applying for the renewal of a lease;

(f) any other matters which is to be or may be prescribed under this Act.

22. The following Acts are hereby repealed:

	Repeals
(a) The Quit Rent Redemption and Apportionment Act.	Cap. 289
(b) The State Grants Act.	Cap. 291
(c) The Reserves and Trust Land (Adjudication and Titles) Act.	Cap. 295

Fig. (i) SOUTHERN PROVINCE Total area sample = 318 gardens

Clearing of Bush	Number of Gardens Belonging To:			Percentage of area sample approx.
	Residents	Non-Residents	Total	
By permission of Headman/Chief	7	3	10	3
Without permission of Headman/Chief	49	-	49	15
TOTAL	56	3	59	18

The explanation for non residents to seek permission in all these samples (figs. (i)-(iii) goes without saying as the role of residence in land acquisition is discussed in the body of this work. In this sample all the non residents were new settlers — 1 came from neighbouring Rhodesia and the other 2 from different chieftaincies.

Of the residents who apparently sought permission only 1 addressed this request to the chief. He first sought to leave the area of the chief for another chief where land was more fertile. The chief disapproved his leaving and instead let him cultivate a portion of the land on a farm which was previously owned by a European which the chief had managed to obtain for settlement of his people. In the remaining 6 cases where permission

was sought from the headman, in 2 instances the requests were just a matter of formality. Suitable land was first spotted and then the headman informed of the intention to cultivate the land in question. The headman expressed approval. The informing of the headman it was said was mere courtesy and obtaining of an authentic witness in the event of dispute. In another instance 1 migrant worker returning from work in neighbouring Rhodesia sought the assistance of his village headman to secure a suitable garden for cultivation. In another case, a village resident sought the approval of the headman to till a regenerated field which apparently had been abandoned. The headman granted the approval certifying that the previous owner had since moved to another area. In the final case in which it is alleged that the headman's permission was sought, the headman was in fact a brother of the landholder. The headman's involvement in this case was hence prompted more by concern for a relation than with the normal functions of the office.

Fig. (ii) CHIPATA Total area sample = 508 gardens

Clearing of Bush	Number of Gardens Belonging To:			Percentage of area sample approx.
	Residents	Non-Residents	Total	
By permission of Headman/Chief	-	2	2	0.4
Without permission of Headman/Chief	135	-	135	26
TOTAL	135	2	137	26

In this sample the 2 non residents who sought permission were both from neighbouring Malawi. The absence of any need for such permission in the case of residents must serve to indicate unequivocally that neither the chief nor the headman is a land owning authority.

Fig. (iii) CHAVUMA Total area sample = 382

Clearing of Bush	Number of Gardens Belonging To:			percentage of area sample approx.
	Residents	Non-Residents	Total	
By permission of Headman/Chief	1	7	8	2
Without permission of Headman/Chief	101	-	101	26
TOTAL	102	7	109	28

All the 7 non residents in this sample came from neighbouring Angola. In the 1 and only instance where a resident sought permission of the headman, no apparent reason for the request was given. It can only be suggested that this too was just a matter of formality.

APPENDIX 3 INHERITANCE

Fig. (i) SOUTHERN PROVINCE

Relationship to Deceased	Number of Gardens	Percentage of area sample approx.
Patrikin	12	4
Matrikin	25	8
Widow	2	0.6
TOTAL	39	12.6

Despite the fact that the Tonga are matrilineal, this sample again demonstrates a swerve to matrilineal descent. In all the 12 cases where land was inherited by the patrikin of the deceased all were sons. In the only 2 cases where widows inherited land of the late husbands, they both remained at the village of husbands and had children with them. The negligible number of widows inheriting land in this manner may serve to indicate that invariably a widow prefers leaving the husband's village after his death to join her maternal relatives in the village of origin.

Of the 25 cases of inheritance representative of matrilineal descent, in 16 instances land was inherited by nephews of the deceased uncles. In 6 cases land was inherited by brothers of the deceased. And in only 3 cases, children (2 sons and 1 daughter) inherited land of their deceased mothers.

Fig. (ii) CHIPATA

Relationship to Deceased	Number of Gardens	Percentage of area sample approx.
Patrikin	19	4
Matrikin	-	
Widow	19	4
TOTAL	38	8

In this sample, of the deceaseds' paternal relatives who inherited the land, 16 were sons and 1 was a daughter who was deceased's only surviving child. 2 were grandsons who inherited their grandfathers' land. Patrilineal descent is again firmly revealed to the exclusion of maternal relatives. The widow's preferential right of inheritance to the deceased husband's land is relatively more vivid compared with both the Tonga and Luvale. In all the 19 cases of widow inheritance, widows preferred to continue living at the late husbands' villages. This inclination among the Ngoni in contrast to the other two appears not hard to seek. Among both Luvale and Tonga children belong to the mother's side; and so if the widow decides to leave the husband's village, it would be in the company of the children. Children among the Ngoni after payment of 'malowolo', are put, as a matter of right on the father's side.

(Cf., J.A. Barnes, Marriage in a Changing Society, op. cit., p. 5). Thus if a woman is attached to her children as indeed is to be expected, she would rather stay in the husband's village where she will have their company. In the above 19 cases, all but 1 of the widows had children with the deceased husbands.

This should enhance the conclusion that residence is the primary criterion to inheriting the husband's land notwithstanding the lack of children. The point to be emphasized, however, is that a widow with children is more inclined to be resident in the husband's village even after his death.

Fig. (iii) CHAVUMA

Relationship to Deceased	Number of Gardens	Percentage of area sample approx.
Patrikin	4	1
Matrikin	15	4
Widow	1	.3
TOTAL	20	5.3

Of the 4 paternal relatives of the deceased who inherited the land, 3 were grandsons and 1 a daughter. Only the daughter's inheritance appears to be a good case demonstrating a shift to patrilineal descent. The other 3 cases of grandsons can either be evidence of the shift, although not necessarily, or an indication of the Luvale bilineal descent where maternal relatives are unavailable.

Of the 15 cases of inheritance by maternal relatives of the deceased, 9 are nephews and 1 a niece, 3 are brothers, 2 are daughters. 1 daughter inherited her mother's land at the mother's village and the other involved a chieftainess. The daughter in the latter case succeeded to the mother's

office as well as inheriting the entire estate. This is a rare case of a married woman who by virtue of her royal status has managed to acquire property in circumstances where an ordinary married woman could not have similar acquisitions.

The only widow inheritance involved a couple which had originally come from neighbouring Angola to settle in Chavuma. All the relatives had remained in Angola. On the death of the husband, the widow decided to stay in this village and this appears to have been prompted by convenience. Children of the marriage were all grown up and married living away from their father's village. The virtual absence of widow inheritance may serve to show that a widow is more inclined to leave the husband's village in the event of his death to join her maternal relatives. If and when a widow decides to stay at the husband's village however, she has a preferential right of inheritance to the land of the late husband.

APPENDIX 4 GRANTS OF LAND

Fig. (i) SOUTHERN PROVINCE

	Relationship to Grantor				Percentage of sample – approx.
	Matrikin	Patrikin	Non-Relation	Total	
Absolute	26	32	-	58	18
Loan	2	-	-	2	0.6
TOTAL	28	32	-	60	18.6

Fig. (ii) CHIPATA

	Relationship to Grantor				Percentage of sample - approx.
	Matrikin	Patrikin	Non-Relation	Total	
Absolute	11	63	2	76	15
Loan	-	-	1	1	0.2
TOTAL	11	63	3	77	15.2

Fig. (iii) CHAVUMA

	Relationship to Grantor				Percentage of sample - approx.
	Matrikin	Patrikin	Non-Relation	Total	
Absolute	27	25	-	52	14
Loan	2	-	1	3	0.8
TOTAL	29	25	1	55	14.8

Fig. (i) SOUTHERN PROVINCE TONGA

Type of Marriage	Number of Wives holding land independent of husband	Number of Wives holding no land other than that cultivated jointly with husband	Total	Percentage of sample approx.
Virilocal	5	108	113	36
Uxorilocal	-	1	1	0.3
Intra-village	5	41	46	14
TOTAL	10	150	160	50.3

This sample apart from showing the effect of marriage on landholding also shows the number of different marriages entered into. Of the total 160 marriages recorded, 113 are virilocal, 1 uxorilocal and 46 intra village. This helps emphasize that the Tonga essentially practise virilocal marriages. In the virilocal marriage situation there are only 5 cases where married women have land over which they have rights exclusive of the husband. In all the 5 cases the crop gardens were situated in the respective villages of the wives. In 1 of these 5 cases, the wife's village was not far away from the husband's.

The wife was prompted to obtain her own garden which she cultivates actively because the husband, a polygamist, did not give her one although the other two wives were given. In the other 108 cases where both wife and husband cultivate the same field, it is the garden initially acquired by the husband.

In the only 1 uxorilocal marriage, the land belonged to the husband who cleared a virgin bush. In the 46 intra village marriages husbands still assert their authority by owning fields of their own with only 5 cases in which wives in addition to cultivating the husbands' fields, had their own garden obtained from their relatives.

Fig. (ii) CHIPATA

Type of Marriage	Number of wives holding land independent of husband	Number of wives holding no land other than that cultivated jointly with husband	Total	Percentage of sample approx.
Virilocal	5	190	195	38
Uxorilocal	3	6	9	2
Intra-village	2	50	52	10
TOTAL	10	246	256	50

This sample also shows the number of the various types of marriage. Out of 256 marriages, 195 are virilocal, 9 are uxorilocal and 52 are intra village. The high percentage of virilocal marriages should show that Ngoni marriages are still typically virilocal. Of the 9 uxorilocal marriages 4 were between Ngoni women and Chewa men who are matrilineal. 1 was between a Ngoni woman and a Malawian. Only the remaining 4 were between Ngoni parties.

In the 195 virilocal marriages where 5 women have fields of their own in addition to that jointly cultivated with the husbands, all the fields are in their villages of origin well within easy access from the husbands' villages. In the 9 uxorilocal marriages, in 3 cases fields are owned by wives while the husbands cultivate the same.

2 were given to the wives by a grandmother and grandfather respectively and the other wife was given the land by her parents. In the other 6 cases the husbands managed to obtain their own fields in which wives also cultivate. In 1 case the husband was granted land by the headman after obtaining permission to reside in the village. In another case a man was given land by a friend. In the remaining 4 cases the man just cleared virgin bush. This demonstrates how well placed a man is despite the nature of the marriage to acquire his own land, whereas the woman in the virilocal marriage has practical limitations.

In the intra village marriage situation, only 2 women have land of their own in addition to that jointly cultivated with the husband.

Fig. (iii) CHAVUMA

Type of Marriage	Number of wives holding land independent of husband	Number of wives holding no land other than that cultivated jointly with husband	Total	Percentage of sample approx.
Virilocal	15	170	185	48
Uxorilocal	2	-	2	0.5
Intra-village	1	10	11	3
TOTAL	18	180	198	51.5

This sample similarly shows that Luvale marriages are typically virilocal. In 198 marriages, 185 are virilocal, 2 are uxorilocal and 11 are intra village. In the 185 virilocal marriages, 15 cases involve women having land of their own in addition to that jointly cultivated with husbands. In all but 4 of these cases the lands so owned are vacant while the wives cultivate the husbands' fields. In 2 cases the lands are being temporarily cultivated by mothers. In 2 other cases wives cultivate these fields as the villages where they are situated are close to the husbands' villages.

In the 2 uxorilocal cases, the husbands cultivate with the wives the latters' fields. These husbands have no land of their own. In the other case, both wife and husband have land of their own. And finally in the 11 intra village marriages where 1 wife has land of her own, this is in addition to that which she cultivates with the husband. The lands jointly cultivated are owned by husbands.

APPENDIX 6 : PANEL COMPOSITION

PANEL 1 LUBANGENI (CHIPATA)

NAME	AGE	VILLAGE
Nelson Zulu	49	Zizwe
Zamajaya Mphanza (Headman)	62	Zamajaya
Ananiya Mnukwa Mphanza (Headman)	56	Mnukwa
Ben Zizwe (Headman)	70	Zizwe
Chitani Kuthwa Soko (Headman)	75	Lubangeni
Kennedy Mphanza (Headman)	65	Mushamunye
Silwako Ngombe	65	Nthombimbi
Isanduka Magawa	47	Maulawo
Simoni Phiri	65	Chanzala
Zikhalo Zulu	50	Kayeka
Timothy Mwase	65	Mnukwa
Limbikani Tembo	43	Mukwekwe
Ackson Zulu	70	Lembani
Lembani Banda	60	Njalaniko
Monica Zulu (widow)	70	Lubangeni
Justina Nyendwa (Mrs)	40	Jaulani
Malitina Shawa (Widow)	70	Lubangeni
Theleziya Ngoma (Widow)	50	Kaluba
Elemina Njobvu (Widow)	55	Chanzala
Ajustina Ngoma (Widow)	65	Lubangeni
Maria Soko (Widow)	61	Lubangeni
Jusita Zulu (Widow)	65	Katambo
Stephano Tembo	55	Chanzala
Yohane Tembo	61	Lubangeni
Gregorio Phiri	59	Chanzala
TOTAL	25	

Average age : 59 yrs.6½ months (59.64 yrs.) Ratio of female to male: 8.17 = F. M. 1: 2.13

PANEL 7 CHIEF CHOONGO (SOUTHERN PROVINCE/MONZE)

NAME	AGE	VILLAGE
Chief Choongo (Chief)	50	Choongo
B.M. Mukubani (Judge President)	63	Hamwiimba
Peter Moonga (Headman)	50	Namaunga
S.H. Musukuminabantu	60	Kajamba
Moses Hakona	65	Choongo
Sixpence Habwacha	70	Munsanje
Noah Nalunguma	60	Munyati
Aroni Bolomani	54	Munsanje
Peter Benzu	63	Munsanje
Same Choongo	66	Choongo
Matthew Milimo	45	Mbamunya
H.P. Hankaanza	48	Kalukwe
J.W. Nangamba	50	Simoonga
Cosmas Mwinga (Headman)	39	Namaunga
E.M. Chimpati	58	Chimpati
Sara Mwiinga (Mrs)	40	Munsanje
Cecilia Chiima (Mrs)	38	Munsanje
Rosemary Hangumbo (Mrs)	42	Munsanje
Jersey Matimba (Mrs)	39	Munsanje
Mangalita Kakoma (Mrs)	45	Munsanje
June Matibo (Mrs)	40	Munsanje
Mutinta Laheba (Miss)	38	Munsanje
Marta Mwebebya (Mrs)	40	Munsanje
Arnold Mwanakanje	48	Munsanje
J.H. Buku	50	Choongo
TOTAL	25	

Average age : 50 yrs. 4½ months (50.44 yrs.)
Ratio of female to male : 8:17 = F. 1 M. 2.13

PANEL 1 CHINGI (CHAVUMA)

NAME	AGE	VILLAGE
Chingi (Headman)	65	Chingi
Sachitengi (Headman)	70	Sachitengi
Sawili (Headman)	65	Sawili
Salumai (Headman)	70	Salumai
Bulaya Mulongesa	65	Salumai
Salute Chinyana	50	Salumai
Katolika Ngumbwe	50	Chingi
Mufolo Chinyana	60	Katumbula
Mboazi Kambinga	52	Sawili
Zyau Mukusa	61	Chingi
Lozye Litongo	50	Salumai
Thomas Sakutema	55	Sachitengi
Paulo Chinyama	45	Chingi
Zyame Kakenge	60	Salumai
Brown Kahone	65	Kombwe
Yeta Sakalwiji	70	Chingi
Nyaphezo Sachitengi (Widow)	70	Sachitengi
Nyakayombe Mukumbi (Widow)	70	Salumai
Filipa Ngamba (Mrs)	65	Salumai
Foloshi Kaseshi	60	Sakavi
Ndabo Chipepa	60	Sakubanja
Fwalenga Ngongi	50	Sawili
Mupila Chinyama	50	Sawili
Masumba Ndumba	55	Katumbula
Bernard Chipoya	35	Kanema
TOTAL	25	

Average age : 58 yrs. 7 months (58.72 yrs.)

		F.	M.
Ratio of female to male :	3:22 =	1:	7.3

Summary of Panels

The panels consisted of a minimum of 11 - 15 members (i.e. in 4 instances in Southern Province — Chiefs Mweenda and Sianjalika) and a maximum of 25. 7 panels were composed in both Chipata and the Southern Province and 5 in Chavuma.

Selection of the members of each panel was random but due care was taken to ensure that there was an overall representation of villages in the surrounding area being surveyed. Only those sufficiently conversant with local custom, and therefore capable of making valuable contribution were selected. In this regard advice of local chiefs and in certain instances village headmen was sought. But above all the criterion of having land for cultivation was especially insisted on. Female representation, although not based on any definite ratio, was included in an effort to obtain a complete view.

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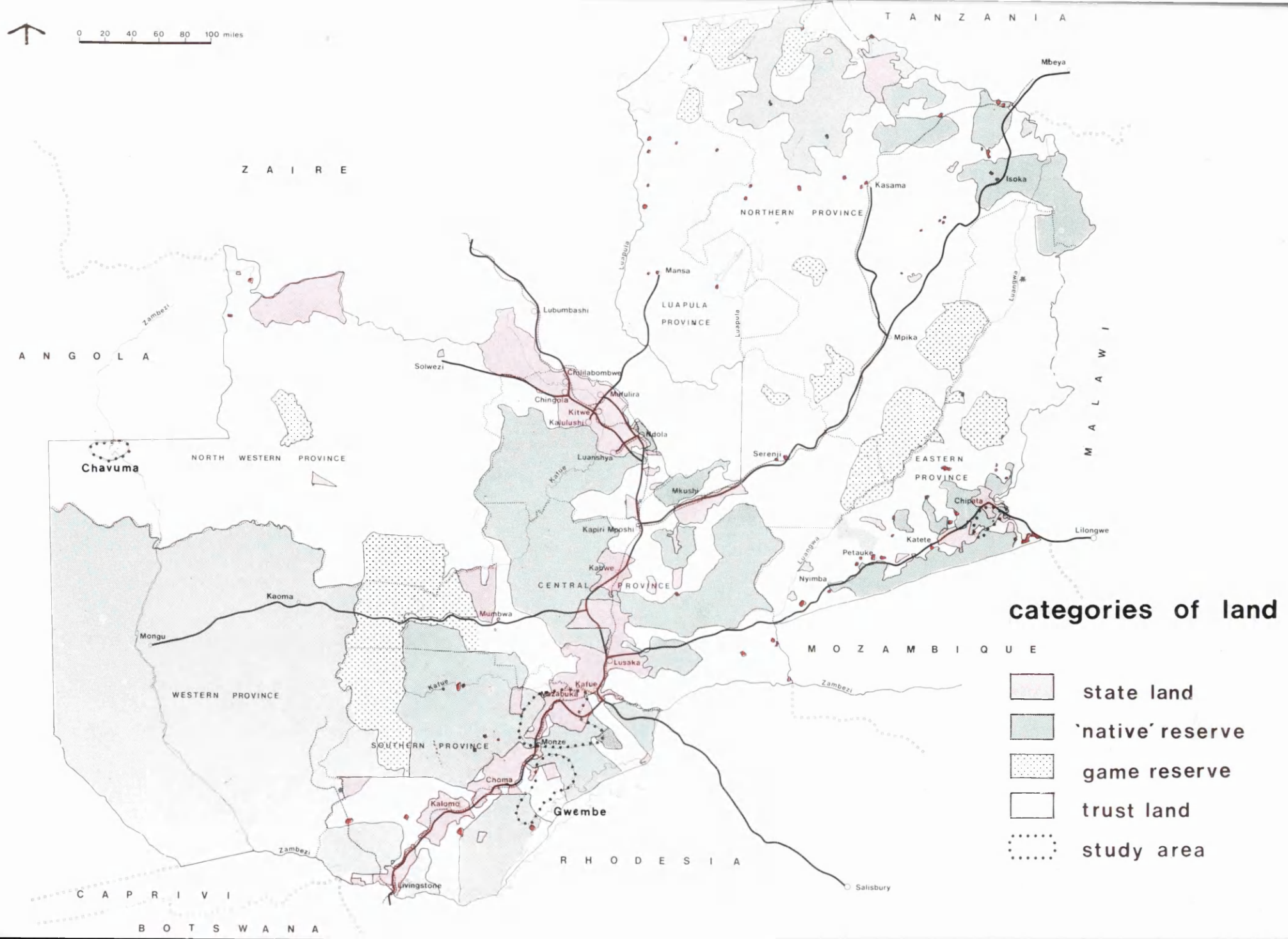
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Salisbury
Zambezi
Luapula
Luangwa
categories of land
state land
'native' reserve
game reserve
trust land
study area